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HAGUE INTERNATIONAL TRIBUNALS

Barcelona Traction at 40: The ICJ as an Agent of Legal Development

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Abstract

The article revisits the *Barcelona Traction* judgment of the International Court of Justice, rendered forty years ago. It evaluates the lasting influence of the Court's pronouncements on the nationality of corporations and on obligations *erga omnes*, and uses the case to illustrate the Court's role as an influential agent of legal development. In this respect, it identifies a number of factors that can help to explain under which circumstances judicial pronouncements are likely to shape the law.

Keywords

community interest; development of international law; diplomatic protection; international community; International Court of Justice; lawmaking; nationality of corporations; obligations *erga omnes*

Forty years ago, on 5 February 1970, the International Court of Justice (ICJ, the Court) rendered its final judgment in the *Barcelona Traction* case between Belgium and Spain.¹ This brought to an end proceedings spanning 12 years,² during which the parties had produced approximately 60,000 pages of written documents.³ For a variety of reasons (and not just its length), this was a remarkable case: it was a case about 'big business' and hostile takeovers; one of the (not so many) ICJ decisions that was widely reported not only in specialist publications, but also in the press and in general law journals.⁴ Moreover, it was a case that ended in a notable anticlimax, when the Court surprisingly upheld one of Spain's preliminary objections and

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1 *Case Concerning the Barcelona Traction, Light and Power Co. Ltd (New Application: 1962) (Belgium v. Spain) (Second Phase)*, [1970] ICJ Rep. 3 (hereafter *Barcelona Traction*).

2 For a summary of the case history see *ibid.*, at 6, paras. 1–3; S. Wittich, 'Barcelona Traction Case', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), paras. 4–5.

3 See the estimates put forward by M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 10, at n. 44; and J. Sette-Camara, 'Behind the World Bench', in *International Law – Liber Amicorum Eduardo Jiménez de Aréchaga* (1994), 1069, at 1071.

4 See, e.g., D. Guggenheim, 'Le droit et le titre en matière d'actions et l'affaire de la Barcelona Traction', (1971) 67 *Schweizerische Juristen-Zeitung* 71; W. Wengler, 'Die Aktivlegitimation zum völkerrechtlichen Schutz von Vermögensanlagen juristischer Personen im Ausland', (1970) 34 *Neue Juristische Wochenschrift* 1473. See also J. Brook's long feature essay 'Annals of Finance: Privateer', an eminently readable account of the *Barcelona*

declared the case inadmissible; this rather clearly brought out the cumbersome nature of dispute settlement by the ICJ.

But, of course, *Barcelona Traction* is remarkable mainly because, in its judgment of 5 February 1970, the Court made two crucial pronouncements on the questions of law enforcement: by 15 votes to 1, it denied Belgium's right to bring proceedings on behalf of a company that was controlled by Belgian shareholders but incorporated under Canadian law, holding that for the purposes of diplomatic protection the Barcelona Traction company did not possess Belgian nationality. And as if that were not enough, it also noted (in passing, but by no means accidentally) that while nationality governed claims of diplomatic protection, it was irrelevant where states sought to enforce obligations owed to 'the international community as a whole' – which it called 'obligations *erga omnes*'.

These two pronouncements have caused much debate and confusion, and continue to be discussed in literature and jurisprudence. The subsequent sections add to the existing literature, but do so from a specific perspective. They look at the Court's two crucial holdings (on nationality of corporations and obligations *erga omnes*) from the perspective of judicial lawmaking, and in this respect put forward two related claims. First, we argue that, while from a dispute settlement perspective the Court's handling of the case was disappointing, the *Barcelona Traction* judgment illustrates the Court's influence on the development of international law. And, second, we submit that *Barcelona Traction* helps us to gain an understanding of the conditions under which international courts and tribunals can act as 'agents' of legal development. This requires some brief introductory comments on the notion of 'judge-made (international) law' (section 1). Section 2 then traces the Court's two main holdings and their continuing relevance. Finally, section 3 attempts to articulate some basic lessons that *Barcelona Traction* yields with respect to the Court's potential contribution to the development of international law.

1. THE ISSUE: COURTS AS AGENTS OF LEGAL DEVELOPMENT

1.1. Conflicting assumptions about 'judicial lawmaking'

Whether courts are supposed to make or develop the law, as opposed to merely applying it, is one of (international) law's perennial questions.⁵ Like many perennial questions, it eschews a simple answer. Debates typically proceed on the basis of two commonly shared assumptions.

Traction's history and a gripping account of the life of Juan March, the Spanish entrepreneur profiting from the hostile takeover (*New Yorker*, 21 May 1979, 42, and 28 May 1979, 42).

5 H. Lauterpacht, *The Development of International Law by the International Court* (1958), 21. Of course, one can always claim that each application of law, each judgment, is also 'either a step forward or a step backward in the development of the law', as does M. Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law', (1983) 10 *Syracuse Journal of International Law and Commerce* 239, at 241. How to determine whether the step is a big or a small one, and what counts as 'forward' and 'backward', remains a singularly difficult endeavour; see A. Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice – A Commentary* (2006), 677, at 789 (mn. 316 *in fine*).

The first assumption is that international courts have no express legislative mandate.⁶ This is frequently acknowledged,⁷ and it should not come as a surprise. Wary of activist judges, states have often attempted to circumscribe the judicial role rather narrowly by including safeguard clauses in the constitutional documents of international courts and tribunals.⁸ The Statute of the ICJ is no exception. Nothing in it empowers the Court to make or develop law.⁹ Its decisions are binding only between the parties and in respect of the particular dispute.¹⁰ They are not formal sources of law but, at best, ‘material’ ones – meaning that whatever ‘law’ can be found in them must be anchored in a formal source to be binding and applicable in the relationships between states other than the parties to the dispute.¹¹

The second common assumption is that even without a legislative mandate, the Court, through its decisions, can influence international law. In fact, it seems largely agreed that, in practice, its contribution to the formation and development of international law is immense.¹² Again, this is not surprising. The International Court of Justice is the principal judicial organ of the United Nations, and its decisions are bound to have significant repercussions beyond the strict confines of the question before it. The Court refers (almost exclusively) to itself and will only break from its line of jurisprudence in rather exceptional circumstances;¹³ states and their lawyers rely on ICJ case law in formulating claims, treating it as authoritative on the existing law;¹⁴ scholars seek to ground their arguments in ICJ decisions;¹⁵ the International Law Commission (ILC) draws on the Court’s jurisprudence when codifying international law.¹⁶ The UN General Assembly stated early on that the

6 The subsequent considerations focus on the Court’s contentious jurisdiction. Whether the Court has greater leeway to develop international law through its advisory function is a separate matter, addressed, e.g., by Lachs, *supra* note 5, at 246–62; and J. A. Frowein and K. Oellers-Frahm, ‘Article 65’, in Zimmermann et al., *supra* note 5, 1420 (mn. 316).

7 See, e.g., *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226 (hereafter *Nuclear Weapons*), at 237, para. 18; *Interpretation of Peace Treaties (Second Phase)*, [1950] ICJ Rep. 221, at 244 (Judge Read, Dissenting Opinion); C. G. Weeramantry, ‘The Function of the International Court of Justice in the Development of International Law’, (1997) 10 LJIL 309, at 311.

8 The most prominent example in point is Art. 3(2) of the WTO Dispute Settlement Understanding, pursuant to which ‘[r]ecommendations and rulings of the [WTO Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements’. Within the context of international criminal law, the reliance on ‘elements of crime’ (agreed between states, and intended to ‘assist the Court in the interpretation and application’ of the law (Art. 9)) presents a variant on the same theme.

9 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Merits), [1982] ICJ Rep. 143, at 152 (Judge Gros, Dissenting Opinion).

10 ICJ Statute, Art. 59.

11 *Ibid.* and Art. 38(1)(d). See also Lauterpacht, *supra* note 5, at 22.

12 A. Boyle and C. Chinkin, *The Making of International Law* (2007), 268; Lauterpacht, *supra* note 5, at 5; R. Bernhardt, ‘Article 59’, in Zimmermann et al., *supra* note 5, 1231 at 1244 (mn. 46–7); Pellet, *supra* note 5, at 790 (mn. 319).

13 Lauterpacht, *supra* note 5, at 9–20; M. Mendelson, ‘The International Court of Justice and the Sources of International Law’, in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (1996), 63, at 81; R. Bernhardt, ‘Article 59’, in Zimmermann et al., *supra* note 5, 1231, at 1244 (mn. 46).

14 Lauterpacht, *supra* note 5, at 14; Bernhardt, *supra* note 12, at 1244 (mn. 47).

15 Bernhardt, *supra* note 12, at 1244 (mn. 47).

16 Obvious examples include the question of reservations to treaties (see Vienna Convention on the Law of Treaties (VCLT), Arts. 19–20) or questions dealt with in Articles on the Responsibility of States for Internationally Wrongful Acts (2001) UN Doc. A/56/10 (ASR), such as that of attribution of conduct of individuals to states (Art. 8) and proportionality as a limit to countermeasures (Art. 51).

Court should be ‘utilized to the greatest practicable extent in the progressive development of international law’.¹⁷ Even the Court itself (always formally denying that it can act as a legislator¹⁸) has acknowledged that its decisions have implications for the relations between states other than the parties to a dispute before it,¹⁹ quite apart from a number of its judges having clearly taken a position in favour of the Court developing or making international law, whether in separate and dissenting opinions,²⁰ or writing in an extrajudicial capacity.²¹ As a result of these factors, there are areas of substantive international law which can hardly be understood without a knowledge of the Court’s case law: any student of international law seeking to assess the state of the law on questions such as the use of force, maritime delimitation, or the legal personality of international organizations will immediately be referred to the landmark ICJ decision on the matter, which is seen as an accurate expression of ‘the law’.

On the face of it, the two assumptions seem difficult to reconcile. One way of addressing the tension between them is to distinguish between the theory and reality of international lawmaking—hence some commentators suggest that while it should not do so, the Court in reality does ‘make’ or ‘develop’ the law.²² Yet that in itself is simplistic. A more appropriate way of explaining the role of the Court may be to view its pronouncements as contributions to the process of legal development and norm creation. As the above-mentioned examples illustrate, in a system relying on treaty-making and ‘amorphous processes of state practice and *opinio juris*’,²³ the potential contribution of judicial decisions is considerable:²⁴ through its jurisprudence, the ICJ can clarify the content of unwritten law, whether custom or general principle; it can advance a particular interpretation of a treaty; it can fill gaps in the law by relying on analogous reasoning; it can refine existing principles through their clarification or modification, or the carving out of exceptions; and so forth.²⁵ Yet even where it does so, the Court does not make or develop the law single-handedly; it operates within the broader context of legal development and in many respects is constrained

17 GA Res. 171 (II) of 1947. See also GA Res. 3232 (XXIX) of 1974.

18 *Nuclear Weapons*, *supra* note 7, at 237, para. 18.

19 *Aegean Sea Continental Shelf (Greece v. Turkey)* (Jurisdiction), [1978] ICJ Rep. 3, at 16–17, para. 39, with respect to the Court’s potential pronouncement as to the status of a multilateral treaty.

20 See, e.g., the dissenting opinion of Judge Álvarez in *Competence of the General Assembly* (Advisory Opinion), [1950] ICJ Rep. 4, at 13. See generally on Judge Álvarez’s position on the lawmaking power of the International Court K. Zobel, ‘Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a “New International Law” and Judicial Lawmaking’, (2006) 19 *LJIL* 1017–40.

21 See notably Weeramantry, *supra* note 7, at 321; and Lauterpacht, *supra* note 5, *passim*.

22 Weeramantry, *supra* note 7, at 311.

23 Boyle and Chinkin, *supra* note 12, at 268.

24 R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, vol. 1 (1992), 41; Boyle and Chinkin, *supra* note 12, at 268.

25 For details on the techniques used by international courts to influence the law see Lauterpacht, *supra* note 5, at 156–7; Ch. de Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett (1968), 393–403; and, in more detail, Weeramantry, *supra* note 7, at 313–20. According to the latter (at 320) the compounding of decisions applying general rules to specific facts unavoidably leads to further elaboration and development of the law, even if only on a ‘micro scale’. Cf. H. Kelsen, *Reine Rechtslehre* (1960), 242 ff., who speaks of the ‘constitutive character of judicial decisions’ in general.

by it. Two obvious ‘obstacles to the rapid judicial development of the law’²⁶ (which talk about ‘judge-made law’ risks overlooking) are of particular importance. First, as is the case with all courts, the ICJ’s role is reactive; it depends on cases instituted before it. Unlike domestic courts, however, international jurisdiction is consensual rather than compulsory. Since 1946, the Court has been seized of a timid average of 2.3 ICJ cases per year.²⁷ And while there are patterns of repeated involvement (notably maritime delimitation and, perhaps, the use of force), this has prevented the Court from developing the law in any systematic or comprehensive way.

Second, and more importantly, the Court’s influence on the process of legal development is interstitial. It no doubt has a chance to influence the law through its decisions, but its influence is limited in time.²⁸ Once it has rendered its decisions, the case – and with it the legal issues that it had raised – is out of the Court’s hands. Nothing prevents other actors from ignoring, overruling, or limiting the impact of the Court’s contribution.²⁹ ICJ decisions are not per se relevant contributions to the process of legal development, but only to the extent that they are acceptable to the international legal community. Outside the bounds of Article 59 of the Statute, their authority is persuasive only. And so they must ‘persuade’.

1.2. ‘Rules of thumb’ on the ICJ’s contribution to legal development

In the light of these considerations, it may be preferable to avoid terms such as ‘judicial lawmaking’ and instead speak of the Court’s role as an ‘agent’³⁰ or actor participating in the process of legal development. When seeking to assess the agent’s influence on the process, legal arguments about the normative value of ICJ decisions provide only the starting point for the enquiry. The real question, instead, is to assess to what extent a particular ICJ decision has in fact shaped the law in a given area. As far as specific holdings are concerned, this can of course be done retrospectively – by evaluating the impact of a given ICJ pronouncement on the subsequent development of the law. By contrast, it is much more difficult to assess in the abstract under which conditions ICJ pronouncements are likely to be influential. Despite the wealth of debate about the conceptual problems of ‘judge-made law’, this question is hardly

26 De Visscher, *supra* note 25, at 391. For considerations on the ‘limits of lawmaking’ see also D. Terris, C. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (2007), 127–30.

27 This is the most generous calculation, based on the number of cases inscribed on the Court’s General List (146 as at May 2010), including those quickly dropped. For full details see www.icj-cij.org/docket/index.php?p1=3&p2=2. It should be noted that even Charles de Visscher, who otherwise stressed the importance of judicial law-making, remarked that ‘[d]oubtless long years must still pass and many more judgments be rendered before the Court’s decisions can be synthesized in a systematic body of principles or rules’ (*supra* note 25, at 403). See further Boyle and Chinkin, *supra* note 12, at 269.

28 In Pellet’s terms, ‘the Court does not have the last word’ (*supra* note 5, at 790 (mn. 319)).

29 The reversal, in Art. 1 of the 1952 Brussels Collision Convention and Art. 11 of the 1958 High Seas Convention, of the *Lotus* ruling on the exercise of national criminal jurisdiction over persons responsible for collisions on the high seas may be the most prominent example in point. For brief comment see A. von Bogdandy and M. Rau, ‘Lotus, The’, in Wolfrum, *supra* note 2, at para. 20.

30 Cf. Lauterpacht, *supra* note 5, at 5: international tribunals as ‘agencies for the development of international law’.

addressed in any detail. If anything, commentators have typically advanced a number of rather simple ‘rules of thumb’.³¹

Two of these ‘rules of thumb’ seem to have gained particular currency.³² One refers to the reasoning supporting a particular pronouncement. Schwarzenberger, commenting on the likely impact of judicial decisions on the formation of international law, noted that much depended on ‘the fullness and cogency of the reasoning’ and that it ‘was not accidental that the least convincing statements on international law made by the International Court of Justice excel by a remarkable economy of argument’.³³ Others rely on the common-law distinction between *ratio* and *obiter*,³⁴ with Amerasinghe suggesting that ‘[m]ore authority naturally attaches to the former than to the latter’.³⁵ Lastly, it is argued that the concerns raised by activist lawmaking had affected the attitude of the Court and its members. A recent study qualifies them as ‘reluctant lawmakers’, fully aware that they ought not to be perceived to make law.³⁶ In a similar vein, Judge Shahabuddeen (writing extrajudicially) concludes his detailed analysis by observing that the ICJ typically navigated ‘from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science’.³⁷

The picture emerging from these brief considerations is that while questions of judicial lawmaking may have been rather overworked conceptually, we are still a far cry from assessing with any certainty the circumstances under which a particular judicial pronouncement is likely to shape the law. The subsequent discussion will not solve this problem. Yet it will approach it inductively, by assessing the impact of the two key holdings of the *Barcelona Traction* case and by drawing a number of tentative lessons from that decision’s history.

2. THE LASTING IMPACT OF THE *BARCELONA TRACTION* PRONOUNCEMENTS

Given the conceptual problems of judicial lawmaking, and the mixed reaction to the Court’s decision, it seemed by no means clear that *Barcelona Traction* should shape international law. Yet, for better or worse, the judgment’s central holdings remain extremely influential.

31 But see the balanced considerations in Boyle and Chinkin, *supra* note 12, at 300–10.

32 In addition to the ‘rules of thumb’ addressed in the text, it is worth mentioning that some commentators (e.g. G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 1 (1957), 31) place emphasis on the margin by which a decision has been reached: hence a pronouncement that has gained the unanimous or near-unanimous support of the bench is said to be more influential than one that divided the Court.

33 Schwarzenberger, *supra* note 32, at 32. For similar points see, e.g., Terris et al., *supra* note 26, at 121; and Boyle and Chinkin, *supra* note 12, at 302.

34 See, e.g., R. Y. Jennings, ‘The Judiciary, National and International, and the Development of International Law’, (1996) 45 ICLQ 1, at 6 ff.; M. Shahabuddeen, *Precedent in the World Court* (1996), 152–64; L. Condorelli, ‘L’*autorité de la décision des juridictions internationales permanentes*’, in *La juridiction internationale permanente. Colloque de Lyon* (1987), 277, at 308.

35 C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), 33.

36 Terris et al., *supra* note 26, at 129. A similar point had already been made by Lauterpacht, *supra* note 5, at 77.

37 Shahabuddeen, *supra* note 34, at 233 (citing Lord Devlin, ‘The Study of the Law’, (1938) 54 LQR 186).

2.1. Diplomatic claims on behalf of corporations

1. As for diplomatic protection, it is submitted that the Court's approach to nationality continues to govern the law of diplomatic claims. To recall, the Court rejected Belgium's claim to exercise diplomatic protection on behalf of a company that was registered in Canada but was effectively controlled by Belgian shareholders. Its reasoning on this point was based on three key considerations.

(i) The Court emphasized the distinction between shareholders and company, which were 'separated . . . by numerous barriers', including the 'separation of property rights'.³⁸ This approach was indeed accepted in many domestic legal systems, but rather than saying that domestic law was merely a fact (as the Permanent Court of International Justice (PCIJ) had done³⁹), the Court, accepting a *renvoi*, held that international law would be 'called upon to recognize' the domestic distinction between corporation and shareholder, as 'international law had not established its own rules'.⁴⁰

(ii) Controlled by municipal law, international law had to respect the sharp distinction between shareholders and company. The obvious way to implement this was to make nationality dependent on the formal criterion of incorporation, provided at least that there was some real connection going beyond mere registration⁴¹ – one might call this the 'incorporation plus X' approach.

(iii) In contrast, the Court was adamant that shareholder rights could not be equated with rights of the company. While some states had previously acted on behalf of a company controlled by shareholders bearing their nationality, the Court (without really assessing it) considered this practice to be insufficient.⁴² In its view, the shareholders' state could therefore exercise diplomatic protection for the company only exceptionally:⁴³ (a) if special treaty rules so provided; (b) in special cases concerning the treatment of enemy property and nationalizations; (c) if the company had ceased to exist; and (d) perhaps if claims were raised *against* the state of incorporation ('protection by substitution'). But no special treaty applied, nor did any of the exceptions. What is more, the Court saw no need to assess in any detail whether Spain had violated direct rights of the shareholders (which Belgium could, of course, have espoused by way of diplomatic protection).⁴⁴

2. The Court's holding on nationality disappointed many commentators.⁴⁵ With respect to the Court's reasoning, criticism indeed seemed justified. In particular, the Court's 'domestic analogy' rested on rather shaky foundations,⁴⁶ and one could have

38 *Barcelona Traction*, *supra* note 1, at 34, para. 41.

39 See *Certain German Interests in Polish Upper Silesia* [1926] PCIJ Ser A No 7 at 19: 'from the standpoint of International Law . . . municipal laws are merely facts . . . which constitute the activities of States, in the same manner as do legal decisions or administrative measures'.

40 *Barcelona Traction*, *supra* note 1, at 33–4, para. 38.

41 *Ibid.*, at 42, para. 71.

42 *Ibid.*, at 40 and 46–47, paras. 62 and 89, for the Court's very brief remarks.

43 *Ibid.*, especially at 39 ff. and 41 ff., paras. 59 ff. and 69 ff.

44 *Ibid.*, at 37, para. 49.

45 For a near-exhaustive discussion of the academic debate see S. Beyer, *Der diplomatische Schutz der Aktionäre im Völkerrecht* (1977), 48 ff.

46 A point stressed by Ch. de Visscher, 'La notion de référence (renvoi) au droit interne dans la protection diplomatique des actionnaires', (1971) 7 *Revue belge de droit international* 1; and L. C. Caflisch, 'The Protection of

expected a more detailed analysis of actual instances of diplomatic protection on behalf of shareholders.⁴⁷ As for the outcome, there was widespread concern that by stressing the separation between company and shareholders, the Court had adopted a formal or 'rigid' approach, ignored the realities of international business, and divorced law from real life.⁴⁸

Looked at from a distance, this last criticism seems exaggerated. As the brief summary shows, the Court's approach was by no means as 'formal' as is sometimes suggested. The Barcelona Traction company was not an 'empty shell', and the Court emphasized its ' manifold links ' with Canada.⁴⁹ One might even say that while the Court refused to make the nationality of corporations dependent on a genuine link requirement (as developed in its *Nottebohm* judgment⁵⁰), its 'incorporation plus X' test came rather close to it: in both instances, international legal rules on nationality rely on domestic legal acts but complement this formal approach by adding a substantive criterion to prevent abuse. Perhaps more importantly, the Court's allegedly formalistic approach to nationality had obvious advantages. It relied on a rather simple test and – unlike competing approaches emphasizing more tangible ties such as control of business or the 'social seat' of a company – produced clear and predictable results. It thus avoided problems of multiple claims brought by different states, which, as the Court stated, would have created 'an atmosphere of confusion and insecurity in international economic relations'.⁵¹ And it was flexible in that the Court admitted the possibility of special rules deviating from the general approach.

3. These factors may help to explain the continuing relevance of the Court's holding on nationality. To be sure, in many respects international law has moved on. Since 1970, states have agreed on a wide range of treaty rules laying down special requirements for claims relating to the treatment of foreign corporations. Very often, these do not follow the Court's *Barcelona Traction* approach of requiring 'incorporation plus X'. Some define nationality on the basis of some form of control;⁵² others are more formal than the ICJ had been, in that they consider incorporation as such to

Corporate Investments Abroad in the Light of the *Barcelona Traction* Case', (1971) 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 162, at 172.

47 See, e.g., R. B. Lillich, 'The Rigidity of *Barcelona*', (1971) 65 *AJIL* 522, esp. at 525; R. Higgins, 'Aspects of the Case Concerning the *Barcelona Traction* Light and Power Company, Ltd.', (1971) 11 *Virginia Journal of International Law* 327, at 331.

48 See notably F. A. Mann, 'The Protection of Shareholders' Interests in the Light of the *Barcelona Traction* Case', (1973) 67 *AJIL* 259.

49 Wittich, *supra* note 2, at para. 19. See also para. 3 of the ILC's commentary to Art. 9 of its Draft Articles on Diplomatic Protection adopted in 2006 (in UN Doc. A/61/10), where it is observed that '[t]he Court in *Barcelona Traction* was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection.'

50 See *Nottebohm (Liechtenstein v. Guatemala) (Second Phase)*, [1955] ICJ Rep. 4, at 23.

51 *Barcelona Traction*, *supra* note 1, at 37, para. 49.

52 In this respect see, e.g., the Claims Settlement Declaration establishing the Iran–US Claims Tribunal, (1981) 20 *ILM* 230, Art. VII(1), pursuant to which claims of legal persons are permitted only 'if collectively, natural persons who are citizens of such country [i.e. Iran or the United States] hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock'.

be sufficient.⁵³ Perhaps more importantly, a huge number of bilateral investment treaties (BITs) establish special mechanisms for investment protection and blur the line between shareholders and company which the Court had emphasized.⁵⁴ More often than not, these BITs expressly state that shareholdings should be treated as investments for the purposes of mixed arbitration – and, surprisingly, these jurisdictional provisions have been used to assimilate substantive shareholder rights with rights of the company.⁵⁵ Finally, investment treaties now frequently permit claims in defence of indirect investments, which allows claimants to circumvent the strictures of nationality rules. In short, it can hardly be questioned that many disputes that would have given rise to diplomatic claims on behalf of corporations at the time of *Barcelona Traction* are today addressed within special legal frameworks, notably by way of investment arbitration. In its recent *Diallo* judgment, the ICJ noted that ‘in contemporary international law, the protection of the rights of companies and the rights of shareholders is essentially governed by bilateral or multilateral agreements for the protection of foreign investments’.⁵⁶ Yet, as that case shows, diplomatic claims on behalf of corporations remain a possibility.

Where such claims are brought by means of diplomatic protection, the more convincing approach is, indeed, that the ‘incorporation plus X’ test laid down in *Barcelona Traction* continues to govern. There have, of course, been attempts to discard it altogether. According to Orrego Vicuña, for example, ‘the aggregate of the practice [as summarized in the last section] demonstrates forcefully that the criteria of the *Barcelona Traction* case no longer prevail and that shareholders should be entitled to protection’.⁵⁷ Yet that view is attractive only at first sight. It ignores the distinction between the general rule and special provisions: if the latter were concluded to disapply the former, then they implicitly affirm the general rule, even if simply as the default rule. The whole point of the maxim *lex specialis derogat legi generali* is to maintain the relevance of the general rule, giving *occasional* priority to any potential special rule providing differently.⁵⁸ With respect to using investment treaties as evidence there is a further problem, not always acknowledged by those criticizing *Barcelona Traction*. As observed by Kate Parlett, investment arbitration is not ‘a morphed form of delegated diplomatic protection’;⁵⁹ rather, Article 27 of the

53 See the practice discussed in L. J. Lee, ‘*Barcelona Traction* in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later’, (2006) 42 *Stanford Journal of International Law* 237, at 252–3 and Appendix 1.

54 For comment on this point see notably I. A. Laird, ‘A Community of Destiny: The *Barcelona Traction* Case and the Development of Shareholder Rights to Bring Investment Claims’, in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), 77; C. Schreuer, ‘Shareholder Protection in International Investment Law’, in P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung – Common Values in International Law: Festschrift für Christian Tomuschat* (2006), 601; M. Paparinskis, ‘Barcelona Traction: A Friend of Investment Protection Law’, (2008) 8 *Baltic Yearbook of International Law* 105.

55 For pertinent criticism see Z. Douglas, *The International Law of Investment Claims* (2009), 398 ff.

56 *Ahmadou Sadio Diallo (Republic of Guinea v. DRC)* (Preliminary Objections), [2007] ICJ Rep., at para. 88.

57 F. Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society – Constitutionalization, Accessibility, Privatization* (2004), 42.

58 See, e.g., para. 3 of the ILC’s commentary to Art. 55 ASR (in UN Doc. A/56/10).

59 K. Parlett, ‘Role of Diplomatic Protection in the Protection of Foreign Investments’, (2007) 66 *Cambridge Law Journal* 533, at 535. For more on this point see S. J. Knight and A. J. O’Brien, ‘*Ahmadou Sadio Diallo (Republic*

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) suggests that it is an *alternative* to diplomatic protection rather than a redefinition of its conditions.

Given these conceptual problems, reports about the death, or ‘bypassing’,⁶⁰ of *Barcelona Traction* seem greatly exaggerated. The allegedly technical holding remains, rather, in good shape. In fact, whenever the international community, since 1970, has had to address general rules on diplomatic protection of corporations, it has relied on the much-criticized *Barcelona Traction* holding. In the *ELSI* case, a chamber of the Court affirmed the central message of *Barcelona Traction*, even though it accepted, exceptionally, a claim of ‘protection by substitution’ on the basis of a special bilateral treaty regime.⁶¹ In his report on diplomatic protection of corporations, the ILC’s Special Rapporteur John Dugard observed that *Barcelona Traction* ‘dominate[d] all discussion of this topic’.⁶² On the basis of his work the ILC discussed at length whether to replace the ‘incorporation plus X’ test by any of the competing theories (*siège social*, centre of business, and so forth), but decided against it. In essence, draft articles 9–12 affirm the central features of the Court’s *Barcelona Traction* ruling – hence the ILC echoes the warning against multiple actions,⁶³ and affirms that ‘[t]he most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the state of nationality of the corporation and *not* by the state or states of nationality of the shareholders’.⁶⁴ While the 2006 Draft Articles on Diplomatic Protection attempt to specify the required tangible ties between a company and its state of incorporation,⁶⁵ the ILC’s work on balance probably is best seen as an attempt – perhaps akin to that of a glossator explaining the meaning of a provision of Justinian’s *codex* – to concretize the message of *Barcelona Traction*, not to move away from it. And to the extent that the ILC might have been perceived as moving away, the ICJ’s recent judgment in the *Diallo* case clearly reaffirms *Barcelona Traction*’s key holdings:⁶⁶ while recognizing the increasing importance of special legal frameworks, the Court continues to emphasize the distinction between a company and its shareholders, stresses the importance of incorporation to determine the nationality of the former, and seems to take a more

of *Guinea v. Democratic Republic of the Congo*: Clarifying the Scope of Diplomatic Protection of Corporate and Shareholder Rights’, (2008) 9 *Melbourne Journal of International Law* 151, at s.IV.D.; and cf. M Pappasinskas, ‘Investment Arbitration and the Law of Countermeasures’, (2008) 79 *British Year Book of International Law* 264, at 281–97.

60 Orrego Vicuña, *supra* note 57, at 40.

61 *Elettronica Sicula S.p.A. (ELSI)*, [1989] ICJ Rep. 15, especially at 79–80, para. 132. For comment see A. V. Lowe, ‘Shareholders’ Rights to Control and Manage: From *Barcelona Traction* to *ELSI*’, in N. Ando et al. (eds.), *Liber amicorum Judge Shigeru Oda*, vol. 1 (2002), 269; F. A. Mann, ‘Foreign Investment in the International Court of Justice: The *ELSI* Case’, (1992) 86 *AJIL* 92. In the *Diallo* case (on which more below), the Court itself has stated that the *ELSI* ruling should be read as a special rule based on the applicable friendship, commerce, and navigation (FCN) treaty.

62 Fourth Report on Diplomatic Protection, UN Doc. A/CN.4/530, at para. 3.

63 Para. 6 of the commentary to draft art. 9 (in UN Doc. A/61/10).

64 Para. 1 of the commentary to draft art. 11 (in UN Doc. A/61/10) (emphasis in original).

65 See notably draft art. 9, which provides that if ‘a company had no substantial business activities in the State of incorporation, and if the seat of management and the financial control of a State are both located in another State’, that other state should be entitled to exercise diplomatic protection.

66 *Diallo*, *supra* note 56, at paras. 60–67, particularly 61 and 64. Significantly, both parties relied heavily on *Barcelona Traction* in their arguments: see the Court’s summary in paras. 51 ff. of the judgment.

cautious approach than the ILC (or indeed the Court itself, in *ELSI*) to the problem of ‘protection by substitution’.⁶⁷

To sum up, since 1970, special rules on nationality and special legal frameworks for the vindication of investor rights have multiplied. Yet while the exceptions have become more numerous, they remain what they were in 1970: exceptions to a general rule based on the ‘incorporation plus X’ test. Despite the amount of criticism, that general rule remains largely unchanged. And so the law of diplomatic protection remains premised on the *Barcelona Traction* approach – developments since 1970 may be more than a footnote, but little more than a coda, to it.

2.2. Obligations *erga omnes*

1. The Court’s second important holding – on obligations *erga omnes* – has prompted debates of a different character. On the face of it, it has been less controversial. Only few commentators have openly criticized it, while many hail it as an inspiring dictum. The question is not whether the Court was right to ‘invent’ the notion of obligations *erga omnes* as an enforcement concept. Instead, debate centres on two other issues: what did the Court mean by it? and does it matter?

The Court itself is responsible for much of the confusion surrounding the *erga omnes* concept, as it introduced it in a rather mysterious way. The relevant passage appears, without much advance warning, in paragraphs 33–34 of the *Barcelona Traction* case, which state that

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* . . . 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.⁶⁸

This pronouncement continues to fascinate and puzzle commentators (including at times the Court and its members).⁶⁹ It is phrased in a rather complicated way, not least because it relies on a curious Latin concept (obligations *erga omnes*) that had been used previously to describe third-party effects of treaties or judgments,⁷⁰ but

67 Ibid., at paras. 86 ff. (discussing draft art. 11(b) of the ILC’s work on diplomatic protection). For brief comment see Knight and O’Brien, *supra* note 59, at s.IV.D.

68 *Barcelona Traction*, *supra* note 1, at 32, paras. 33–34.

69 A detailed treatment can be found, for example, in the following works: A. de Hoogh, *Obligations Erga Omnes and International Crimes* (1996); C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005, 2010); S. Villalpando, *L’émérgence de la communauté internationale dans la responsabilité des Etats* (2005); L.-A. Sicilianos, *Les réactions décentralisées à l’illicéité : des contre-mesures à la légitime défense* (1990); P. Picone, *Comunità internazionale e obblighi ‘erga omnes’* (2006); as well as in the contributions to C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order – Jus Cogens and Obligations Erga Omnes* (2006). The clearest summary is J. A. Frowein, ‘Obligations *Erga Omnes*’, in Wolfrum, *supra* note 2. Ragazzi’s monograph, *supra* note 3, contains much information on specific examples of obligations *erga omnes*, but curiously neglects the concept’s enforcement aspect.

70 See, e.g., A. D. McNair, ‘Treaties producing effects “*erga omnes*”’, in *Scritti di diritto internazionale in Onore di Tomaso Perassi*, vol. 2 (1957), 21; and see Tams, *supra* note 69, at 103–6, for comment and further references.

was now applied to the field of law enforcement. Yet, on consideration, matters are not that complicated. The essence of the *erga omnes* concept can be described in four simple steps.

(i) International law draws a distinction between the general rules governing the treatment of aliens, and a special set of rules protecting fundamental values.

(ii) To this special set of rules protecting fundamental values applies a special regime of standing. The right to raise claims in response to violations is not restricted to the state of nationality (as it is under diplomatic protection).

(iii) Instead, certain fundamental values, being the concern of the international community as a whole, can be protected by each and every state.

(iv) Finally, these rights of protection do not have to be conferred expressly by treaty, but can (also) exist without a special written ‘empowerment’ – and would then flow from general international law.

Looked at in this rather sober way, one might say that obligations *erga omnes* are not that mysterious after all. The idea behind the concept is certainly known to many domestic legal systems, which accept that ‘technical rules of *locus standi*’ may need to be modified where important interests are at stake, so as to permit the effective protection of community interests.⁷¹ That said, to have embraced the concept of obligations *erga omnes* certainly was a giant leap for the ICJ. After all, only four years earlier, in 1966, the same Court had relied on ‘technical rules of *locus standi*’⁷² to dismiss an extremely high-profile ‘public interest claim’ brought by Ethiopia and Liberia against South Africa.⁷³ As is well known, *South West Africa* was a disaster for the Court – from a legal but also ‘from a public relations point of view’⁷⁴ – and it required the Court to mitigate damage, which it did in two ways: by recognizing the UN’s termination of the South African mandate,⁷⁵ and by launching the *erga omnes* concept. In so doing, it accepted that for a narrowly defined circle of community obligations, international law should be prepared to accept law enforcement by many states, even if this might create ‘an atmosphere of confusion and insecurity in international [economic] relations’.⁷⁶

2. What, then, have been the effects of this ‘other’ *Barcelona Traction* dictum? In practice, one popular answer is (or at least was) that they are next to nothing. Hugh Thirlway, in his otherwise excellent review of ICJ jurisprudence in the *British Year Book*, suggests that obligations *erga omnes* are a ‘purely theoretical category’ and the passage ‘little more than an empty gesture’.⁷⁷ Putting it rather more bluntly, Alfred Rubin labelled obligations *erga omnes* the product of ‘the wishful thinking of some

71 See the House of Lords’ landmark decision in the ‘Fleet Street Casuals’ case: *R. v. Inland Revenue Commissioners ex parte Federation of Self-Employed and Small Businesses Ltd*, [1982] AC 617, at 644.E (Lord Diplock).

72 *Ibid.*

73 *South West Africa (Liberia v. South Africa) (Ethiopia v. South Africa) (Second Phase) (Merits)*, [1966] ICJ Rep. 6.

74 J. Crawford, ‘Preface’, in Tams, *supra* note 69, at xiii. For a comprehensive assessment of the case and its aftermath see J. Dugard, *The South West Africa/Namibia Dispute – Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973).

75 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), [1971] ICJ Rep. 16.

76 *Barcelona Traction*, *supra* note 1, at 49, para. 96.

77 H. Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989’, (1989) 60 *British Year Book of International Law* 1, at 100.

publicists who have no money to spend, no troops to send, no children likely to die in a military action'.⁷⁸ These may seem extreme statements, yet they draw support from the fact that, forty years after *Barcelona Traction*, the Court still has to hear its first full-blown '*erga omnes* case'. There have, of course, been instances of public interest litigation before the Court, including the *Nuclear Tests* cases brought by Australia and New Zealand,⁷⁹ Portugal's *East Timor* case,⁸⁰ or the pending proceedings between Belgium and Senegal,⁸¹ yet, typically, applicant states in these cases have sought to emphasize their special interest in the subject matter before the Court.⁸²

Still, the cautious reading of Thirlway, Rubin, and others seems to lose ground. On consideration, the much more convincing view is that – despite the absence of proper ICJ cases – the *erga omnes* concept has been a remarkable success. There are two main arguments to support this claim. First, the cautious reading may be based on an unrealistic view of the ICJ. While recent decades have witnessed an increase in the number of cases, states very rarely institute ICJ proceedings; thus one should not make too much of the absence of *erga omnes* cases.

Second, and more importantly, even without proper ICJ cases, the *erga omnes* concept has left its mark on international law. It has 'developed apace'⁸³ and 'spilled over' into other areas of law, notably the law of state responsibility. The ILC's 2001 Articles (not binding in law, but formulated in close co-operation with governments) in particular take up the idea of 'law enforcement in the public interest'. Drawing on *Barcelona Traction*, Article 48 of the ILC's text recognizes the right of each state to invoke another state's responsibility if 'the obligation breached is owed to the international community as a whole' (i.e. an obligation *erga omnes*).⁸⁴ While Article 48 merely spells out the meaning of the *Barcelona Traction* dictum, that dictum has also been applied to justify other forms of law enforcement. Much of the debate has centred on the countermeasures – that is, coercive measures taken in response to serious and well-attested violations of obligations *erga omnes*.⁸⁵ Whether such a right exists remains a matter for debate. The ILC seemed unable to expressly recognize it, and in its Article 54 left the matter open.⁸⁶ However, practice suggests a more liberal approach. On frequent occasions, states have asserted a right to suspend treaties, freeze foreign assets, or impose embargoes in response to *erga omnes* breaches, against other states such as Zimbabwe, Belarus, Yugoslavia, South Africa,

78 A. Rubin, 'Comment', in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993), 171, at 172.

79 [1974] ICJ Rep. 253 and 457.

80 [1995] ICJ Rep. 90.

81 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Provisional Measures), Order of 28 May 2009, available at www.icj-cij.org.

82 For details see Tams, *supra* note 69, 167 at fn. 42.

83 *East Timor*, *supra* note 80, at 215 (Judge Weeramantry, Dissenting Opinion).

84 ASR, *supra* note 16, Art. 48.

85 For a detailed analysis see M. Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council', (2006) 77 *British Year Book of International Law* 333; and Tams, *supra* note 69, at 198–251.

86 For comment on the terminological problems raised by Art. 54 see L. A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', (2002) 13 *EJIL* 1127, at 1139–44.

and so forth.⁸⁷ Given this rather widespread practice, much suggests that the ‘*erga omnes* rationale’ has modified the rules governing countermeasures.⁸⁸

There may also be other spillover effects, outside the field of responsibility.⁸⁹ Some argue that the *erga omnes* concept should govern questions of jurisdiction;⁹⁰ others proclaim *erga omnes* effects on concepts such as waiver or estoppel;⁹¹ and the ICJ in the *Wall* opinion seemed to imply that states were under a duty not to recognize effects of *erga omnes* breaches.⁹² Finally, treaties with express law enforcement clauses are now called ‘*erga omnes partes*’ treaties, as if only the ‘*erga omnes*’ label could justify a broad approach to standing.

Some of these ‘other’ alleged *erga omnes* effects may admittedly be questionable. To take but one example, the frequent references to obligations *erga omnes partes* seem to ignore the fact that the *erga omnes* concept is intended to close an enforcement gap, and thus is hardly necessary where a treaty expressly provides for standing in the public interest. Yet the brief survey shows that the *erga omnes* concept, far from being a purely theoretical category, clearly has a place in contemporary international practice and jurisprudence. In fact, the real problem today seems to be one of over-use: there is a tendency, among ‘publicists . . . without money to spend’,⁹³ but also among members of the International Court, to use the *erga omnes* concept as a legal vade mecum that can conveniently be used to explain all sorts of legal effects. In the long run, this inflationary reliance may be the real challenge for the *erga omnes* concept.⁹⁴ Yet it clearly shows that the Court’s ‘PR exercise’ has successfully placed a concept on the legal agenda, and that this concept has developed (if the term may be permitted in this context) a considerable amount of ‘traction’.

87 The various instances are assessed in the works mentioned *supra*, note 85.

88 Tams, *supra* note 69, at 249–51; J.A. Frowein, ‘Reactions by not Directly Affected States to Breaches of Public International Law’, (1994) 248 RCADI 345, at 417 ff.

89 The most radical extension of the *erga omnes* concept can be found in Judge Cançado Trindade’s separate opinion appended to the Court’s interim order in the *Belgium v. Senegal* case (*supra* note 81, at paras. 68–73). In the judge’s view, the *erga omnes* concept, ‘heralding the advent of the international legal order of our times, committed to the prevalence of superior common values’ (para. 71), required a wide-ranging reinterpretation of traditional international law; notably it implied the granting of interim protection under more lenient conditions, and the horizontal application of human rights law. For brief comment see Tams, *supra* note 69, 312 ff. (new epilogue to the paperback edition).

90 See, e.g., R. van Alebeek, ‘The Pinochet Case: International Human Rights Law on Trial’, (2000) 71 *British Year Book of International Law* 29, at 34.

91 See, e.g., *Gabcikovo Nagymaros*, [1997] ICJ Rep. 7, at 117–18 (Judge Weeramantry, Dissenting Opinion); R. Lefeber, ‘Editorial: Cum Grano Salis’, (1998) 11 LJIL 1, at 6–7; C. J. Tams, ‘Waiver, Acquiescence and Extinctive Prescription’, in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (2010), para. 14.

92 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep. 136, at 200, para. 159. This may have been better explained as a consequence of the serious breach of an obligation imposed by a peremptory norm in the sense of ASR, Art. 41. For comment see S. Talmon, ‘The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?’, in Tomuschat and Thouvenin, *supra* note 69, at 99–125.

93 Rubin, *supra* note 78.

94 See Judge Higgins’s pertinent observation in her separate opinion in the *Wall* opinion (*supra* note 90, at 216, para. 37 (Judge Higgins, Separate Opinion): ‘The Court’s celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase* (Judgment, I.C.J. Reports 1970, p. 32, para. 33) is frequently invoked for more than it can bear.’

3. THE LESSONS OF *BARCELONA TRACTION*

The preceding assessment suggests that while – as a dispute settlement body – the Court in *Barcelona Traction* performed rather disappointingly, the judgment's pronouncements have exercised considerable influence on the development of international law in two important areas. The question remains whether *Barcelona Traction* yields lessons of a more general nature about the Court's potential role as an agent of legal development. When addressing that question in the following, we are mindful of the fact that *Barcelona Traction* is just one case, and that we have looked at only two particular processes of legal development. Still, we would submit that the experience of the Court's two pronouncements invites a number of observations. Given the uncertainties surrounding the ICJ's role as an agent of legal development, these may be usefully spelled out even where they seem to appear straightforward or obvious. More specifically, we would submit that *Barcelona Traction* yields five lessons.

3.1. Courts can be both reluctant and enthusiastic lawmakers

The first lesson relates to the attitude of the Court when engaging in legal development. *Barcelona Traction* provides evidence of two different attitudes: in line with what is perceived to be its general approach, the Court was a 'reluctant'⁹⁵ agent of legal development, but it also – contrary to the common perception – interpreted its role much more enthusiastically.

With respect to the question of diplomatic claims, the Court, in *Barcelona Traction*, could hardly avoid shaping the law. No generally agreed test governing the nationality of corporations had been accepted, nor had the matter been addressed by any major treaty;⁹⁶ so the Court's pronouncement was very likely to be applied outside the specific case before it. That the Court was reluctant and circumscribed in its approach to the question it had to answer is evident, hence its choice of a simple and straightforward general rule not requiring much in the way of proof (incorporation) over other possibilities (*siège social*, the strongest link) which would have been less predictable.

By contrast, in its pronouncement on *erga omnes* obligations the Court was not reluctant or circumscribed at all. Taking up Lord Devlin's above-quoted remark, one might say that, rather than 'hugging the coast point by point', the Court boldly set sail for 'the open sea'.⁹⁷ What is more, it did so of its own accord, as no gap was waiting to be filled, no outstanding issue had to be decided lest there be a *non liquet*. The Court could perfectly well have spared the world paragraphs 33 and 34, and no one would have realized – because no one expected them to be there in the first place. In fact, it may well be that, precisely because no specific outcome was at stake, the Court considered itself free to engage in its exercise of 'enthusiastic' legal development. The experience of *Barcelona Traction* certainly suggests that where the

⁹⁵ Terris et al., *supra* note 26, 129.

⁹⁶ The Court determined the existence of a gap quite clearly when it stated that 'international law had not established its own rules' on the matter under consideration: see *supra* note 40.

⁹⁷ *Supra* note 37.

Court – exceptionally, no doubt – decides to ‘leave the coast’,⁹⁸ it may also leave behind it its usual concerns for straightforward rules ensuring legal certainty. Yet, more fundamentally, *Barcelona Traction* clearly shows that common assertions about the cautious nature of the Court need to be taken with a grain of salt. It is by no means always a ‘reluctant lawmaker’,⁹⁹ but, at least occasionally, goes out of its way enthusiastically to ‘strik[e] out a path towards new developments in the law’.¹⁰⁰

3.2. Popular rules of thumb are of limited usefulness

The second observation relates to the ‘rules of thumb’ put forward by commentators to assess the likely impact of judicial pronouncements on the development of international law. As noted above, two such rules of thumb are popular among writers: the preference for *ratio* over *obiter*, and the preference for well-reasoned judicial pronouncements.¹⁰¹ Curiously, neither of them is borne out by the *Barcelona Traction* case.¹⁰²

3.2.1. Poorly reasoned statements can influence the law

Intuitively, few would disagree with the latter ‘rule’ given here, yet the *Barcelona Traction* case provides little support for it. As noted above, the Court’s reasoning in the case is by no means above criticism. With respect to obligations *erga omnes*, the Court did not in fact offer any justification. It asserted a certain legal proposition, without even the slightest hint whence it had been ‘deduced’. With respect to the rule of nationality of corporations, the Court did offer some justification for its ‘incorporation plus X’ test, but its reasoning was at best brief and debatable. Yet poorly – if at all – reasoned as they may have been, both pronouncements have shaped the law. This should not be taken as an argument against reasoning in judicial decisions. Of course well-reasoned judgments are a ‘better’ form of administering justice than poorly reasoned ones. Yet the experience of *Barcelona Traction* suggests that one should not place too much emphasis on the (intuitively persuasive) rule of thumb put forward by commentators: the likely impact of a judicial pronouncement need not always depend on the ‘fullness or cogency of quality of the reasoning’.¹⁰³ Conversely, even where the Court pronouncements ‘excel by a remarkable economy of argument’,¹⁰⁴ they may very well shape the law.

3.2.2. The law can be shaped by obiter dicta

The second rule of thumb fares little better. In fact, the considerable impact of the Court’s pronouncement on obligations *erga omnes* suggests that the common distinction between *ratio decidendi* and *obiter dicta* is of limited relevance in international

98 Ibid.

99 Terris et al., *supra* note 26, 129.

100 De Visscher, *supra* note 25, 397.

101 *Supra*, section 1.2.

102 In contrast, the experience of the case confirms the third ‘rule of thumb’ – namely that unanimous or near-unanimous pronouncements by the Court would be more likely to influence the law. See *supra* note 32 for reference.

103 Schwarzenberger, *supra* note 33.

104 Ibid.

law. This is so because the *erga omnes* pronouncement was not even remotely relevant to the case before the Court; it was – to cite Lord Abinger’s remark – ‘not only an *obiter dictum*, but a very wide divaricating *dictum*’.¹⁰⁵ And yet it is one of the Court’s most quoted pronouncements of all time. So at least in one instance, ‘a gratuitous statement’¹⁰⁶ expressed in an ‘obiter reasoning’¹⁰⁷ did shape the law.

Of course, one could dismiss this particular observation if it were merely an exception that proved the rule.¹⁰⁸ But it is not. In a surprisingly large number of instances, international law has been shaped by *obiter dicta* – typically not as ‘obiter’ as the *erga omnes* dictum, but still irrelevant to the case at hand. By way of example, suffice it to mention the PCIJ’s *obiter dicta* asserting the primacy of restitution over compensation (*Chorzów Factory*),¹⁰⁹ and the possibility of creating rights of third parties without their consent (*Free Zones*).¹¹⁰ In fact, even one of the most prominent (if controversial) judicial statements of all time, the PCIJ’s *Lotus* presumption – that ‘[r]estrictions upon the independence of States cannot . . . be presumed’ – was pure *obiter*.¹¹¹

A detailed study on ‘obiter that shaped the law’ has yet to be written.¹¹² The present cursory remarks are no substitute for it. What they indicate is that the distinction between *ratio* and *obiter*, essential in legal systems relying on doctrines of precedent, should not be lightly transposed to the international sphere. International law knows of no system of precedent. What is more, the experience of *Barcelona Traction* – but also of *Free Zones*, *Chorzów Factory*, and *Lotus* – suggests that the seemingly categorical distinction between *ratio* and *obiter* is of little relevance when assessing the impact of a given judicial pronouncement.

3.3. Residual rules are more likely to make a lasting impact

In addition to questioning popular rules of thumb, *Barcelona Traction* offers some insights into when a judgment is likely to make an impact. In this vein, the third lesson to be drawn from a rereading of the case is that the Court’s pronouncements are more likely to influence the development of the law if they posit a general,

¹⁰⁵ *Sunbolt v. Alford*, (1838) 3 M. and W. 218, at 252.

¹⁰⁶ S. McCaffrey, ‘Lex Lata or the Continuum of State Responsibility’, in J. H. H. Weiler, A. Cassese, and M. Spinedi (eds.), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 of State Responsibility* (1989), 242, at 243.

¹⁰⁷ For further attempts to dismiss the *erga omnes* dictum as irrelevant because of its *obiter* status see F. A. Mann, ‘The Doctrine of *Jus Cogens* in International Law’, in Ehmke et al. (eds.), *Festschrift Scheuner* (1973), 399, at 418 (a dictum ‘that was unnecessary to the decision and which convey[s] the impression of having been studiously planted into the text or artificially dragged into the arena’); and similarly J. Charney, ‘Comment’, in Delbrück, *supra* note 78, 158 at 159.

¹⁰⁸ It seems to be treated as such by many commentators who are prepared to accept the relevance of the *erga omnes* dictum, but maintain the distinction between *ratio* and *obiter*; see, e.g., Shahabuddeen, *supra* note 34, at 159; O. Schachter, *International Law in Theory and Practice* (1991), 344 (‘Although this comment . . . was pure *obiter dictum*, it has been widely influential’).

¹⁰⁹ [1928] PCIJ, Ser. A, No. 17, at 47. In the circumstances of the case, Germany had only demanded compensation; see C. Gray, *Remedies in International Law* (1987), 96.

¹¹⁰ [1932] PCIJ, Ser. A/B, No. 46, at 147. This was to serve as the basis for VCLT, Art. 36; see the ILC’s commentary on draft article 32, (1966) 2 *Yearbook of the International Law Commission* 228, para. 4.

¹¹¹ [1927] PCIJ, Ser. A, No. 10, at 18. In fact, the *Lotus* presumption is often criticized as (among other things) having been unnecessary; see notably Lauterpacht, *supra* note 5, at 361.

¹¹² For a slightly fuller treatment see Tams, *supra* note 69, at 167–73.

residual rule that admits of exceptions. This is brought out very clearly by the remarkable 'success' of the Court's holding on nationality.

In the circumstances of the case, any attempt by the Court to formulate a general test governing the nationality of corporations – whether relying on incorporation, seat, strongest link, or any other potential criterion – would have acquired general relevance. The case squarely raised an issue of major practical and theoretical relevance and required the Court to address it on the basis of general international law. While the Court thus could hardly avoid making a pronouncement that would acquire general relevance, it 'secured' its approach by admitting the possibility of exceptions. It effectively articulated a general, default rule that allowed for further development through the carving out of exceptions, the refinement of the scope of application of the general rule, and so forth. In this respect, the *Barcelona Traction* case affirms Lauterpacht's observation (preceding the judgment) that

[judicial legislation] cannot attempt to lay down all the details of the application of the principle on which it is based. It lays down the broad principle and applies it to the case before it. Its elaboration must be left . . . to ordinary legislative processes or to future judicial decisions disposing of problems as they arise.¹¹³

Indeed, since 1970 both 'ordinary legislative processes' and 'future judicial decisions' have built on the Court's general rule of nationality in *Barcelona Traction*. What is more, states have progressively elaborated on the principle, even if that has been primarily through the making of special rules, with the concomitant reduction in the practical significance of the general rule. Still, as further demonstrated by the Court in its recent *Diallo* judgment, the *Barcelona Traction* general rule of nationality of corporations has retained its status as *the* fallback position.¹¹⁴

In fact, experience since 1970 suggests that while the broad and residual rule on nationality enunciated in *Barcelona Traction* may be easy to disapply in particular circumstances, it is almost impossible to reverse. The obvious way to reverse it would be through the conclusion of a general multilateral treaty – as had happened to the *Lotus* holding on jurisdiction.¹¹⁵ Yet the prospects of such an eventuality are rather slim when the issue is as politically sensitive and divisive as the diplomatic protection of corporations. By the same token, it is difficult to imagine that the Court's dictum should be reversed by a body of international practice consistent enough to give rise to the emergence of new rule of custom – especially if diverging approaches can be explained as *leges speciales*. In short, *Barcelona Traction* suggests that residual, default rules that admit of exceptions are rather likely to make a lasting impact on the law.

3.4. Judicial pronouncements will shape the law if they take up a societal demand

The preceding considerations highlight one particular feature of the Court's statement on nationality, but, in and of themselves, cannot explain the tremendous

¹¹³ Lauterpacht, *supra* note 5, at 189–90.

¹¹⁴ *Supra*, section 2.1.

¹¹⁵ *Supra* note 29.

influence that both *Barcelona Traction* pronouncements have exercised. So it may be asked whether, despite their diversity, these two pronouncements share a common trait that can explain their impact. It is submitted that, ultimately, both pronouncements were able to shape the law because they responded to a clear societal demand.

With respect to the nationality of corporations, the international society, in 1970, seemed to be in need of a general rule, which the Court provided. As noted above, no general test governing the nationality of corporations had been accepted, hence there was a gap in the law. Of course, not every gap in the law requires to be filled. Yet where the gap concerns an issue as important and politically sensitive as the diplomatic protection of corporations, there arguably is a societal demand for legal certainty. In *Barcelona Traction* the Court responded to that need by laying down a straightforward default rule that was relatively easy to apply, but admitted of exceptions. Its pronouncement clarified the state of the law in an important area and thereby enhanced legal certainty. Conversely, it prompted states that considered the default rule to be insufficient or unacceptable to 'contract out' of it by way of treaty. The *Barcelona Traction* case thus enunciated a general rule and indirectly encouraged states to formulate special rules for special circumstances. As a result of both factors, it succeeded in bringing at least a measure of legal certainty to a hitherto rather underregulated area of international law.

The Court's 'other' *Barcelona Traction* dictum, the pronouncement on obligations *erga omnes*, fulfilled a very different function, but it, too, responded to a societal demand. The Court's dictum launched a concept that accommodated a generally felt interest in some form of enforcement action in defence of community interests. After the 1966 *South West Africa* judgment, international law was in need of such a concept – one that sent a political signal, that reopened the door to the notion of community interest, and that was broad enough (and maybe mysterious enough) to be applied outside its initial field of application. The Court, having felt the repercussions of *South West Africa*, was keenly aware of this societal demand. By 'inventing' the *erga omnes* concept, it was able to translate it into a general legal concept that would provide a framework for debates about law enforcement in the public interest. It thereby not only responded to a societal demand, but also '[gave] general and articulate formulation to developments implicit, though as yet not clearly accepted, in actual international custom or agreement of States'.¹¹⁶

The experience with both pronouncements thus suggests that a judgment is most likely to shape the law if it responds to a societal demand or concern, and translates this demand into legal form. This may seem trite, but it arguably constitutes the most important 'lesson' that can be drawn from the *Barcelona Traction* case. Just as the law more generally, so a specific pronouncement by the Court, cannot 'be divorced from the general framework of normative argument in the society within which it operates'.¹¹⁷ As both of the Court's pronouncements in this case were in line with 'general framework[s] of normative argument[s]'¹¹⁸ within the international

¹¹⁶ Lauterpacht, *supra* note 5, at 173.

¹¹⁷ V. Lowe, *International Law* (2007), 99.

¹¹⁸ *Ibid.*

society, they were unlikely to be reversed through subsequent international law-making (whether treaty or custom). Instead, they shaped the process of legal development because states and other actors could be expected to ‘build practice around them’¹¹⁹ – by applying the principles articulated or even by contracting out of, and thus indirectly affirming, them.

4. CONCLUSION: THE ICJ AS A POWERFUL AGENT OF LEGAL DEVELOPMENT

To these, one has to add a fifth and concluding observation. Even though it does not make the law single-handedly, but merely participates in a broader process, the *Barcelona Traction* case underlines the Court’s potential as a powerful agent of legal development. The previous sections indicate that, when assessing the likely impact of judicial decisions, one should not overly rely on intuitively acceptable rules of thumb, but instead appreciate the Court’s interaction with the international legal community. It can only be repeated: given the formal and functional limits placed on the ICJ, its decisions only shape the law where they are taken up by other actors engaged in the process of legal development. Talk about ‘judicial lawmaking’ tends to obfuscate this obvious restriction on the Court’s role. Yet *Barcelona Traction* shows that even though it is restrained by formal and functional factors, the Court has an enormous potential to influence the process of legal development. In one judgment, and without particularly convincing reasoning, the Court managed to lay down a general rule on the nationality of corporations and articulate a novel concept capable of explaining, justifying, and guiding international enforcement action in defence of community interests. Either claim to fame would be sufficient to make *Barcelona Traction* an important decision. Two such achievements in one judgment make it a landmark.

¹¹⁹ Boyle and Chinkin, *supra* note 12, at 301.