# Introduction

## 1.

On 5 February 1970, after international legal proceedings spanning twelve years, and more than two decades after the dispute had arisen, the President of the International Court of Justice, Judge Bustamante y Rivero, read out the Court's judgment in the *Case Concerning the Barcelona Traction, Light and Power Co., Ltd.*[1] In that judgment, the Court held that, under international law, the nationality of corporations depended on national incorporation rules and that the violation of shareholders' rights did not normally constitute a separate breach of international law. The Barcelona Traction, Light and Power Co., having been incorporated under Canadian law, therefore was to be treated as Canadian, although 88 per cent of its shares were held by Belgian shareholders, and Belgium could not espouse claims of diplomatic protection. Highly controversial at its time, this holding remains the crucial judicial pronouncement on the nationality of corporations to date.[2]

[1] ICJ Reports 1970, 3.
The company was declared bankrupt in 1948 by a Catalan district judge, and eventually was taken over by a Spanish finance magnate. After diplomatic representations by various countries, Belgium, in 1958, instituted proceedings against Spain before the ICJ. These were discontinued in 1961 to allow for direct negotiations between the company and its new Spanish owners, but re-entered on the Court's list in 1962 after the negotiations had failed (ICJ Reports 1961, 9). At the beginning of the second phase of the proceedings, Spain raised four preliminary objections against the admissibility of Belgium's claims, of which the Court dismissed two and joined the other two to the merits (ICJ Reports 1964, 6). When it actually declared the case inadmissible, in 1970, the written pleadings exceeded 60,000 pages in length, see Sette-Camara (1994), 1071; Ragazzi (1997), 10 (his note 44).

[2] See Judge Oda's separate opinion in the *ELSI case*, ICJ Reports 1989, 83–87; and further Brownlie (2003), 466–471; Akehurst/Malanczuk (1997), 266–267; Verdross/Simma (1984), 880–881.

A quick glance at the textbooks, however, reveals that *Barcelona Traction* is more than a controversial decision on the question of diplomatic protection of corporations. Two paragraphs of the judgment have taken on a life of their own and have inspired much discussion among States, courts, commissions, and commentators. Although they did not affect the rules of nationality, nor indeed any other central aspect of the case before the Court, these two paragraphs are among the most famous judicial pronouncements in the ICJ's history. Since they provide the starting-point of the present study, they merit to be quoted in full.

> 33. When a State admits into its territory foreign investments or foreign nationals, whether national or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
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> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character.[3]

In the three-and-a-half decades that have passed since 5 February 1970, this passage (which will be referred to as the *Barcelona Traction* dictum) has puzzled courts and commentators, including, at times, the ICJ itself. On its basis, international lawyers have begun to discuss the concept of obligations *erga omnes*, or obligations owed to the international community as a whole.[4] The importance of this category of obligations, at least from a conceptual point of view, is widely acknowledged today. It is brought out with particular clarity in the International

For early and continuing discussions of the Court's approach see Seidl-Hohenveldern (1971), 255; Higgins (1971), 327; Mann (1973a), 259; van Dijk (1980), 414–416; Wallace (1992), 356; Henkin (1995), 89; Seidl-Hohenveldern (1996), 115.

[3] ICJ Reports 1970, 32 (paras. 33–34).

[4] Although not identical in meaning, both expressions are generally treated as synonyms. The present study employs the former expression, as it is the more common. For a different approach see e.g. article 48 (1)(b) ASR and para. 9 of the ILC's commentary.

Law Commission's Articles on State Responsibility, adopted in 2001, which recognise its impact on the rules governing the invocation of responsibility,[5] and expressly cite para. 33 of the *Barcelona Traction* judgment as evidence of a modern approach, pursuant to which State responsibility can no longer be reduced to bilateral relations between pairs of States.[6] Many commentators are prepared to go beyond that. To them, the emergence of obligations *erga omnes* marks no less than a paradigm shift in international law. Delbrück sees it as part of 'the ongoing process of the constitutionalization of international law';[7] to many others, obligations *erga omnes* (together with the related concept of peremptory norms) reflect 'a common core of norms essential for the protection of communal values and interests', which transcend the bilateralism and parochial State concerns dominating traditional international law.[8] The Latin phrase '*erga omnes*' thus has become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order based on law. Indeed, such is the degree of fascination that even sceptical commentators like Prosper Weil (whose earlier work is widely regarded as a highly influential *critique*) acknowledge that the concept is one of the 'pièces maîtresses de l'arsenal conceptuel du droit international d'aujord'hui.'[9]

As often, the reality is neither so clear nor so bright. One problem is readily admitted by commentators: whatever the relevance of obligations *erga omnes* as a legal concept, its full potential remains to be realised in practice. The international community's failure effectively to react against humanitarian catastrophes, for example in Pol Pot's Cambodia or during the 1994 Rwandan genocide, makes solemn proclamations of a core of fundamental values ring hollow.[10] Bruno

[5] See article 48 (1)(b) ASR and paras. 2, 8–10 of the ILC's commentary to that provision. See further para. 2 of the introductory commentary to Part Three, Chapter I, and para. 2–3 and 7 of the introductory commentary to Part Two, Chapter III.

[6] See commentary to article 1 ASR, para. 4.

[7] Delbrück (1999a), 35.

[8] See ILA Study Group (2000), para. 105. For similar statements or approaches see e.g. Ragazzi (1997) (stressing the moral foundations of the *erga omnes* concept and its relevance for the quest 'for peace and justice among States through the promotion of their common good' (218)); Tomuschat (1995), 15; Fassbender (1998), 75–85 and 126–128; Fassbender (2003), 5–7; Karl (2002), 277.

[9] Weil (1992), 286 and 287 respectively. Weil's criticism seems to have become mollified over time: contrast Weil (1983), 430–433, and Weil (1992), 284–291.

[10] See e.g. Kooijmans (1990), 92–93, and further Hannum (1989), 82, for a critical comment on the reluctance of States to institute ICJ proceedings against Cambodia, which had, *inter alia*, accepted the Court's compulsory jurisdiction under article 36, para. 2 of the ICJ Statute.

Simma's much-quoted observation encapsulates this feeling of disappointment: 'Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"'.[11]

This comment, however, only identifies part of the problem. It is difficult to disagree with the factual assessment – as will be shown in subsequent chapters, obligations *erga omnes* often have yet to enter 'the world of the "is"'. On the other hand, the observation seems to suggest that, as a matter of law, the *erga omnes* concept was fully developed, and that all that remained to be done was to implement it in practice. If this assessment were correct, further legal analysis would be unnecessary, and should be substituted by political pledges and action. Of course, however, it is not correct.[12] Difficulties with the *erga omnes* concept cannot be reduced to problems of implementation, or differences between *is* and *ought*, *Sein* and *Sollen*. Despite the wealth of analysis and the host of solemnly-worded statements, commentators continue to disagree about even the most fundamental issues. Having reviewed the ICJ's jurisprudence, Thirlway doubts whether the *Barcelona Traction* dictum is 'little more than an empty gesture'.[13] On the basis of a rather summary reference to international practice, Rubin arrives at the same result.[14] More specifically, there is no agreement about the scope of the *erga omnes* concept, and the legal consequences flowing from that status remain unclear. A brief glance at the jurisprudence of the ICJ and the many academic works addressing obligations *erga omnes* shows that the concept has become a sort of legal *panacea*; it is said to affect the legal regime of law enforcement, but also the *pacta tertiis* principle, the question of persistent objection, the territorial and temporal application of obligations, etc.[15] Thirty-five years after the *Barcelona Traction* judgment (and quite apart from problems of implementation), there is thus very often no agreed *ought* and basic aspects of the legal regime of obligations *erga omnes* remain 'very mysterious indeed'.[16] Given these controversies, it may be no coincidence that its implemetation has proven tortuous.

[11] Simma (1993a), 125. See also Zemanek (2000a), 10 ('The Tortuous Implementation of the Idea in Practice').
[12] Simma's own work, which discusses many aspects of the legal regime of obligations *erga omnes* and is frequently referred to in subsequent chapters, testifies to this.
[13] Thirlway (1989), 100. [14] Rubin (1993), 172. [15] For references see below, Chapter 3.
[16] Brownlie (1988a), 71.

## 2.

The present study attempts to demystify aspects of the 'very mysterious'[17] concept and thereby to facilitate its implementation. Apart from suggesting ways of identifying obligations *erga omnes*, it assesses whether all States, acting individually, are entitled to respond to breaches of such obligations by (i) instituting contentious proceedings before the International Court of Justice and (ii) resorting to countermeasures against the State responsible for the breach. The subsequent chapters will show that these questions are highly controversial, and involve a host of intricate issues, such as the interrelation between different sources of international law and the role of individual States in the process of safeguarding general interests of the international community. Nevertheless, they represent only some of the issues raised by the *erga omnes* concept. The decision to focus on identification, ICJ proceedings and countermeasures (and to ignore other questions) is to some extent due to space constraints. But it is also based on a number of assumptions about the function of the *erga omnes* concept, its influence on the rules governing responses against wrongful acts, and the role of States in the process of securing compliance with international law. Before proceeding with the actual analysis, these assumptions and caveats may be briefly explored, as they help situate countermeasures and ICJ claims within the broader framework, and delimit the scope of the present study. Four points seem particularly relevant.

The first relates to the function of the *erga omnes* concept. The present study focuses on the *enforcement* of international law, i.e. on attempts to induce a State to cease its wrongful conduct and to remedy its consequences.[18] The underlying assumption is that obligations *erga omnes*

[17] Brownlie (1988a), 71.

[18] For similar definitions see Schachter (1991), 227; Shihata (1996–1997), 37; Dahm/Delbrück/Wolfrum (1989), 90–91; Weschke (2001), 2; Ferencz (1983), xv. It must be admitted that there is no agreement about how to interpret the notion of 'enforcement' in international law. Literature in well-developed fields of international law (such as international environmental law, international humanitarian law, or disarmament law) often includes positive, incentive-based measures, preventive measures, or, more generally, all other means aimed at safeguarding compliance with legal systems; see e.g. Bothe (2000), 23; Bothe (1996), 13; Beyerlin (2000), 231–240; Kessler (2001), 48–50; Ladenburger (1996).

Others have adopted a narrower approach than the one pursued here, e.g. by restricting enforcement to measures requiring justification (see Morrison (1995), 43), or by solely focusing on judicial means of enforcement (such as, for example, Jennings (1987), 3). Article 53 UNC, addressing the role of regional arrangements in the

first and foremost affect this area of the law.[19] This assumption is widely shared, and finds support in the above-quoted *Barcelona Traction* dictum, especially the Court's recognition of the 'legal interest' of all States in seeing obligations *erga omnes* observed. However, it has already been mentioned that the *erga omnes* concept is said to influence a wide variety of other legal issues, often entirely unrelated to questions of law enforcement. These other *erga omnes* effects are not usually acknowledged in the legal literature, which is one of the factors mystifying the concept. The present study discusses, and puts forward a distinction between, different types of *erga omnes* effects to avoid these complications.[20] Beyond that, however, it remains focused on *erga omnes* effects in the field of law enforcement.

Secondly, by analysing countermeasures and ICJ proceedings, the present study focuses on what will be called measures of *decentralised enforcement by States*. In contrast, it does not address other forms of law enforcement, notably (i) means of direct recourse, by individuals, groups of individuals, or legal persons against infringements of their rights, or (ii) the institutional enforcement of obligations within the framework of international organisations. While the former distinction is relatively unproblematic, the line between institutional and decentralised enforcement may not always be easy to draw, as it requires an analysis of the often complex interplay between international organisations and their member States. For the purposes of the present study, institutional enforcement will be defined as a measure authorised by the agreement establishing an international organisation. In contrast, decentralised enforcement comprises measures that cannot be evaluated in the light of the institutional rules alone.[21] Following this approach, decentralised enforcement thus covers measures taken by groups of States and may even include measures agreed within the framework of an international organisation, as long as these are directed against non-member States.[22]

The decision to focus on decentralised enforcement by States is based on a simple assumption. It is assumed that State enforcement remains

enforcement of UN sanctions, is equally based on a narrower (treaty-specific) understanding; see Ress/Bröhmer in: Simma (2002a), Article 53, MN 3–7. On 'enforcement' by the Security Council see below, footnote 23.

[19] Contrast notably Ragazzi (1997), who sees enforcement rights as mere 'corollaries' (p. xii) of the *erga omnes* concept.

[20] See below, Chapter 3.

[21] See the similar distinction drawn by Alland (1994), 26.

[22] Following this use of terminology, there may thus well be collective decentralised measures.

an essential aspect of protecting general interests under international law. This does not mean that enforcement by non-State actors was irrelevant. Quite to the contrary, direct recourse and institutional enforcement are increasingly relevant – few today would question the importance of systems of judicial protection of individuals in fields such as human rights or investment protection, or of institutional responses under Chapter VII of the United Nations Charter.[23] What is more, the different forms of enforcement are interrelated: as will be shown below, by conferring enforcement competence upon individuals or international organisations, States may have restricted their own enforcement rights.[24] Decentralised enforcement by States therefore is only one (and not necessarily the most appropriate)[25] way of securing compliance with general interests of the international community. The subsequent analysis, however, is based on the assumption that, at the present stage of international law, it remains indispensable, as it is the only form of enforcement that is independent of treaty-based mechanisms.

Thirdly, the present study focuses on two specific measures of decentralised law enforcement, namely countermeasures and ICJ proceedings. Again, this is not to suggest that these are the only forms of conduct by which States could enforce international law. The above definition of enforcement (comprising all attempts to induce another State to cease its wrongful conduct and to remedy its consequences) is sufficiently broad to cover a variety of responses, ranging from verbal protests to the use of military force.[26] The decision to focus on countermeasures and ICJ proceedings is based on a third assumption: these two forms of response are most likely to be affected by the *erga omnes* concept. There are two aspects to this assumption:

[23] On the relevance of direct recourse see e.g. Brown Weiss (2002), 798. As regards Chapter VII UNC, it must be conceded that Security Council action under articles 41 and 42 UNC are based on a wider understanding of the term '*enforcement*'. Unlike in the present study, Security Council *enforcement* action does not presuppose a breach of the law, but is based on political considerations about whether a specific situation amounts to a threat to the peace, breach of the peace or an act of aggression. While the Council will usually only respond if international law has been violated, it is conceivable that situations brought about by lawful conduct should qualify as threats to, or breaches of, the peace. For a comprehensive discussion of the functions of Security Council enforcement action see Frowein/Krisch in Simma (2002a), introductory commentary to Chapter VII, especially MN 17–24. See further Wolfrum in Simma (2002a), Article 1(1), MN 17–19; Dinstein (2001), 250–251; Schachter (1991), 390.

[24] See below, Chapter 7. [25] See Tomuschat (1995), 15.

[26] Contrast the narrower understanding noted above, footnote 18.

The first aspect relates to the function of the *erga omnes* concept. As stated above, the present study discusses how the concept affects the regime of law enforcement. Without prejudicing the subsequent analysis, it is understood that, if anything, it *enhances* the prospects of enforcement, and that States can respond against *erga omnes* breaches in a way not otherwise open to them. As a consequence, it would be rather beside the point to discuss enforcement measures that are *always* available to all States, irrespective of whether the breach, against which they are directed, affects an obligation *erga omnes*. This notably applies to measures that are intrinsically lawful and do not require any justification. Protests and verbal condemnations are one example; under modern international law; they are part of the regular informal diplomatic relations and can no longer be considered a (*prima facie* unlawful) interference in the domestic affairs of another State.[27] Unfriendly, but lawful, responses against breaches (retorsions) are the second type of response in point.[28] As will be shown below, the distinction between countermeasures and retorsions is often difficult to draw in practice. Both can be qualified as sanctions by which States seek to exercise pressure on other States.[29] Whether a specific response is *prima facie* unlawful and requires justification, or still unfriendly but lawful, can only be decided on a case-by-case basis, having regard to the applicable legal rules and taking account of the development of the law.[30] These practical difficulties notwithstanding, the distinction is crucial as a matter of law. By definition, responses can only qualify as retorsions if they remain intrinsically lawful. If it passes that test, it does not require

[27] See Crawford, Fourth Report, para. 35; ILC, commentary to article 42 ASR, para. 2.

[28] On retorsions see Partsch (2000b), 232; Tomuschat (1973), 184–185; Alland (1994), 25; Elagab (1987), 4 and 29–30.

There is some disagreement over the precise definition of the notion of 'retorsion'. In the view of some authors, it denotes unfriendly (but lawful) responses against prior wrongful acts, while others extend it to cover unfriendly responses against prior unfriendly (but lawful) acts as well. Of these, the former, narrower, understanding seems preferable, as it maintains a minimum of coherence in what is already a very vague notion. For a discussion of the terminological issue see Dzida (1997), 49–50.

[29] For a different understanding of the term 'sanction' (comprising only centralised enforcement) see Abi-Saab (2001), 32; White/Abass (2003), 522. For a broader approach (as used here) see draft article 30 of the ILC's first reading text; Dupuy (1983), 505; and cf. Crawford (2001a), 57 for a discussion.

[30] For example, calls for compliance with human rights standards may have, at one time, been considered an unlawful intervention in another State's internal affairs, whereas today they would be considered permissible. See further below, Introduction to Chapter 6.

to be justified, but can be taken by all States. Whether protests or retorsions are lawful, therefore, does not depend on the specific (*erga omnes*) character of the prior breach against which they are directed.

The second aspect concerns the areas of law in which the *erga omnes* concept is being invoked. Even when leaving aside measures always available to all States, enforcement can take various forms. Apart from countermeasures and judicial proceedings, States can notably seek to enforce general interests by forcible means or by exercising national jurisdiction over a particular form of conduct or a particular group of persons. Unlike retorsions and protests, these two forms of responses are not always available, and States wishing to react against breaches are required to justify their respective conduct under the rules of jurisdiction and those governing the use of force. There have indeed been suggestions in the literature that the *erga omnes* concept should provide such justification. As regards jurisdiction, writers have drawn a parallel between the *erga omnes* concept and the rules governing extra-territorial jurisdiction.[31] Van Alebeek has even suggested a direct link between the two, arguing that 'the ... principle [of universal jurisdiction] should now be seen as having its theoretical basis in the concept of *erga omnes* obligations'.[32]

As regards forcible measures, there have equally been claims that obligations *erga omnes* should be enforceable by way of humanitarian intervention. In the view of Michael Reisman, 'military intervention ... [even qualified as] a primary means of enforcing some *erga omnes* norms concerned with human rights.'[33]

However, both statements are speculative and do not reflect the present state of international law. As regards the former, it cannot of course be excluded that the *erga omnes* concept should come to regulate questions of jurisdiction. Cases such as the *Fur Seals Arbitration* or the more recent *Tuna II* and *Shrimps/Turtle* disputes suggest that States indeed may seek to safeguard general interests by claiming a right to exercise extra-territorial jurisdiction.[34] At present, however, there is little indication that an alignment of the two concepts has taken or will take place. Historically, the law of jurisdiction has evolved as a distinct branch of international law and continues to be treated

[31] Jørgensen (2000), 222–223; Boed (2000), 299–302; Sands (2003), 184–191; Bianchi (1999), 271–274.
[32] van Alebeek (2000), 34. [33] Reisman (1993), 171.
[34] See Moore (1898), Vol. I, 755; 33 ILM (1994), 839; WT/DS58/AB/R respectively; and cf. Sands (2003), 184–191.

separately from the rules governing claims made on the international plane. In line with this development, the International Court, when recognising the legal interest of all States in seeing obligations *erga omnes* observed, discussed international claims, but did not make any statement, even inferentially, about the exercise of national jurisdiction.[35] As regards State practice, States asserting a right to exercise extra-territorial jurisdiction have not relied on the *erga omnes* concept, nor have national courts applying principles of universal jurisdiction.[36] The link between jurisdiction and obligations *erga omnes* thus seems more tenuous than van Alebeek's statement suggests.[37]

The same applies to measures involving the use of force. As will be shown below,[38] traditional instances of humanitarian intervention do form part of the historical context in which obligations *erga omnes* have to be seen. However, under modern international law, the legality of measures involving the use of force is first and foremost governed by the UN Charter.[39] Whether humanitarian intervention is permissible under present-day international law therefore is almost exclusively discussed with respect to article 2, para. 4 UNC, which – following the two most prominent arguments advanced by supporters – either does not prohibit the use of force for humanitarian purposes,[40] or recognises a non-written exception based on customary international law.[41] In contrast, debates following the recent military operations in Kosovo, Afghanistan and Iraq suggest that the *erga omnes* concept is of limited (or no) relevance to the dispute. States

[35] Higgins (1994), 57.

[36] If anything, national courts seem to have taken the view that all States could exercise universal jurisdiction over breaches of obligations arising from peremptory norms (*jus cogens*). See below, section 4.2.2.b for a discussion.

[37] Cf., however, below, section 4.1, for brief comment on article 218 LOSC, which recognises a right of port States to exercise jurisdiction over certain discharge offences in any part of the sea. Interestingly, this provision (unless other broad jurisdiction-conferring clauses) is frequently cited in support of the *erga omnes* concept.

[38] See below, section 2.2.2.d.

[39] For comprehensive discussions of the concept of humanitarian intervention see e.g. Gray (2000a), 26–42; Gray (2000b), 240; Chesterman (2001); Beyerlin (1995), 926; Lillich (1967), 325; Lillich (1974), 229; Teson (1997); Brownlie (1974), 217; Brownlie (1963), 338–342; Akehurst (1984), 95; Verwey (1986), 57.

[40] See e.g. Goodrich/Hambro (1946), 68–69; D'Amato (1987), 57–73; Teson (1997), 150–157; similarly the United Kingdom's argument in the *Corfu Channel case*, ICJ Pleadings, Vol. III, 296.

[41] See Lillich (1967), 325; Oppenheim/Lauterpacht, Vol. I (1955), 312–313 and 319–320; Fonteyne (1973), 203; and, more recently, Teson (1997), 177–179.