Leiden Journal of International Law, 22 (2009), pp. 29–49
 Printed in the United Kingdom doi:10.1017/S0922156508005621

De-territorializing and Re-territorializing *Lotus*: Sovereignty and Systematicity as Dialectical Nation-Building in Early Republican Turkey

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Abstract

The chief aim of this article is to unearth, explicate, and contextualize the various techniques on which Mahmut Esat, Turkey's agent before the Permanent Court of International Justice in the *Lotus* case, drew in order to narrate a fresh understanding of Turkish 'nationhood' during a period of intense vulnerability for the newly established Republic. The argument advanced by Turkey in this case – that it need not demonstrate the existence of a specific jurisdictional exception in international law in order to proceed with its prosecution of the French captain of the *Lotus*, a French vessel – has often been dismissed as an example of cynical apologetics. Nevertheless, a close reading of Turkey's pleadings reveals that it was inclined to oscillate between a variety of universalistic and particularistic approaches, Esat litigating the *Lotus* with an eye to exploiting the schism that lies at the heart of the concept of 'civilization' so as to submit Turkey to the normative authority of the international legal system while bolstering its positive power as an independent sovereign state. More specifically, it was by merging two modes of reasoning – the one prizing systematicity, the other prioritizing sovereignty – that Esat sought to construct a new, robustly reconciliatory identity for the 'Turkish nation', one that would enable it to embrace its commitment to international order by securing its place in 'la civilisation contemporaine' while amplifying the ambit of its autonomy as 'un état civilisé'.

Key words

capitulations; civilization; Mahmut Esat; international legal discourse; international legal system; Kemalism; nation-building; state sovereignty; Treaty of Lausanne

At this juncture in history, *the Turks warred with the West in order to become Western.*
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1 *Türkiye'nin Siyasî Hayatında Batılılaşma Hareketleri* (2004), 92 (translation mine, emphasis in original). Please note that I have either translated or employed existing translations of all Turkish language materials in that which follows. However, with the exception of those cases in which it was clear that reliance on translations would not impede appreciation of textual nuances, I have left French-language materials in the original.

1. Introduction

The decision of the Permanent Court of International Justice (PCIJ, the Court) in the *Lotus* case has long been associated with the view, propounded vigorously but subtly by Turkey before the Court, that state sovereignty is fundamentally unfettered in all circumstances save those in which express legal limitations are at issue.[2] As such, both Turkey's pleadings and the Court's judgment have frequently been dismissed as retrograde and unsalvageable, classic examples of the kind of weak-hearted deference to parochial chauvinism that 'modern' international law's quasi-heroic mission was intended to eviscerate. Brierly, for instance, characterized Turkey's assertion of 'jurisdiction over non-resident non-nationals' as a 'juridical by-product of the aggressive racial nationalism which was launched by the French Revolution and powerfully reinforced by the Italian Risorgimento'.[3] That the Court accepted this claim betrayed its adherence to the 'highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States', a proposition from which he was obviously determined to maintain the greatest possible distance.[4] Verzijl toed a similarly critical line, describing the Court's prioritization of state 'will' as 'in complete agreement' with 'positivist doctrine'.[5] Even with the sporadic references to considerations of legal normativity that were strewn throughout the dissenting opinions, it could not be denied, he maintained, that 'the great majority in the Court' had adopted 'the positivist standpoint'.[6]

Spiermann has recently questioned the attribution of positivism to the judgment, arguing that Max Huber's aim was not to undermine international law at a time when its legitimacy was being questioned and the Court had yet to find its footing, but simply to uphold a strong interpretation of sovereign equality. Since 'only states could be international lawmakers', and every state is juridically autonomous, 'no state' could be held to wield the right to 'legislate with binding effect on another state'.[7] As a result, Spiermann contends, the *Lotus* case should be read not as an attempt to create a presumption against the curtailment of state sovereignty, but as

2 *Case of the SS 'Lotus' (France v. Turkey)*, PCIJ Rep. Series A No. 10.

3 J. L. Brierly, 'The "Lotus" Case', (1928) 44 *Law Quarterly Review* 154, at 156, 162.

4 Ibid., at 155. For an analogous assessment of the Turkish position, see R. Portail, *L'affaire du 'Lotus' devant la Cour permanente de Justice internationale et devant l'opinion publique* (1928), 89–92.

5 J. H. W. Verzijl, *The Jurisprudence of the World Court: A Case by Case Commentary* (1965), I, 83.

6 Ibid., at 97. For similar sentiments see, e.g., H. D. de Vabres, 'L'affaire du "Lotus" et le droit pénal international', (1928) 2 *Revue de droit international* 135, at 165; H. A. Steiner, 'Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice', (1936) 30 AJIL 414, at 416. For less condemnatory reviews see, e.g., W. Berge, 'Conflicts in Respect to Criminal Jurisdiction', (1930) 24 *American Society of International Law Proceedings* 34; H. Lauterpacht, *The Development of International Law by the International Court* (1958), 359–61. For a brief history of the way in which international organizations initially responded to the felt need for a less uncompromising stance on the assertion of jurisdiction over incidents on the high seas, see P. C. Jessup, 'The Growth of the Law', (1935) 29 AJIL 495. Their efforts would yield the Convention on the High Seas of 1958, which effectively overruled the PCIJ's decision in the *Lotus* case. S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006), III, at 1595.

7 Not surprisingly, he links this move to the Court's invocation of 'independence' as a 'fundamental principle of international law' in *Status of the Eastern Carelia (Finland v. Russia)*, PCIJ Rep. Series B No. 5, at 27. See O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), 255–6.

an effort to articulate a residual principle, one that would make room for deference to such sovereignty in all cases where the jurisdiction being asserted does not violate well-established rules of international law.[8]

My aim here is not to address the question of whether the Court's judgment is or is not amenable to characterization as an instance of 'extreme positivism'. Rather, the principal objective of this study is to unearth, explicate, and contextualize the various techniques on which Mahmut Esat, Turkey's Minister of Justice and agent before the Court, drew in order to narrate a fresh understanding of Turkish 'nationhood' during a period of intense vulnerability for the new Republic. The argument advanced by French authorities in the case – that Turkey ought to be entitled to prosecute the French captain of the *Lotus*, a French vessel, if and only if it was able to prove that international law explicitly permits jurisdiction to be asserted over offences committed on the high seas – may be viewed as a gesture towards the normative primacy of international legal order. Conversely, and as already noted, the countervailing Turkish argument – that no such jurisdictional exception need be established, international law being rooted in the will of consenting states – has often been dismissed as an example of cynical apologetics. Nevertheless, a close reading of Turkey's pleadings reveals that it was inclined to oscillate between a variety of universalistic and particularistic approaches, Esat litigating the *Lotus* case with an eye to exploiting the schism that lies at the heart of the concept of 'civilization' so as to submit Turkey to the normative authority of the international legal system while bolstering its positive power as an independent sovereign state. More specifically, it was by merging two modes of reasoning – the one prizing systematicity, the other prioritizing sovereignty – that Esat sought to construct a new, robustly reconciliatory identity for the 'Turkish nation', one that would enable it to embrace its commitment to international order by securing its place in 'la civilisation contemporaine' while amplifying the ambit of its autonomy as 'un état civilisé'.[9] This strategy was made possible by the very character of international legal discourse, which, simultaneously constraining and enabling, restricts sovereignty at the very same moment as invigorating it, setting in motion a dialectical to-and-fro between the self-determinative authority of the individual state and the systemic integrity of the collective order in which all such states are embedded.[10] It is striking, and not a little suspect, that Turkey's pleadings in the *Lotus* case, considerably more nuanced than the hard-headed voluntarism with which they have frequently been

8 Ibid., at 253–4. See also O. Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', (2007) 18 EJIL 115, at 129–32.

9 In doing so, Esat was relying, tacitly if not avowedly, on the late Ottoman tradition of employing 'civilizational' rhetoric for the sake of bolstering Istanbul's prestige and authority while holding European powers to account on the basis of their own normative claims. C. Aydın, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought* (2007), 19, 31.

10 For classic analyses of the interaction between international law's two most dominant patterns of argumentation, the one 'hard', 'subjective', and consent-dependent, and the other 'soft', 'objective', and 'justice'-oriented, see D. Kennedy, *International Legal Structures* (1987); and M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

conflated,[11] have not been subject to the kind of properly critical reading necessary to capture Esat's tactical polyvalence.

This study provides just such a reading, and does so by grounding its discourse analytical examination of the texts in a socio-politically informed account of the historical context within which Esat operated when enlisting international legal argumentation for his cause.[12] However vehemently Esat would insist that the two states appeared before the Court 'sur un pied de parfaite égalité . . . pour liquider leur conflit',[13] France's status as an imperial power with an ongoing interest in its extensive Levantine mandates – mandates over territories it had only recently 'inherited' from the Ottomans, it should not be forgotten – clearly exerted a tremendous influence over his general approach. Turkey's relations with France had always been exceptionally close: not only had what has conventionally been regarded as the first capitulatory agreement, discussed in detail below, been concluded with France for the purpose of fostering Mediterranean trade and consolidating an anti-Habsburg alliance,[14] but French cultural influence remained largely unrivalled until the tail end of the nineteenth century,[15] when German political and economic might arrived on the scene in full force.[16] An especially salient factor here was France's retention of Hatay (Alexandretta) as part of its Syrian mandate. A border province with a highly variegated population that would be annexed by Turkey following a plebiscite in 1939, Hatay's status had yet to be determined in 1926, precluding the establishment of stable, 'trust-dependent' relations between the two countries and colouring their attitudes towards the *Lotus* case.[17] It should come as no surprise, then, that Esat would decide to couch his defence of Turkey's assertion of criminal jurisdiction in anti-imperialist terms, recruiting many of international law's most deeply entrenched discursive structures in order to present his submissions as a form of resistance against French aggression.[18] For Esat, Turkey's right to exercise its criminal jurisdiction in the *Lotus* case was nothing less than a matter of national

11 See *supra* notes 3 and 4. Even Spiermann, so critical of the imputation of positivism to the Court's judgment, falls prey to this platitude, claiming flatly that Turkey, unlike France, repudiated the need for 'a mechanism for resolving clashes between them'. See O. Spiermann, '*Lotus* and the Double Structure of International Legal Argument', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 131, at 144.

12 For noted examples of this approach – 'critical discourse analysis', if you like – in international legal scholarship, see N. Berman, 'The *Nationality Decrees Case*, or, Of Intimacy and Consent', (2000) 13 LJIL 265; K. Knop, *Diversity and Self-Determination in International Law* (2002), ch. 4.

13 'Discours prononcé par Mahmout Essat Bey', in *The 'Lotus' Case: Documents Relating to Judgment No. 9* (1927), 102, at 102.

14 T. Naff, 'The Ottoman Empire and the European States System', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (1984), 143, at 146–7.

15 Mustafa Reşid Paşa, Grand Vezier during the *Tanzimat* reforms of the mid-nineteenth century, would go so far as to claim that 'it is always to France that we turn', as 'she has prompted our reforms'. M. Raccagni, 'The French Economic Interests in the Ottoman Period', (1980) 11 *International Journal of Middle East Studies* 339, at 341. See also M. Burrows, '"*Mission Civilisatrice*": French Cultural Policy in the Middle East, 1860–1914', (1986) 29 *Historical Journal* 109.

16 L. B. Fulton, 'France and the End of the Ottoman Empire', in M. Kent (ed.), *The Great Powers and the End of the Ottoman Empire* (1984), 141.

17 'Discours prononcé', *supra* note 13, at 108. For details see M. Khadduri, 'The Alexandretta Dispute', (1945) 39 AJIL 406; A. Özgiray, 'Turco-French Relations and the Syrian Border Question (1924–1930)', in D. Panzac (ed.), *Histoire économique et sociale de l'Empire ottoman et de la Turquie (1326–1960): Actes du sixième congrès international tenu à Aix-en-Provence du 1er au 4 juillet 1992* (1995), 671.

18 Ş. Halıcı, *Yeni Türkiye Devleti'nin Yapılanmasında Mahmut Esat Bozkurt (1892–1943)* (2004), 364–5.

liberation – one battle, so to speak, in an ongoing struggle to consolidate the gains of the Treaty of Lausanne of 1923, which brought First World War-related hostilities involving Turkey to an end, by remaining firm in the face of what it saw as an attempt to reintroduce the capitulatory regime. Even those facets of international legal discourse associated most closely with the vocabulary of 'civilization' could be channelled into such a counter-hegemonic struggle, facilitating projects of a sort directly antithetical to those in the name of which they had originally been designed and deployed.

2. International law as an enabling and a constraining force

The *Lotus* case arose from a collision on the high seas between two vessels, the one French (the *Lotus*) and the other Turkish (the *Bozkurt*). The event resulted in the death of eight Turkish nationals, and when the *Lotus* finally arrived in Istanbul, naval authorities seized and initiated criminal proceedings against Lieutenant Demons, its master, along with Hasan Bey, the master of the *Bozkurt*. The charge was involuntary manslaughter, and the prosecution, which the Turkish authorities refused to halt in spite of repeated protests from the French chargé d'affaires, resulted in Demons receiving a sentence of eighty days' imprisonment and a fine. Although the public prosecutor filed an appeal, diplomacy intervened to have the two states submit the question of whether Turkey's decision to institute criminal proceedings against Lieutenant Demons contradicted 'principles of international law' to the PCIJ by way of special agreement,[19] Turkey not yet having joined the League of Nations.[20]

Of the various arguments advanced by French authorities before the Court, the most compelling concerned Article 6 of the Turkish Penal Code of 1926, which extended the jurisdiction of Turkish courts to foreigners arrested in Turkey for offences committed 'abroad to the prejudice of Turkey or of a Turkish subject'.[21] The French condemned this provision, and the 'protective principle' it embodied, as incompatible with international law, contending that nothing in such law permitted jurisdiction of this type. Unless Turkey were capable of demonstrating that international law allowed for the jurisdiction it claimed, the Court would have no choice but to find a violation of Article 15 of the Convention respecting Conditions of Residence and Business and Jurisdiction (Convention of Lausanne) that had been appended to the Treaty of Peace (Lausanne Peace Treaty) of the general Treaty of Lausanne, a provision which tethered the institutional competence of the Turkish judiciary to its adherence to 'principles of international law'.[22] Turkey's unsuccessful bid to extend its jurisdictional authority to crimes committed in third states while negotiating the Treaty of Lausanne was deemed to be of significance here.

19 'Compromis d'arbitrage', in *'Lotus' Case: Documents*, *supra* note 13, at 25.
20 Turkey would become the League's 56th member in 1932. M. O. Hudson, 'Admission of Turkey to Membership in the League of Nations', (1932) 26 AJIL 813.
21 For this translation, see *SS 'Lotus'*, *supra* note 2, at 14–15.
22 Treaty with Turkey and Other Instruments Signed at Lausanne July 24, 1923, (1924) 18 AJIL Sup. 1, at 72.

https://doi.org/10.1017/S0922156508005621 Published online by Cambridge University Press

Turkey's most pertinent counter-arguments made much of the fact that Article 6 had been lifted verbatim from the Italian Penal Code of 1889 and bore a close resemblance to similar provisions in a number of other codes. This, Esat argued, meant that the 'protective' model of criminal jurisdiction could not be taken to violate international law and that Turkey was well within its rights in instituting it. Further, the expression 'principles of international law' in Article 15 was sufficiently clear on its own terms to preclude consideration of the *travaux préparatoires*. In fact, France was fundamentally misguided in insisting that Turkey should be required to demonstrate the existence of a permissive international rule, Article 15 meaning one thing and one thing only – that Turkey was entitled to assert its jurisdictional authority in all cases except those in which doing so would flout a well-established 'principle of international law'. The onus, then, was on France to show that such a 'principle' was available, not on Turkey to prove that it was not. And since no such 'principle' could actually be located, Turkey was fully justified in asserting jurisdiction over Demons.

Limiting itself to the terms of the special agreement, the Court focused on the question of whether Turkey's assertion of jurisdiction over Demons fell foul of international law.[23] It dismissed France's *travaux* argument by pointing to the lucidity of the Convention's text and went on to hold that Turkey had indeed been entitled to institute criminal proceedings against Demons, as no 'principle of international law' potent enough to restrict its jurisdiction to incidents occurring wholly within its own territory could be found.[24] While it could not be denied that 'modern' conceptions of jurisdiction are 'territorial' in the sense that states are prohibited from exercising their jurisdictional powers in the territories of other states absent specifically permissive rules derived from custom or convention, it was certainly not true that this, in and of itself, was sufficient to prevent a state from asserting jurisdiction in its own territory with respect to crimes that had taken place outside it. 'Such a view would only be tenable', Huber wrote on behalf of the Court's 'majority',[25] 'if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory'.[26] Since no such prohibition existed, Turkey was justified in initiating proceedings against Demons for actions whose catastrophic effects had been felt aboard the *Bozkurt*, concurrent jurisdiction being the only viable solution to the matter at hand.[27]

Again, however, what is of significance for the purposes of the present study is not whether the reasoning underlying the final judgment was valid, sound, or even desirable, but the discursive practices through which Esat sought to weave a number of universalistic and particularistic motifs into his pleadings in an effort to buttress

23 *SS 'Lotus'*, *supra* note 2, at 13, 15.
24 Ibid., at 16–17, 19.
25 The Court had actually been divided evenly, i.e. 6–6, with Huber's vote proving decisive on account of his status as president. This led some to question the influence of ad hoc judges on its decisions. See, e.g., J. F. Williams, 'L'affaire du "Lotus"', (1928) 35 RGDIP 361, at 374–5; M. O. Hudson, *The Permanent Court of International Justice, 1920–1942* (1972), 360.
26 *SS 'Lotus'*, *supra* note 2, at 19, 18–19 generally.
27 Ibid., at 30–1.

Turkey's jurisdictional competence. This effort manifested itself multifariously, with Esat advancing a number of arguments to establish that 'une restriction de cet attribut essentiel de la souveraineté ne peut être présumée', this having to be 'prouvée par celui qui l'allègue', a conclusion which he would summarize with the classic, almost stoically pithy, expression '*in dubio pro libertate*'.[28] Consider, for example, these remarks:

> Monsieur le Président, Messieurs de la Cour, . . . le rôle de l'agent turc devant ce haut aréopage est un rôle d'expectative; il doit, en effet, entendre développer, par le Gouvernement français, que l'autorité judiciaire turque, dans l'affaire *Boz-Kourt–Lotus*, a agi contrairement à un principe existant du droit international, reconnu et appliqué par les nations civilisées, soit un traité visant le cas litigieux, soit une coutume ayant la force de *consensus gentium*. Tant que l'existence de ce principe n'aura pas été démontrée, et n'aura pas reçu la consécration de cette Cour, la Turquie devra être considérée comme ayant usé, dans l'affaire *Boz-Kourt – Lotus*, de son droit de souveraineté, comme tout État civilisé qui vit sous le régime du droit commun international.[29]

The deployment of 'les nations civilisées' in the first sentence lends Esat's analysis an unmistakably internationalist flavour, albeit one in which a preponderantly European or Western conception of 'civilization' is elevated hegemonically to the status of a normative absolute. The basic idea, of course, is that Turkey, like every other member of the group of 'nations civilisées', is perfectly prepared not only to recognize the supremacy of international law but also to accept the judgment of the Court in the event that the French should succeed in convincing it of the existence of a directly applicable 'principle of international law'. This strikes at the heart of Esat's desire to shift the burden of the argument onto the shoulders of Jules Basdevant, agent for France and future judge of the International Court of Justice, by bringing Turkey fully within the purview of international law. The immediately following sentence strikes a somewhat different chord, however, with Esat once again drawing upon themes of 'civilization' in order to counter France's charge that it has violated international law, only this time not for the sake of pushing France to satisfy the evidentiary burden of the case but with the aim of strengthening Turkey's claim to formal equality vis-à-vis every other 'état civilisé'. After all, Esat is clearly implying, if Turkey is truly to be characterized as an 'état civilisé', it must be in possession of no less formidable a claim to sovereign power than any of its counterparts, with no less legitimate a right to defend its prosecutorial jurisdiction than France itself. Interestingly, therefore, the same concept of 'civilization' on which Esat relies in order to express Turkey's identification with the international legal system is also used to bolster its 'droit de souveraineté', a sovereignty that is sufficiently resilient to compete on a formally equal basis with that of France. The final clause of the last sentence conveys this versatility with admirable concision, emphasizing Turkey's right to be regarded 'comme tout État civilisé qui vit sous le régime du droit commun international'.

28 'Discours prononcé', *supra* note 13, at 134–5.
29 Ibid., at 104.

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One of the single most impressive illustrations of this move is the following passage, a classic instance of the effort to blend appeals to the normative supremacy of the international legal system with gestures towards the inviolability of sovereign power:

> Monsieur le Président, Messieurs de la Cour, la Turquie a voulu faire partie de la grande famille des nations; elle en a réclamé et obtenu tous les droits; mais elle a aussi accepté, de grand coeur, toutes les obligations; elle vient de mettre en vigueur le Code civil suisse, le Code des obligations suisse, le Code pénal italien et le Code de commerce allemand. Sa législation modernisée se heurte, dès les premiers jours, à des obstacles. La Turquie veut bien remplir toutes les obligations qui découlent du droit international; elle ne veut pas qu'on exige d'elle quoi que ce soit au delà de ces obligations. Vous allez prendre votre décision au nom des principes du droit international, au pays de Grotius. Votre sentence sera respectée par la Turquie; elle ne veut pas séparer son sort de celui de la civilisation européenne.[30]

By drawing on the language of reciprocal rights and duties, Esat is able to press for the recognition of the Republic as a thoroughly 'modern' and 'European' state, one that is willing to submit to the opinion and authority of 'la civilisation européenne', while simultaneously laying claim to precisely the same sovereignty of which each member of this 'civilisation' is, at least notionally, in possession. Although participation in 'la civilisation européenne' endows one with a broad array of state-monopolistic entitlements, arming one with the right to index others' expectations with respect to one's behaviour to one's own (freely given or withdrawn) consent, it also imposes a corresponding set of obligations, bringing one within the domain of the normative directives of this 'civilization'. Hence, as before, it is on the basis of the same concept of 'civilization' employed for the sake of binding it to the international legal system that Turkey is to be supplied with the kind of mature, self-confident sovereignty requisite for the full exercise of a 'modern' state's powers, channelling that distinctively post-Napoleonic craving for self-reliance which the Republic had inherited from its imperial predecessor into a newer, and substantially heartier, vision of national responsibility and international respectability. Turkey's desire to win recognition as a member of – and, in this sense, to acquiesce in its appropriation by – 'la grande famille des nations', as evidenced by its willingness to adopt, directly or in modified form, some of the most 'modernisée' codes the West has to offer, is balanced by its wish, no less pronounced and no less exacting, to make use of the benefits of such membership to denounce hypocrisy, demand fair and equal treatment in its relations with other sovereigns, and lobby for the acquisition of 'tous les droits' associated with this 'famille'.

Notwithstanding the undeniable power of these passages, Esat's attempt to exploit the double signification of 'civilization', the one constraining and the other enabling, reveals itself most clearly in the two arguments on which he placed the greatest rhetorical weight when defending Turkey's decision to seize and prosecute Lieutenant Demons. The first of these aimed to demonstrate that Article 6 of the Turkish Penal Code, in spite of French assertions to the contrary, was in conformity

30 Ibid., at 136.

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with the basic 'principles of international law'. The second sought to establish that Article 15 of the Convention of Lausanne did not call for any restriction on the Turkish judiciary aside from necessitating compliance with such law.[31] While these were by no means the only arguments that Esat advanced,[32] they were certainly the two in which the double logic of 'civilizational' rhetoric was operationalized with greatest effect. Before considering these two arguments, however, I will provide a brief discussion of Turkey's experience with the capitulations, its controversial and peculiarly unstable 'membership' in the European state system, and the position that it came to adopt during the course of negotiating the Treaty of Lausanne. Neither of Esat's two chief arguments is capable of being appreciated in the absence of an understanding of the broader socio-political forces underlying the reconstitution of the 'Turkish nation' during the 1920s.

3. Enveloped by/enraptured with/enraged at the West

It is well known that late Ottoman efforts to facilitate sustained economic growth and maintain the kind of social cohesion needed to keep secessionist nationalism at bay were hamstrung by the capitulatory agreements into which the Empire had entered with various Western states. Originally nothing more than unilateral pledges (*ahdnameler*) by the sultan to ensure that non-Muslim foreigners could reside and do business on Ottoman territory, these agreements were introduced with the intention of streamlining relations with the Empire's political allies and trading partners by granting a number of extraterritorial privileges to their nationals and 'protégés'.[33] Interestingly, it is the first Ottoman–French agreement, apparently concluded between Sultan Süleyman I and King Francis I in 1535, that has traditionally been regarded as the *locus classicus* of the Ottoman capitulatory regime, and its seventh renewal, concluded in 1740 between King Louis XV and Sultan Mahmud I, appears to have been the first such document to bind Istanbul's hand *in perpetuo*.[34] The Ottoman chancery made a point of retaining the condescending tenor of the agreements well into the eighteenth century, routinely presenting them to the sultan's subjects as imperial directives – 'concessions gracieuses', as some commentators have put it[35]

31 For brief recitals of both arguments, see ibid., at 104.

32 Other arguments related to the applicability of the relevant precedents and the question as to where the 'effects' of the offence were to be localized for the purposes of an analysis of 'la loi du pavillon', ibid., at 104–5, 121–34. See also 'Mémoire présenté par le Gouvernement de la République turque', in *'Lotus' Case: Documents*, *supra* note 13, at 224, at 240–2; 'Contre-mémoire présenté par le Gouvernement de la République turque à la Cour permanente de Justice internationale', in *'Lotus' Case: Documents*, *supra* note 13, at 287, at 305–18.

33 See A. H. de Groot, 'The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries', (2003) 22 *Oriente Moderno* 575, at 578–80; E. Eldem, 'Capitulations and Western Trade', in S. N. Faroqhi (ed.), *The Cambridge History of Turkey* (2006), III, 283, at 293–7.

34 G. P. du Rausas, *Le régime des capitulations dans l'Empire ottoman* (1902), I, at 23, 1–105 generally. See also J. B. Angell, 'The Turkish Capitulations', (1901) 6 *American Historical Review* 254, at 255–6, 258; P. M. Brown, 'The Capitulations', (1922–3) 1 *Foreign Affairs* 71, at 77; N. Sousa, *The Capitulatory Régime of Turkey: Its History, Origin, and Nature* (1933), 58–9, 68–70. For more recent and somewhat different evaluations, however, see Eldem, *supra* note 33, at 290; D. Goffman, 'Negotiating with the Renaissance State: The Ottoman Empire and the New Diplomacy', in V. H. Aksan and D. Goffman (eds.), *The Early Modern Ottomans: Remapping the Empire* (2007), 61 at 68–9.

35 See, e.g., H. Bonfils, *Manuel de droit international public* (1908), 526.

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– issued from a position of material and symbolic superiority for the purpose of furthering commerce, cementing political alliances, and integrating non-Muslim communities.[36] After this period, however, references to foreign sovereigns came increasingly to be couched in overtly amicable terms, with the 1740 capitulation itself emphasizing the French king's status as a 'très-magnifique, très-honoré, sincère et ancien ami' of the Sublime Porte.[37]

As is often the case, this discursive shift betrayed a realignment of prevailing power dynamics. In addition to privileges of a personal character, such as the freedom to practise a religion of one's choice and the freedom to travel freely throughout the Empire, most capitulatory agreements provided for a considerable number of economic (e.g. tax exemptions and control over customs regulations) and juridical (e.g. consular courts wielding jurisdiction in cases involving disputes between foreigners) privileges.[38] A set of concessions as wide-ranging and tightly networked as this was bound to play into the hands of predatory forces, and this, of course, is exactly what occurred with the politico-economic consolidation of post-mercantilist Europe, as a result of which the capitulations began to be used as a means of penetrating hitherto inaccessible markets and absorbing textiles and other commodities from hinterland producers under conditions of minimal supervision.[39] Simply put, as '*privileges* granted in the early period of Turkish reign became *rights*' during the course of the eighteenth century,[40] the Ottoman Empire was transformed into 'a virtual open and free market for Europe'.[41] This development was made all the more problematic on account of the practice of extending distinct legal status to the Empire's dominant non-Muslim minorities, which eventually came to be recognized as semi-autonomous 'nations' (*milletler*) endowed with a considerable measure of internal sovereignty.[42] By facilitating the rapid expansion of commercial ties between European merchants and the Empire's steadily growing non-Muslim proto-bourgeoisie, the crystallization and enlargement of the *millet* system engendered resentment within the Turkish-Muslim ruling elite, which reacted by cultivating an increasingly chauvinistic nationalistic consciousness of its own.[43] Thus, while originally reflective of the military supremacy of the Ottomans

36 K.-H. Ziegler, 'The Peace Treaties of the Ottoman Empire with European Christian Powers', in R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (2004), 338, at 344–5, 347.

37 I. de Testa, *Recueil des traités de la Porte ottomane avec les puissances étrangères* (1864), I, at 187.

38 For an influential discussion, see Sousa, *supra* note 34, at 70–86.

39 For a comprehensive but critical study see Eldem, *supra* note 33. World systems theory has proved to be invaluable for conceptualizing the socio-political ramifications of the Empire's incremental assimilation into global economic networks. See, e.g., I. Wallerstein, H. Decdeli, and R. Kasaba, 'The Incorporation of the Ottoman Empire into the World-Economy', in H. İslamoğlu-İnan (ed.), *The Ottoman Empire and the World-Economy* (1987), 88.

40 Sousa, *supra* note 34, at 164–5 (emphases in original).

41 Naff, *supra* note 14, at 158.

42 F. Ahmad, 'The Late Ottoman Empire', in Kent, *supra* note 16, at 22. The affinity between the status of foreigners and those belonging to such 'nations' should not, however, be exaggerated: M. H. van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls and* Beraths *in the 18th Century* (2005), 55–6.

43 See F. M. Göçek, 'The Decline of the Ottoman Empire and the Emergence of Greek, Armenian, Turkish, and Arab Nationalisms', in F. M. Göçek (ed.), *Social Constructions of Nationalism in the Middle East* (2002), 15; K. H. Karpat, '*Millets* and Nationality: The Roots of the Incongruity of Nation and State in the Post-Ottoman Era', in B. Braude and B. Lewis (eds.), *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society* (1982), I, 141.

and the comparatively modest contribution of European trade to their treasury, the capitulatory concessions and the ethno-denominational institutions of governance with which they were affiliated ultimately came to serve as instruments of domination and sectarianism, exacerbating tensions between the Empire's constituent groups and establishing themselves as perhaps the single most galvanizing forces of mobilization for Turkish nationalist movements.[44]

Desire to do away with the capitulations gathered pace steadily from the mid-nineteenth century onwards. The Committee of Union and Progress (İttihat ve Terakki Cemiyeti, known to most contemporaneous Western sources as the 'Young Turks' or 'Jeunes-Turcs') attempted to abrogate them unilaterally in 1914, but this did not succeed in gaining the formal approval of any of the relevant Western powers save for Austria and Germany, the Empire's two strongest allies during the First World War.[45] Mustafa Kemal's 'National Forces' (Kuva-i Milliye) made the elimination of the capitulatory regime a non-negotiable condition for the cessation of hostilities, Article 6 of their founding charter, the 'National Pact' (Misak-ı Milli) of 28 January 1920, proclaiming that 'complete independence and liberty in the matter of assuring the means' of its development constituted 'a fundamental condition' of the Turkish people's 'life and continued existence'.[46] In addition to drawing the Kemalist vision of national self-determination close to, if not altogether in line with, the Bolsheviks' call for an anti-imperialist coalition of nationally organized proletarians,[47] this position served as Turkey's principal bargaining stance during the Lausanne negotiations. In fact, it was for nothing less than the abolition of the capitulatory agreements that İsmet Paşa (later İsmet İnönü) pressed with the greatest vigour in his role as chief negotiator at Lausanne. Not only had the capitulations been unilateral from the very outset, lacking the endurance and reciprocality of treaties, İsmet argued, but a fundamental change had occurred in the circumstances which had given rise to them, entitling Turkey to cast them aside even in the event that they were to be characterized as treaties.[48] This combination of textual analysis with a classic *rebus sic stantibus* argument was supplemented with a critique of the capitulations as anachronistic.[49] Europeans had long fixed the abolition of these agreements, if not in earnest then at least in form, to the amelioration of the Turkish legal system, but little concrete action had been taken to relieve the Turks of the

44 Simpson captures this transformation masterfully, down to the mourning and melancholia of its characteristically 'tragic' narrative. See G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), 244–5.

45 N. Bentwich, 'The Abrogation of the Turkish Capitulations', (1923) 5 *Journal of Comparative Legislation and International Law* 182, at 183.

46 For this translation see A. J. Toynbee, *The Western Question in Greece and Turkey: A Study in the Contact of Civilisations* (1923), 210.

47 The similarity is anything but coincidental, as Bolshevik Russia was second only to Afghanistan in extending *de jure* recognition to the Ankara government and its abrogation of the capitulations, doing so on 16 March 1921 in an effort to move Kemal towards an explicitly Leninist line. Sousa, *supra* note 34, at 350. Though later strained, relations between Kemalist and Bolshevik policymakers were far from distant at the time, the deeply overstretched nationalists succeeding in repulsing the British-sponsored Greek invasion of Anatolia only with substantial Soviet support in arms and capital. S. Yerasimos, *Türk-Sovyet İlişkileri: Ekim Devriminden 'Millî Mücadele'ye* (1979).

48 'Memorandum read by the Turkish Delegate at the Meeting of December 2, 1922, of the Commission on the Régime of Foreigners', in *Lausanne Conference on Near Eastern Affairs (1922–1923): Records of Proceedings and Draft Terms of Peace* (1923), 471, at 478–9. This document is a translation of the French original.

49 Ibid., at 472, 479.

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increasingly anomalous position in which they found themselves, even after they had begun to revise their legal codes and revamp their adjudicative practices.[50] 'As the deficiencies in our judicial organisation have now been remedied', İsmet declared, 'and as on the other hand the Capitulations are provisions absolutely incompatible with the sovereignty of a State, their abrogation ought not to become the subject of any dispute'.[51]

Interestingly, it is in the very same year that İsmet was standing firm on the issue of the capitulations that one finds Ziya Gökalp, chief theoretician of Turkish nationalism and intellectual godfather to much of the Kemalist elite, writing that 'a nation condemned to every political interference by Capitulations is meant to be a nation outside of European civilization', comparing Turkey's situation in unfavourable terms with that of post-Meiji Japan, which had managed to transform itself into a 'European power' without being stripped of its 'religion and national identity'.[52] The implicit reliance on a twofold rhetoric of 'civilization' that one discerns here – the wish to be viewed as a fully 'civilized' state, coupled with the willingness to abide by the normative precepts of 'civilization' – was crucial, as Turkey's desire to abrogate the capitulations had long been linked – and not loosely or coincidentally, but in the most intimate and organic of terms – to its status as a partial, or incomplete, 'member' of the European state system. Turkey gained formal 'admission' into this system in 1856 with the Treaty of Paris. The preamble to this treaty addressed the need to preserve the integrity and independence of the Ottoman Empire through 'garanties efficaces et réciproques',[53] and Article 7 accorded it the right 'à participer aux avantages du droit public et du concert Européens',[54] the operative assumption being that this would restrict Russia's reach in the Black Sea and preserve the Ottomans' hold over a Balkans increasingly given to visions of pan-Slavic unity, while ensuring that steps would be taken to forestall the persecution of non-Muslim minorities within the Empire by transferring Russia's role as their 'protector' to west European states.[55] Further, Article 32 precluded any renewals or replacements of the capitulations in force prior to the Crimean War without the consent of the relevant Western powers,[56] thereby endowing them with the status of international treaties with which Istanbul was obligated, legally no less than morally, to

50 Ibid., at 473–4.

51 Ibid., at 474. This position initially met with stiff resistance, İsmet cabling back to Ankara on the occasion of the conference's preliminary consideration of his call for the elimination of the capitulatory regime with news that Lord Curzon had declared that he saw little likelihood of achieving peace if the Allies were expected to satisfy conditions of this sort. 'No. 226: Hey'et-i Vekîle Riyâsetine', in B. N. Şimşir (ed.), *Lozan Telgrafları: Türk Diplomatik Belgelerinde Lozan Barış Konferansı* (1990), I, 291.

52 'Towards Western Civilization', in N. Berkes (ed.), *Turkish Nationalism and Western Civilization: Selected Essays of Ziya Gökalp* (1959), 268, at 277.

53 General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia, signed at Paris, 30 March 1856, (1969) 114 *The Consolidated Treaty Series* 409, at 410.

54 Ibid., at 414. For commentary see H. M. Wood, 'The Treaty of Paris and Turkey's Status in International Law', (1943) 37 AJIL 262; Y. Onuma, 'When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', (2000) 2 *Journal of the History of International Law* 1, at 35–9.

55 As the Duke of Argyll observed, 'the substitution of an European for a Russian protectorate over the subjects of the Porte is no mere inference from a single clause in the Treaty of Paris, but was a fundamental part of the whole policy of the Allies'. G. D. C. Argyll, *The Eastern Question: From the Treaty of Paris 1856 to the Treaty of Berlin 1878, and to the Second Afghan War* (1879), I, at 21.

56 General Treaty, *supra* note 53, at 419.

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comply.[57] (That the sultan was compelled to issue a decree renewing the Empire's pledge to observe norms of non-discrimination and declaring its intention to undertake a comprehensive programme of pro-Western financial reforms one month prior to the signing of the Treaty of Paris adds yet another wrinkle to the story.[58]) Not without a hint of irony, then, it was in the very same moment that the Empire's 'entry' into the European state system was being celebrated that it came to fasten itself ever more firmly to the capitulations.

Not surprisingly, the Ottomans' 'admission' into the European state system, however tentative and makeshift, would not go without criticism. Lorimer, for one, lamented the extension of 'the rights of civilisation to barbarians who have proved to be incapable of performing its duties'.[59] The third edition of Oppenheim's seminal treatise would later observe that Turkey's 'position as a member of the Family of Nations was anomalous, because her civilisation fell short of that of the Western States', going on to explain that 'it was for that reason that the so-called Capitulations were still in force, and that other anomalies still prevailed'.[60] This was crucially important, as the concept of 'civilization' defined the cultural conditions of engagement with the processes through which international legal norms were generated, refined, and disseminated.[61] Far from being fixed, however, the meaning of the term 'civilization' – a staple of nineteenth- and early twentieth-century international legal discourse that was introduced into Turkish in 1834[62] – seems to have been rather amorphous. In fact, there was exceedingly little in the way of an explicitly articulated 'standard' of 'civilization' available at the time of the Treaty of Paris, this coming to the fore only in the final decades of the nineteenth century and then only in response to the need (characteristically positivistic, as some would argue) to distinguish that which was 'civilized' in the 'strict' or 'proper' sense of the term from that which could not be so characterized, a need that was felt with particular urgency as Europe's awareness – and, to a significant degree, *construction* – of cultural difference in its relations with non-European peoples became progressively acute.[63]

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57 Sousa, *supra* note 34, at 168–9.

58 See R. H. Davison, 'Turkish Attitudes Concerning Christian–Muslim Equality in the Nineteenth Century', (1954) 59 *American Historical Review* 844, at 850, 857; E. Eldem, 'Ottoman Financial Integration with Europe: Foreign Loans, the Ottoman Bank and the Ottoman Public Debt', (2005) 13 *European Review* 431, at 433.

59 J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883), I, 102. Such sentiments would continue to exert a significant influence over international legal scholarship for quite some time, employed by the likes of Seferiades well into the 1920s. T. Skouteris, 'The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades', (2005) 16 EJIL 823, at 850–3.

60 L. Oppenheim, *International Law: A Treatise* (1920), I, at 34. For commentary on Oppenheim's views on the composition of 'international society' and 'Family of Nations', see B. Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', (2002) 13 EJIL 401, at 412.

61 S. Marks, 'Empire's Law', (2003) 10 *Indiana Journal of Global Legal Studies* 449, at 459.

62 T. Baykara, *Osmanlılar'da Medeniyet Kavramı ve Ondokuzuncu Yüzyıla Dair Araştırmalar* (2000), 29. See also the entry for 'Medeniyyet', in C. E. Bosworth, E. van Donzel, and C. Pellat (eds.), *The Encyclopaedia of Islam: New Edition* (1991), VI, at 968.

63 For two attempts to link the distinction between European/'civilized' and non-European/'uncivilized' in nineteenth-century international legal discourse to positivism, see G. W. Gong, *The Standard of 'Civilization' in International Society* (1984), 41–5, 47–53; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), 37, ch. 2 generally. For more cautious discussions see D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1996) 65 *Nordic Journal of International Law* 385; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 130–2.

Turkey's position in this regard was notoriously unstable – recognized as a sovereign state but not yet as an authentic participant in 'international society', granted 'admission' into the European state system but only conditionally and largely for reasons of realpolitik, Ottoman Turkey was at once 'civilized' and the very antithesis of 'civilization', at once intrinsic to the international legal order spawned by post-Renaissance Europe and that against which Europe's distinctive self-understanding as the embodiment of perfected 'civilization' continued to be elaborated.[64]

Both the capitulatory regime and the rhetoric of 'civilization' left their mark on the terms of the Treaty of Lausanne. Western powers were 'compensated' for the elimination of the capitulations when Turkey agreed to promulgate newer, more 'modern' legal codes. Articles 37 to 44 of the Lausanne Peace Treaty required that Turkey supply its non-Muslim citizens – a designation which, in practice, was effectively restricted to Greeks, Armenians, and Jews, the Ottoman Empire's three principal *milletler* – with all the entitlements of its Muslim citizens.[65] This much the Kemalists were prepared to undertake, as it coincided with their own commitment to attenuate Ottoman traditions of legal pluralism and adopt many of the West's legal and administrative innovations so as to 'catch up' with, and eventually 'overtake', the exemplars of 'contemporary civilization' (*muasır medeniyet*).[66] So much so, in fact, that they allowed 'a number of European legal counsellors' selected from a list drafted by the PCIJ to be posted for a certain period in Istanbul and Izmir for the sake of participating in legislative commissions, observing the operation of Turkish courts, and preparing reports for the Turkish minister of justice when needed – all 'with a view to the institution of such reforms as may be rendered advisable by the development of manners and civilization'.[67] What the Kemalists were *not* willing to do, however, was to allow the most visible elements of the extraterritorial consular regime enshrined in the capitulations to be preserved. To be sure, some of the Treaty of Lausanne's provisions betrayed the continuing influence of the capitulations: in addition to the 'counsellors', there was, for instance, Article 16 of the Convention of Lausanne, which placed matters of personal status involving non-Muslim nationals of the Allied Powers within the jurisdiction of their respective countries' courts.[68] This does little, however, to alter the fact that the most noticeable features of the regime were eliminated by virtue of Article 28 of the Lausanne Peace Treaty, which formalized 'the complete abolition of the capitulations in Turkey in every respect'.[69]

It may be true that Lausanne's resonance owed much to the fact that 'the Turks, who had been humiliated many times before and compelled to yield to threats and

64 See I. B. Neumann, *Uses of the Other: 'The East' in European Identity Formation* (1999), ch. 2.
65 Treaty with Turkey, *supra* note 22, at 13–16.
66 See, e.g., M. Kemal, 'Ankara Hukuk Fakültesinin Açılışında (5.XI.1925)', in T. Parla (ed.), *Türkiye'de Siyasal Kültürün Resmî Kaynakları* (1995), III, 292, at 293.
67 Treaty with Turkey, *supra* note 22, at 97.
68 Shades of the capitulations could also be felt in Arts. 46–57 of the Lausanne Peace Treaty, which concerned the distribution of the Ottoman public debt, and the Commercial Convention which was annexed to the Peace Treaty and required, *inter alia*, that Turkey abolish a variety of barriers on the import and export of goods. Ibid., at 16–23, 72, 74–84. See also M. O. Hudson, 'Law Reform in Turkey', (1927) 13 *American Bar Association Journal* 5, at 6–7; K. Boratav, *Türkiye'de Devletçilik* (2006), 33–4.
69 Treaty with Turkey, *supra* note 22, at 12.

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bluster, now had the delicious satisfaction not merely of resisting the European Powers but ultimately of imposing their own terms'.[70] It is no less true, however, that these terms were derived from the discursive arsenal of international law, with Turkey going to great lengths to combine its aggressive defence of national sovereignty with generalized appeals to the coherence of the international legal system.[71] And it is these two manoeuvres – the one grounded in sovereignty, the other indexed upon systematicity – which one sees at work in the two arguments that Esat developed before the PCIJ.

4. The perils of protection

As mentioned above, Article 6 of the Turkish Penal Code of 1926 allowed for jurisdiction to be extended to nationals of foreign states arrested in Turkey for offences committed abroad but 'to the prejudice of Turkey or of a Turkish subject'.[72] Esat saw this provision as occupying a middle ground between the two extremes of 'territorial' and 'universal' criminal jurisdiction, making room for the possibility of concurrent jurisdiction in cases like *Lotus* by refusing to allow competence to be tethered to or divorced from strictly territorial considerations.[73] Exceptionally forceful, at times even downright vitriolic, in his advocacy of Article 6, Esat attempted to defeat France's claim that it constituted a violation of international law by pursuing a double strategy premised on the articulation of an aggressive, quasi-absolutist account of Turkey's 'droit de souveraineté' and the compilation of a list of states which adhered to one or another version of the 'protective principle'.

Consider Turkey's pleadings. On the one hand, Esat observes, if Turkey is really in possession of the kind of fully fledged sovereignty to which every 'état civilisé' is entitled, where this is understood to mean that its constituent juridico-political structures need not go in search of external sources of validation in order to secure their legitimacy, it seems clear that it must also wield the power to choose freely from among the various modes of criminal jurisdiction to which it has access, at least so long as none of these is found to contravene international law. In other words, since Turkey commands just as authoritative a 'droit de souveraineté' as any other member of the group of 'nations civilisées', and since there is no justifiable reason to believe that the 'protective principle' violates customary international law or any potentially applicable treaties,[74] it 'peut librement choisir entre le système de protection et le système de territorialité'.[75] It is only natural that Esat should charge France with hypocrisy on this point:

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70 P. M. Brown, 'From Sèvres to Lausanne', (1924) 18 AJIL 113, at 115.

71 Indeed, one later Turkish jurist would write that İnönü 'based all his demands there on international law and defended and carried his thesis of equality on the strength of the principles of international law'. C. Bilsel, 'International Law in Turkey', (1944) 38 AJIL 546, at 549.

72 *Supra* note 21.

73 'Mémoire', *supra* note 32, at 237–40. For contemporaneous discussions of the various options available to states, see H. Walther, *L'affaire du 'Lotus' ou de l'abordage hauturier en droit pénal international* (1928), 132–7; N. Henry, 'Le "Lotus" à la Cour de La Haye', (1928) 2 *Revue de droit international* 65, at 91–5.

74 'Discours prononcé', *supra* note 13, at 134. See also 'Mémoire', *supra* note 32, at 243.

75 'Discours prononcé', *supra* note 13, at 119.

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> Est-ce que la France ne peut pas et n'a pas le droit d'introduire demain, dans son Code pénal, le système de protection? Si oui, pourquoi la Turquie n'aurait-elle pas le même droit? Existe-t-il une différence entre la souveraineté turque et la souveraineté française?[76]

Simply put, given the absence of evidence to the effect that the 'protective' model of criminal jurisdiction runs against the grain of international law, there is no need for Turkey to point to 'une règle permissive du droit des gens', its sovereignty permitting it to select that model of jurisdiction which 'conforme à sa situation spéciale et à ses intérêts sociaux' to the greatest degree.[77]

On the other hand, that Esat goes out of his way to supply a list of states which subscribe to some variant of the 'système de protection' testifies to his desire to plant Turkey firmly within the core of 'la civilisation contemporaine'.[78] In addition to Turkey itself, this rather sizable group ('pays de législation protectionniste en matière pénale', he dubs them) includes Austria, Belgium, Greece, Hungary, Italy, Norway, Sweden, and Switzerland in Europe alone, with Argentina, Brazil, China, Guatemala, Japan, Mexico, and Venezuela rounding out the global picture.[79] Esat feels sufficiently comfortable with the idea that these states, amounting to 'un nombre considérable' when totalled,[80] embody the spirit and letter of 'civilization' to pose the question ('merely rhetorical', of course) as to whether they are 'classés parmi les nations non civilisées'.[81] What's more, he points out, very few, if any, states actually subscribe to the 'territorial' model of jurisdiction, at least not in the rigid, uncompromising form advocated by Basdevant.[82] Far from standing in opposition to 'un principe international établi et en vigueur',[83] then, the 'protective' model of criminal jurisdiction falls within the purview of 'la civilisation contemporaine' just as much as its 'territorial' rival: 'à notre avis, aussi bien les États qui ont adopté le système de protection que ceux qui ont accepté le système territorial sont des organismes politiques qui ont contribué au même titre à la civilisation contemporaine'.[84] Of course, the fact that 'le Code pénal turc est la reproduction exacte de ce Code pénal italien et il est en vigueur en Turquie depuis le 1er juin 1926' is by no means irrelevant here,[85] and something on which Giulio Diena, the Italian jurist whose expert opinion is included in the Turkish *contre-mémoire*, dwells at some length. Of particular consequence is Diena's contention that the internal connection between the Italian and Turkish provisions precludes rejection of one in the absence of a concomitant repudiation of the other. 'Devra-t-on en conclure', he asks, 'que l'Italie,

76 Ibid., at 120–1.
77 Ibid., at 117, 119. See also 'Contre-mémoire', *supra* note 32, at 305.
78 'Discours prononcé', *supra* note 13, at 119.
79 Ibid., at 117; 'Contre-mémoire', *supra* note 32, at 302. Indeed, one commentator would go so far as to declare that 'it is clear that in some form or other nearly every country claims this jurisdiction to a small or large extent'. G. W. Berge, 'The Case of the S. S. "Lotus"', (1927–8) 26 *Michigan Law Review* 361, at 377–8.
80 'Discours prononcé', *supra* note 13, at 118, 121.
81 Ibid., at 119.
82 Ibid., at 117, 119; 'Contre-mémoire', *supra* note 32, at 303.
83 'Mémoire', *supra* note 32, at 226.
84 'Discours prononcé', *supra* note 13, at 119. See also 'Mémoire', *supra* note 32, at 240, 243.
85 'Discours prononcé', *supra* note 13, at 117. For an astute analysis of Turkey's 'reception' of Italian law, see R. A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (2005), chs. 8, 9.

à cause de l'article 6 de son Code pénal (dont, comme nous l'avons vu, l'article 6 du Code pénal turc n'est que la reproduction), devra être rangée parmi les nations barbares?'[86]

In sum, there were two modes of reasoning at work in Esat's defence of the 'système de protection', the one aiming to ensure that Turkey would be viewed as belonging to – and therefore bound by the imperatives of – the international legal system and the other capitalizing on the principles of formal equality and reciprocity informing this system in order to make the strongest possible case for the augmentation of its jurisdictional sovereignty. Given the wide-ranging ramifications of the capitulatory regime, it comes as no surprise that Esat would be inclined to consider – or, at least, to present – the French assault on the 'protective principle' as a thinly veiled attempt to reintroduce institutions of consular decentralization, depriving the Turkish judiciary of its authority and the 'Turkish nation' of its barely three-year-old politico-economic independence through a sophistical sleight of hand. After all, if it is true that the consular regime enshrined in the capitulations was 'the result of the survival into the twentieth century of a middle age conception' of legal jurisdiction premised upon the 'legal fiction of ex-territoriality',[87] then the advent of 'modernity', marked, among other things, by the preparation and promulgation of Western-style legal codes, clearly called for the elimination of such extraterritorial practices. Such was Esat's sensitivity on this issue that at one point he argued that 'le bon sens et la logique prouvent que la nouvelle Turquie, pour qui l'abolition des Capitulations était une question d'honneur et d'existence nationale, n'aurait pas demandé et obtenu cette abolition pour accepter qu'on y substituât une situation pire'.[88] Whether 'sincere' or intended for 'mere effect', the force of this reaction reveals much about the Kemalists' motivations for instituting 'le système de protection', which they regarded as an extension of their commitment to cast aside the capitulations and craft a new, assertive but agreeable, confident but co-operative, national identity. In this respect it is well worth noting that the final chapter of Esat's doctoral dissertation, devoted exclusively to an examination of the capitulatory regime, displayed much the same bipartite logic as that just outlined. While Esat felt little anxiety arguing that 'chaque Etat étant libre de s'organiser et de se développer de la manière qui lui convient' and 'les autres Etats ne sauraient lui imposer les formes d'organisation qu'ils jugent nécessaire', he could not bring himself to deny that willingness to conform 'aux principes du Droit International public européen' remained the single most significant precondition for gaining access to 'le concert des Etats civilisés' and securing the right to participate in 'la jouissance complète des privilèges du Droit International public'.[89] That he would go on to appeal to an expansive, distinctly non-territorial conception of criminal jurisdiction in an effort to actualize Turkey's emancipation from the extraterritoriality of the capitulatory

86 'Contre-mémoire', *supra* note 32, at 324.
87 E. Pears, 'Turkish Capitulations and the Status of British and Other Foreign Subjects Residing in Turkey', (1905) 21 *Law Quarterly Review* 408, at 410, 424.
88 'Discours prononcé', *supra* note 13, at 107.
89 *Du régime des capitulations ottomanes: leur caractère juridique d'après l'histoire et les textes* (1928), 107, 109.

regime before the PCIJ may well strike one as paradoxical, but is hardly surprising when considered against the background of Turkey's aspiration to 'modern' statehood.

5. An independent judiciary

It is only on the basis of an understanding of Esat's approach to 'le système de protection' that one can begin to gain an appreciation of the importance that he attached to the second of the two arguments to which I made reference above – that respecting Article 15 of the Convention of Lausanne and the need to keep it from being subjected to 'une plus grande déformation' in the hands of Basdevant.[90] As already mentioned, Article 15 concerned the institutional competence of the Turkish judiciary, requiring 'all questions of jurisdiction' arising between Turkey and the other contracting states to be determined 'in accordance with the principles of international law'.[91]

Esat argues for a strict interpretation of this provision, throwing his weight behind the proposition that it does not require any supplementary analysis, the intentions of the parties being ascertainable and its terms being exceedingly 'nets' and 'formels'.[92] His aim is to establish that the French position with respect to Article 15 – that consideration of Lausanne's *travaux* reveals that Turkey originally attempted to extend its jurisdiction to crimes committed in third states and that the provision must therefore be read in the light of its failure to do so – simply circumnavigates the clarity of the Convention of Lausanne, nullifying the conventional rule that one must remain loyal to the express terms of legal texts to the greatest extent possible before having recourse to ancillary or alternative sources. 'Avec le système d'interprétation employé dans le Mémoire français', he quips, 'il serait toujours possible de soutenir le contraire de ce qu'un traité énonce dans les termes les plus formels'.[93] Indeed, he notes at one point, it was precisely on account of their shared understanding of Article 15, precisely because they 'n'ont pas douté un seul instant que le sens de l'article en question ne fût pas autre chose que les principes du droit international généralement admis et en vigueur',[94] that the two parties were able to take the question as to whether Turkey was entitled to exercise jurisdiction over Demons to the PCIJ in the first place. That Article 15 necessitates such strictness becomes even clearer when read in conjunction with Article 28 of the Lausanne Peace Treaty, which abolished the basic elements of the capitulations decisively and without leaving any room for substantial misunderstanding.[95] Indeed, such is the severity of the French position, Esat contends, that the effective outcome of its acceptance by the Court – the wholesale evisceration of 'le système de protection' –

90 'Discours prononcé', *supra* note 13, at 105.
91 Treaty with Turkey, *supra* note 22, at 72.
92 'Discours prononcé', *supra* note 13, at 105, 134–5; 'Contre-mémoire', *supra* note 32, at 291–4.
93 'Discours prononcé', *supra* note 13, at 108.
94 'Contre-mémoire', *supra* note 32, at 293.
95 'Discours prononcé', *supra* note 13, at 106.

would yield 'une situation inférieure à celle que lui créaient les Capitulations sous le régime de l'empire déchu'.[96]

As with Article 6, though, what drives Esat is the thematic interpenetration of sovereignty and systematicity. Assessed on its own terms rather than being interpreted against the background of the Lausanne negotiations' minutes,[97] Article 15 furnishes Esat with the opportunity to run two, mutually distinct but reciprocally reinforcing, arguments – the one pointing in the direction of international law's binding force, the other underlining the agency of the autonomous state. Take the following passage, a particularly elegant manifestation of Esat's ambitions and sensitivities:

> En résumé, l'article 15 de la Convention de Lausanne relatif à l'établissement et à la compétence judiciaire reconnaît à la Turquie une compétence judiciaire absolue, à la condition que celle-ci ne soit pas contraire aux principes du droit international. La Turquie, de son côté, après avoir obtenu à Lausanne l'abolition complète des Capitulations à tous les points de vue, s'est engagée à se soumettre auxdits principes, mais sur un pied d'égalité complète avec les autres États civilisés et indépendants, *sans aucune restriction ou différence*.[98]

For Esat, the abrogation of the capitulatory regime signals Turkey's submission to the international legal system as well as its acquisition of the capacity to engage with all other states 'sur un pied d'égalité complète'. His decision to conjoin 'civilisés' and 'indépendants' is especially revealing, allowing him to make the point that Turkey derives its sovereignty from the normatively constraining power of the international legal structures which inspire 'civilisation' without jettisoning the countervailing notion that such sovereignty, and the independence intrinsic to it, lays the groundwork for these structures. If Turkey is truly on a level playing field with all other states, or at least those that may justifiably be labelled 'civilisés et indépendants',[99] this is so because its sovereignty flows from the recognition it receives from its immersion in the normative structures of international legal order. Conversely, if it really is the case that Turkey belongs to this order, then it must also be the case that it is entitled to hold its own against aggression and assimilation, commanding just the same rights and freedoms, just the same powers and privileges, as any of its friends and foes, in full force and '*sans aucune restriction ou différence*'. The combination of these two drives lends Esat's analysis a remarkably nimble, not to mention crafty, sense of fluidity, confirming the hybridity of his distinctively universalistic-cum-particularistic mode of reasoning. As he puts it in another passage, 'la compétence judiciaire turque n'est autre que celle des États civilisés qui participent au bénéfice du droit commun international'.[100]

96 Ibid. See also 'Contre-mémoire', *supra* note 32, at 288.
97 'Discours prononcé', *supra* note 13, at 108.
98 Ibid., at 111–12 (emphasis in original).
99 At one point, largely as a result of his effort to use French case law to bind his interlocutor into a guilt-ridden confession of self-contradictoriness with respect to the use of *travaux* for the interpretation of treaty texts, Esat explicitly counts France among the 'pays les plus civilisés', the only other state to which he extends this title being Britain. Ibid., at 111. Viewing Britain and France as the twin exemplars of 'civilized nationhood' had, of course, been highly common for quite some time: see, e.g., W. G. Grewe, *The Epochs of International Law* (2000), 448, 450–1.
100 'Duplique de Mahmout Essat Bey', in *'Lotus' Case: Documents*, *supra* note 13, at 165.

https://doi.org/10.1017/S0922156508005621 Published online by Cambridge University Press

Another, even more illuminating, example of this form of argumentation is provided by Esat's assertion that

> il est impossible pour la Turquie de supposer et d'admettre la moindre restriction à la teneur de l'article 15, de même il ne saurait être question de renoncer au plus insignifiant des droits reconnus à ce sujet par le droit international aux États civilisés de l'Europe. La Turquie, du fait qu'elle appartient à la communauté des États et des Nations relevant de la civilisation contemporaine, considère cette question comme vitale du point de vue de son honneur et de son indépendance.[101]

On the one hand, Turkey's refusal to countenance even the slightest dilution of the meaning of Article 15 and the tenacity with which it clings to the institutional authority of its judiciary are presented as corollaries of a general observance of 'le droit international aux États civilisés de l'Europe', a broad-based identification with 'la communauté des États et des Nations relevant de la civilisation contemporaine'. On the other hand, it is on account of its desire to keep company with those states which it deems 'relevant de la civilisation contemporaine' that Turkey is disposed to consider the question of judicial independence from the perspective of its national 'honneur' and 'indépendance', these being regarded as properties inhering in the very essence of such 'civilisation'. Although set along different trajectories, the two lines of reasoning are part and parcel of the same discursive constellation, playing on two facets of a common conception of 'civilization'.

By underscoring the importance of Turkey's commitment to 'principles of international law', Article 15 allowed for the recruitment of considerations of sovereignty as well as systematicity, permitting Esat to highlight Turkey's fidelity to the normative dimensions of 'la civilisation contemporaine' while demanding treatment as a genuinely 'civilisé' state. Esat made full use of this opportunity, reinforcing Turkey's international legal personality and furnishing it with a revitalized sense of its own agency. Such a sense would simply not have been amenable to cultivation without a narrow reading of Article 15 and a concomitantly broad interpretation of Turkey's 'droit de souveraineté'. In effect, Turkey, like any other state, would have been paralysed – 'condamnée à l'inaction' or, better still, 'réduite à l'inertie et à la stagnation' – if compelled to justify each and every one of its actions and omissions by reference to a specific rule of international law.[102]

6. Conclusion

It is true that Turkish scholars and policymakers have generally broached questions of law, both domestic and international, in highly positivistic and formalistic terms, adamant in their alignment with the West and unrelenting in their eschewal of explicitly Third World perspectives.[103] However, it is no less true that they have

101 'Contre-mémoire', *supra* note 32, at 299.
102 'Discours prononcé', *supra* note 13, at 112, 115.
103 See, e.g., E. Örücü, 'The Impact of European Law on the Ottoman Empire and Turkey', in W. J. Mommsen and J. A. de Moor (eds.), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (1992), 39, at 51–4; B. Aral, 'An Inquiry into the Turkish "School" of International Law', (2005) 16 EJIL 769. A fine example of such parochialism is provided by Esat himself, who, in one of

https://doi.org/10.1017/S0922156508005621 Published online by Cambridge University Press

been just as sensitive to the consequences of their economic and technological decline vis-à-vis the West as their neighbours to the east and south, particularly when their own personal or professional interests have been at stake.[104] What makes the Turkish case especially intriguing is that unlike many of their counterparts in Asia, Africa, and Latin America, who have often sought to extend their post-colonial or non-aligned affiliations to legal disputation overtly and unreservedly (think, for example, of the case of Mohammed Bedjaoui),[105] Turkish jurists have both appealed to and attempted to reorient dominant European understandings of international law, allowing themselves to be subsumed beneath the rubric of such law even as they make the most of its malleability in order to advance their own causes. This ambivalent relationship confers upon Turkey – arguably even more than on any of the other, roughly analogous cases[106] – the dual status of 'insider' and 'outsider', sovereign and subject, operating on a number of different registers at one and the same time and rendering its internalization of socio-culturally exogenous norms even more complex and multifaceted than the experiences of other 'peripheral' or 'semi-peripheral' states belonging to or associated with the non-European world.[107] An imperial power defeated at the hands of other imperial powers, Turkey has pursued much the same line as some of its more vocally anti-imperialist neighbours, but without dropping any of the conceptual and rhetorical apparatuses that it has taken over from the West. Hence, while it may be the case that formalism generally serves to legitimate entrenched forces, consideration of the manner in which Turkey recruited various strands of international legal discourse in the *Lotus* case reminds us that even the sort of loyalty to this discourse which has long been dismissed as dangerously indifferent to 'the political' may be capable of serving a variety of subversive, unabashedly counter-hegemonic ends, at least when placed in the right hands and deployed with the requisite tactical insight.

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his more recalcitrant moods, argued that 'Western civilization, like every other civilization, is a totality; it makes no room for distinctions. It must be received in its entirety, or not at all'. *Atatürk İhtilali* (1995), 120 (translation mine).

104 So proud was he of his performance before the PCIJ that Esat would go on to adopt the surname 'Bozkurt', thenceforth coming to be known as 'Mahmut Esat Bozkurt'. M. Akzambak, *Atatürk'ün Devrimci Adalet Bakanı Mahmut Esat Bozkurt* (2005), I, at 238–9.

105 Knop, *supra* note 12, at 121–7.

106 Consider, for instance, the Chilean/Latin American and Nigerian/African perspectives: L. Obregón, 'Noted for Dissent: The International Life of Alejandro Álvarez', (2006) 19 LJIL 983; M. Toufayan, 'When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias', (2008) 21 LJIL 377.

107 Indeed, Turkey's engagement with 'civilizational' discourse owes much to the Ottomans' attempt to check Western interventionism by positioning themselves at the centre of the Islamic *ummah* while diverting orientalist charges of 'fanaticism' and 'backwardness' towards their Arab provinces. U. Makdisi, 'Ottoman Orientalism', (2002) 107 *American Historical Review* 768.