

The Appearance of the Concept of Obligations *Erga Omnes* on the Agenda: The Dictum of the International Court in the *Barcelona Traction* Case

And they were all amazed,
so that they questioned among themselves, saying,
'What is this?
A new teaching! With authority . . .'

(Mark 1,27)

I. INTRODUCTION

The classic passage on obligations *erga omnes*¹ is contained in two paragraphs from the judgment in the *Barcelona Traction* case (Second Phase), which the International Court delivered on 5 February 1970. These paragraphs read in their entirety as follows:

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded 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*.

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

¹ The Latin expression '*erga omnes*' means 'towards all'. The term '*omnes*' can have either a collective or a distributive connotation. (See Glare (ed.), *Oxford Latin Dictionary* (Oxford, 1982), pp. 1248–9 ('omnis').) As applied to the concept of obligations *erga omnes*, this double connotation raises the issue whether the international community as such can be bound by obligations *erga omnes* and be the bearer of the corresponding rights of protection. This issue, however, does not belong to this study, but to one on international legal personality or on the enforcement of corresponding rights of protection of obligations *erga omnes*.

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.²

The authoritative text of the judgment in the *Barcelona Traction* case is in French.³ In this language, the passage on obligations *erga omnes* reads as follows:

33. Dès lors qu'un Etat admet sur son territoire des investissements étrangers ou des ressortissants étrangers, personnes physiques ou morales, il est tenu de leur accorder la protection de la loi et assume certaines obligations quant à leur traitement. Ces obligations ne sont toutefois ni absolues ni sans réserve. Une distinction essentielle doit en particulier être établie entre les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agit sont des obligations *erga omnes*.

34. Ces obligations découlent par exemple, dans le droit international contemporain, de la mise hors la loi des actes d'agression et du génocide mais aussi des principes et des règles concernant les droits fondamentaux de la personne humaine, y compris la protection contre la pratique de l'esclavage et la discrimination raciale. Certains droits de protection correspondants se sont intégrés au droit international général (*Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951*, p. 23); d'autres sont conférés par des instruments internationaux de caractère universel ou quasi universel.⁴

When examining a judgment rendered by the International Court, it is advisable to refer to both the English and the French texts, because (as the International Court itself has remarked) the two texts are 'mutually supportive', by reason of the very process of drafting.⁵ In any event, one should avoid

² *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33–4.

³ *Ibid.*, p. 51, para. 103. The parties before the International Court can agree to conduct a case in English or French. Without this agreement (which, so far, has only been concluded in the *Asylum* case), the parties may submit their pleadings in either English or French. The International Court then gives its decision in both languages and determines which text is authoritative. See Article 39 of the Statute of the International Court. (*Gen. Ass., Off. Recs., Second Session of the General Assembly, Resolutions, 16 September–29 November 1947*, pp. 105–10, reproduced in Brownlie (ed.), *Basic Documents in International Law*, 4th edn. (Oxford, 1995), pp. 438–55.) For comment, see Mani, *International Adjudication: Procedural Aspects* (The Hague, 1980) pp. 155–7; Tabory, *Multilingualism in International Law and Institutions* (Alphen aan den Rijn and Rockville, 1980), pp. 18–20.

⁴ *I.C.J. Reports 1970*, p. 32, paras. 33–4.

⁵ See the International Court's observations on this point, prompted by a report of the United Nations Joint Inspection Unit and reproduced in Rosenne, 'Publications of the International Court of Justice', 81 *A.J.I.L.* (1987), pp. 687–8.

drawing hasty conclusions from textual arguments based on the translation from the authoritative text.⁶ For example, it has been suggested in the literature that, by writing that a distinction 'should be drawn' between obligations *erga omnes* and other obligations, the International Court was using hypothetical language in the sense that obligations *erga omnes* would only be 'a concept *de lege ferenda*'.⁷ This interpretation of the International Court's passage, though, is untenable, both because the French original uses the indicative mood rather than the conditional ('[u]ne distinction essentielle doit . . . être établie')⁸ and because the use of the conditional in a particular line cannot be isolated from the rest of the passage, where (like the English version in the present instance) the indicative mood is used consistently.

A more appropriate starting point in the study of the International Court's passage on obligations *erga omnes* is the context in which the passage appeared. The *Barcelona Traction* case arose out of the adjudication in bankruptcy by a Spanish court of the Barcelona Traction Light and Power Company, Limited, a Canadian company.⁹ Belgium had initially instituted proceedings before the International Court in 1958, by which it sought reparation for the damage inflicted on the Barcelona Traction company as a result of acts allegedly committed by organs of the Spanish State in violation of international law. Three years later, Belgium requested that the proceedings be discontinued in order that the parties might settle their dispute out of court. Spain did not oppose this request, and the International Court removed the case from its list.¹⁰

⁶ According to Rosenne, 'experience has shown the need for care in using that version of a judgment or of an individual or dissenting opinion, which is not the authoritative text.' (*The Law and Practice of the International Court*, 2nd revised edn. (Dordrecht, 1985), p. 601, note 1.)

⁷ Willisch, *State Responsibility for Technological Damage in International Law* (Berlin, 1987), p. 40.

⁸ Nor does the presence of the modal auxiliary 'should' (in English) or 'doit' (in French) justify the inference drawn by Willisch. The best grammars confirm in theory and show by way of examples how the use of modal verbs is subject to variations and nuances of meaning. See Quirk, Greenbaum, Leech and Svartik, *A Comprehensive Grammar of the English Language* (London, 1985), paras. 4.49–4.50, and (for the auxiliaries 'ought to' and 'should') para. 4.56; Grevisse, *Le bon usage. Grammaire française*, 13th edn. Goosse (Paris, 1993), para. 789, and (for the auxiliary 'devoir') para. 791(c).

⁹ For a summary of the case, see Wallace, C. D., 'Barcelona Traction Case', Heidelberg *Encycl.*, ii, pp. 30–3; Eisemann, Coussirat-Coustère and Hur, *Petit manuel de la jurisprudence de la Cour internationale de justice*, 4th edn. (Paris, 1984), pp. 95–105. For a more extensive discussion, see Miaja de la Muela, *Aportacion de la Sentencia del Tribunal de la Haya en el caso Barcelona Traction (5 de febrero de 1970) a la jurisprudencia internacional* (Valladolid, 1970). See also Higgins, R. 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.', 11 *Virginia Journal of International Law* (1971), pp. 327–43; Seidl-Hohenveldern, 'Der Barcelona-Traction-Fall', 22 *Österreichische Zeitschrift für öffentliches Recht* (1971), pp. 255–310.

¹⁰ *Barcelona Traction, Light and Power Company, Limited*, Order of 10 April 1961, I.C.J. Reports 1961, p. 9.

After negotiations for a settlement broke down, Belgium filed a new application in 1962. Having the benefit of knowing the preliminary objections raised by Spain in response to the first application, Belgium modified its earlier submissions. It now sought reparation for damage suffered, not by the Barcelona Traction company, but by Belgian nationals who were allegedly the owners of a substantial number of shares of the company. Spain responded by filing four preliminary objections. The first and the second objections concerned the jurisdiction of the International Court, while the third and the fourth objections related to the admissibility of the Belgian application. By a judgment delivered in 1964, the International Court dismissed the preliminary objections to jurisdiction and joined the third and fourth objections to the merits.¹¹ In its judgment of 1970, at the end of the second phase of the *Barcelona Traction* case, the International Court upheld the third preliminary objection put forward by Spain, namely that Belgium did not have legal standing to bring the action. On this ground, the International Court rejected the Belgian claim¹² without pronouncing on any other aspects of the case.¹³

The judgment in the *Barcelona Traction* case has not been immune from criticism.¹⁴ On the specific passage relating to obligations *erga omnes*, some writers have raised doubts whether this reference to obligations *erga omnes*

¹¹ *Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 6. At the time of the proceedings, preliminary objections were governed by Article 62 of the Rules of Court. Article 62 was then renumbered as Article 67 after the 1972 amendments of the Rules, and again renumbered as Article 79 after the 1978 revision. (The Rules, as revised in 1978, are reproduced in 17 *I.L.M.* (1978), pp. 1286–304.) On the changes introduced by these revisions, see the considerations developed by Judge Shahabuddeen in his separate opinion in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 271–6. On preliminary objections, see Rosenne, *Law and Practice*, pp. 437–68. On the distinction between preliminary objections to jurisdiction and preliminary objections to admissibility, see Shihata, *The Power of the International Court to Determine its own Jurisdiction: Compétence de la Compétence* (The Hague, 1965), pp. 107–12; Oda, ‘The International Court of Justice Viewed from the Bench (1976–1993)’, 244 *Hague Recueil* (1993, VII), pp. 47–50.

¹² It was not merely a declaration of inadmissibility of the claim, but an outright rejection of it. In his separate opinion, Judge Morelli wrote as follows: ‘Belgium’s right is thereby denied, not because such a right might hypothetically belong to a State other than Belgium (in other words, not for lack of capacity on the part of Belgium), but rather because no such right can be invoked by any State, since no rule exists from which it could derive.’ (I.C.J. Reports 1970, p. 228.)

¹³ The fourth preliminary objection on the exhaustion of local remedies was addressed, though, in several separate opinions attached to the International Court’s judgment.

¹⁴ For example, Thirlway has written that this is a ‘generally disappointing decision’ (‘The Law and Procedure of the International Court of Justice 1960–1989’, 61 *B.Y.I.L.* (1990), p. 35). Carreau has written that, in the *Barcelona Traction* case (and in other cases), the International Court gave ‘des solutions contestables et contestées’ (*Droit international*, 4th edn. (Paris, 1994), p. 612). Taking a more subtle position, Henkin has written that ‘[i]n its own terms, the Court’s judgment may not have been unsound. . . . But if *Barcelona Traction* can be justified by its origins, it may not serve the purposes of international justice, as the shareholders, principal parties in interest, may be without adequate protection and remedy.’ (‘“Nationality” at the Turn of the Century’, Beyerlin, Bothe, Hofmann and Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung. Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhardt* (Berlin, 1995), p. 97.)

was necessary, or even appropriate, for the International Court to reach its conclusions on legal standing. McCaffrey, a former member of the International Law Commission, has expressed the view that this reference was a 'gratuitous statement', which was made in the context of a case 'whose facts and legal issues hardly required such a pronouncement'.¹⁵ In even stronger terms, Mann has written that *obiter dicta* like that on obligations *erga omnes* 'convey the impression of having been studiously planted in the text or artificially dragged into the arena'.¹⁶

As a result of the widespread acceptance of the concept in the international practice, case law and literature, these remarks have become irrelevant. However, to the extent that they bring into question (at least implicitly) the origins of the concept of obligations *erga omnes*, they call for comment. The first issue to consider is the distinction between the *ratio decidendi* of a case and *obiter dictum*, which is the premise upon which McCaffrey and Mann have criticized the International Court's pronouncement on obligations *erga omnes*.

II. THE DISTINCTION BETWEEN *RATIO DECIDENDI* AND *OBITER DICTUM*: (a) PRELIMINARY CONSIDERATIONS

The distinction between *ratio decidendi* and *obiter dictum* is traditional in the common law.¹⁷ One of the rules of the doctrine of precedent (*stare decisis*) is that the only part of a decision that is binding for future cases is the *ratio decidendi*.¹⁸ Essentially, the *ratio decidendi* includes what is necessary to decide

¹⁵ 'Lex Lata or the Continuum of State Responsibility', Weiler, Cassese and Spinedi (eds.), *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin and New York, 1989), p. 243.

¹⁶ 'The Doctrine of Jus Cogens in International law', Ehmke, Kaiser, Kewenig, Meessen and Rübner (eds.), *Festschrift für Ulrich Scheuner zum 70 Geburtstag* (Berlin, 1973), p. 418. On the same page, in note 70, Mann reports the view that the dictum on obligations *erga omnes* was a reaction against the International Court's judgment in the *South West Africa* cases (Second Phase) (on which, see Chapters 7 and 10, below). The same point has been made by several other writers without, however, drawing negative conclusions on the dictum on obligations *erga omnes* similar to those drawn by Mann. See, for example, Crawford, 'The General Assembly, the International Court and Self-Determination', Lowe and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge, 1996), pp. 588–9.

¹⁷ On this distinction, see Cross and Harris, *Precedent in English Law*, 4th edn. (Oxford, 1991), pp. 39–96. See also Allen, *Law in the Making*, 7th edn. (Oxford, 1964), pp. 259–68; Raz, *The Authority of Law. Essays on Law and Morality* (Oxford, 1979), pp. 183–9. These references to works by common lawyers are not meant to exclude the fact that this distinction, and more generally the acknowledgement of the value of precedents, also have a place in the civil law tradition. See Zweigert and Kötz, *Introduction to Comparative Law*, 2nd edn., English trans. Weir (Oxford, 1987), i, pp. 267–73. See also the considerations developed in Kriele, 'Das Präjudiz im kontinental-europäischen und anglo-amerikanischen Rechtskreis', *La sentenza in Europa. Metodo, tecnica e stile* (Padua, 1988), pp. 62–80; Taruffo, 'Dimensioni del precedente giudiziario', *Scintillae iuris*. *Studi in memoria di Gino Gorla*, i (Milan, 1994), pp. 383–404.

the issues before the court, while all propositions of law which are not part of the *ratio decidendi* are *obiter dicta*.

Brownlie defines *obiter dicta* as those

lesser propositions of law stated by tribunals or by individual members of tribunals; propositions not directed to the principal matters in issue.¹⁹

Jennings has correctly pointed out that, in international law, the doctrine of precedent has not been fully worked out.²⁰ If so, one could legitimately raise the question whether there is any place at all, in international law, for a dichotomy between *ratio decidendi* and *obiter dictum*. This issue has several ramifications, which cannot (and need not) be explored here. For the purposes of the present analysis, it will be sufficient to note, once again with Jennings,²¹ that the expression '*obiter dictum*' is often used in the international literature and that, by implication, one can also speak of the '*ratio decidendi*' of an international decision.

The distinction between *ratio decidendi* and *obiter dictum* is clearer in theory than in practice, and the two expressions are bound to remain, like many other key terms of legal discourse, in a 'penumbra of uncertainty'.²² An element of uncertainty is that not all *obiter dicta* have the same weight. Some may be wholly gratuitous, whereas others, while not strictly necessary to arrive at the decision of a case, may address a specific point raised by the parties in the course of the proceedings.²³ To assess the weight and authority of a dictum,²⁴ it is therefore necessary to consider its background, circumstances and subsequent developments.

In international law, to underestimate the importance of *obiter dicta* would

¹⁸ On the doctrine of precedent, as on other issues, one can profitably refer to the writings of Lord Denning. See *The Discipline of Law* (London, 1979), pp. 283–314.

¹⁹ *Principles of Public International Law*, 4th edn. (Oxford, 1990), p. xlvii.

²⁰ 'Judicial Reasoning at an International Court', *Universität des Saarlands. Vorträge Reden und Berichte aus dem Europa-Institut*, Ress ed., No. 236 (Saarbrücken, 1991), pp. 6–7. While denying the binding force of precedents in international law, Franck has noted that 'the narrowest point of law can have the widest conceptual implications' (*Fairness in International Law and Institutions* (Oxford, 1995), p. 317). See also Abi-Saab, 'Cours général de droit international public', 207 *Hague Recueil* (1987, VII), pp. 129–30 and, more extensively, Shahabuddeen, *Precedent in the World Court* (Cambridge, 1996).

²¹ 'The Judiciary, International and National, and the Development of International Law', 45 *I.C.L.Q.* (1996), pp. 9–10.

²² Hart, *The Concept of Law*, 2nd edn. (Oxford, 1994), p. 135.

²³ In *Slack v. Leeds Industrial Co-operative Society* [1923] 1 Ch. 431, 451, Sterndale MR wrote that '[d]icta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present in the judge's mind . . . Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court . . . [M]uch greater weight attaches to them than to the former class.' (The passage, in its entirety, is reproduced in Allen, *Law in the Making*, p. 261.)

²⁴ For reasons of convenience, the term 'dictum', unlike the expression '*obiter dictum*', is not in italics.

be an even greater mistake. In his separate opinion in the *Barcelona Traction* case (Second Phase), Judge Fitzmaurice acknowledged that comments made by the International Court by way of *obiter dicta* cannot have the authority of a judgment. Yet, he remarked, in the absence of international legislation, judicial pronouncements ‘of one kind or another’ are the principal instrument for the clarification and development of international law.²⁵ Sir Hersch Lauterpacht has put forward another reason for the importance of *obiter dicta* in international adjudication, namely the need that the International Court, whose jurisdiction rests on consent, examine all the arguments developed by the parties. This favours a ‘full measure of exhaustiveness’ of international decisions.²⁶ (The application of this test of exhaustiveness varies, of course, in each particular case, in the sense that a judgment must invariably be ‘supported by a stated process of reasoning’ but ‘need not enter meticulously into every claim and contention’ put forward by either party.)²⁷

To sum up, the remark that the International Court’s pronouncement on obligations *erga omnes* was *obiter dictum* is true, but does not dispose of the question of its significance. The next two sections will assess the value of this dictum in light of its background, circumstances and subsequent developments.

III. THE DISTINCTION BETWEEN *RATIO DECIDENDI* AND *OBITER DICTUM*: (b) BACKGROUND AND CIRCUMSTANCES OF THE DICTUM ON OBLIGATIONS *ERGA OMNES*

Lord Devlin once remarked that ‘new categories in the law do not spring into existence overnight’.²⁸ While made in a completely different context, this observation accurately reflects the origins of the concept of obligations *erga omnes*.

The very expression ‘obligation *erga omnes*’ predates the dictum of the International Court. In 1957, while writing on the legal effects of treaties for third States, Schwarzenberger remarked that

[i]nternational servitudes, the effect of treaties of cession on third parties and the problem of individuals as bearers of international duties have been discussed in previous chapters. Treaties in any of these fields hardly bear out the view that, in this manner,

²⁵ I.C.J. Reports 1970, p. 64, para. 2. On the influence of statements pronounced by the International Court, see the observations of Gaja and Brownlie in Cassese and Weiler (eds.), *Change and Stability*, pp. 77 and 92, respectively.

²⁶ Lauterpacht, H., *The Development of International Law by the International Court* (London, 1958), pp. 37–45. A classic case of judicial articulation of a principle (the principle of the persistent objector) by way of *obiter dictum* in response to the arguments of the parties will be discussed in Chapter 3, below.

²⁷ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, p. 210, para. 95.

²⁸ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 525, per Lord Devlin.

obligations *erga omnes* can be automatically created.²⁹

A few years later, Lachs (at that time a member of the International Law Commission) used the expression in the course of a debate on draft Article 62 ('Treaties providing for obligations or rights of third States') of the Vienna Convention on the Law of Treaties. He noted that

[t]reaties establishing objective regimes and obligations *erga omnes* should be dealt with separately from Article 62, paragraph 2.³⁰

This latter precedent is important, if one considers that Lachs was later elected to the International Court and took part in the decision on the merits in the *Barcelona Traction* case. His specific contribution to the drafting of the dictum on obligations *erga omnes* has been highlighted in the international literature.³¹

Without using the expression, several writers may be regarded as having foreshadowed the concept of obligations *erga omnes*. For example, Schachter has noted that certain views expressed by Judge Jessup in the *South West Africa* cases (Second Phase) were a 'presage' to the International Court's dictum on obligations *erga omnes*.³² In his dissenting opinion, Judge Jessup had written that

States may have a general interest—cognizable in the International Court—in the maintenance of an international régime adopted for the common benefit of the international society.³³

Like Judge Lachs, Judge Jessup was a member of the International Court at the time of the *Barcelona Traction* case (Second Phase); his earlier views are undoubtedly helpful in understanding the background of the dictum on obligations *erga omnes*.³⁴

Similarly, Cassese has written that the concept of 'joint obligations' put

²⁹ *International Law as Applied by International Courts and Tribunals*, i (London, 1957), p. 459. (Footnotes have been omitted.) ³⁰ *Y.I.L.C.* (1964, I), p. 83, para. 29.

³¹ For example, McWhinney has written that the dictum on obligations *erga omnes* is Lachs's '(generally acknowledged, and celebrated) personal addition' to the International Court's judgment in the *Barcelona Traction* case. (*Judge Manfred Lachs and Judicial Law-Making. Opinions on the International Court of Justice, 1967–1993* (The Hague, 1995), p. 25, and also pp. 36–8 (where McWhinney elaborates on the same point).) Similar remarks have been made by Rosalyn Higgins ('Fundamentals of International Law', Jasentuliyana (ed.), *Perspectives on International Law (A Publication on the Occasion of the Fiftieth Anniversary of the United Nations and Contribution to the Decade of International Law)* (London, 1995), p. 19); René-Jean Dupuy ('Authors Recollect Judge Lachs', *ibid.*, p. 531); and Pierre-Marie Dupuy ('The Judicial Policy of the International Court of Justice', Salerno (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario* (Padua, 1995), p. 71).

³² 'Philip Jessup's Life and Ideas', 80 *A.J.I.L.* (1986), p. 892.

³³ I.C.J. Reports 1966, p. 373. This reference to a 'general interest' of States in maintaining an objective regime must be distinguished from Jessup's discussion, in a different context, of a broader 'principle of community interest in the prevention of breaches of international law' (*A Modern Law of Nations. An Introduction* (New York, 1948; reimpressed in 1968 with a new Preface by the author), p. 12).

forward by Sperduti in 1958 is ‘the same’ as that embodied in the International Court’s dictum in the *Barcelona Traction* case.³⁵ Cassese was referring to a passage in which Sperduti indicated the existence of

rare . . . norms giving rise to joint obligations, whereby a wrong caused by a subject results in the violation of an obligation towards the community . . .³⁶

There is an evident element of analogy between these words and the International Court’s dictum on obligations *erga omnes*. However, Cassese was perhaps overstating his point because, by the expression ‘joint obligations’, Sperduti meant to refer to a wider category than that of obligations *erga omnes*, including not only customary rules but also conventional ones.³⁷ In this sense, ‘joint obligations’, which apply either to all States or to a limited number of States by way of consent, may be regarded as being similar to, but not ‘the same’ as, obligations *erga omnes*.³⁸

All these statements from different authors belonging to different legal traditions confirm the observation, made by Fitzmaurice in another context, that ‘no one section of humanity has a monopoly of ideas and discoveries’.³⁹ Thus, if the writer is allowed to borrow a vivid expression from Roman law, he would sum up this brief discussion and conclude that, while the ‘mother’ of the dictum (namely, the International Court) is certain, the identity of its ‘father’ is not equally sure.⁴⁰

This uncertainty calls for greater attention to the circumstances of the dictum, and in particular to the arguments put forward by the parties in the course of the proceedings. In its third preliminary objection, Spain alleged that Belgium lacked any capacity to bring an action before the International Court on behalf of the *Barcelona Traction*, which was a Canadian company. In support of its objection, Spain argued that the international obligations on the protection of foreign nationals are strictly bilateral, although a State is

³⁴ Schachter was even more explicit, when he wrote that ‘[i]t seems likely in light of Jessup’s earlier opinion that he had an important role in the Court’s formulation of the *erga omnes* principle.’ (‘Philip Jessup’s Life and Ideas’, p. 892.)

³⁵ ‘Note sull’opera di Giuseppe Sperduti’, 77 *Riv. dir. int.* (1994), p. 317, note 7 (‘It cannot be denied that the same concept [of ‘joint obligations’, in Italian ‘vincoli solidali’] is the basis of the famous dictum of the International Court of Justice on obligations *erga omnes* . . .’).

³⁶ *Lezioni di diritto internazionale* (Milan, 1958), p. 140 (‘Rare . . . norme istitutive di vincoli solidali nel senso che in virtù di esse una lesione arrecata ad un soggetto si concreta nella violazione di un dovere verso la collettività . . .’).

³⁷ *Ibid.*, p. 152. See also Sperduti’s dissenting opinion, as a member of the European Commission on Human Rights, cited in section VI of Chapter 10, below.

³⁸ This remark, of course, is not meant to deny Sperduti’s contribution to the development of the specific concept of obligations *erga omnes*, after the International Court’s dictum, in his role as rapporteur of the Institute of International Law. (See section II of Chapter 8, below.)

³⁹ ‘The Contribution of the Institute of International Law to the Development of International Law’, 138 *Hague Recueil* (1973, I), p. 212.

⁴⁰ ‘(Mater) semper certa est, etiam si vulgo conceperit: pater vero is est, quem nuptiae demonstrant.’ (*The Digest of Justinian*, Mommsen and Krueger eds., English trans. ed. by Watson (Philadelphia, 1985), i, p. 44.) (D.2.4.5, *Paulus libro quarto ad edictum*.)

bound at one time towards several States on the basis of obligations having the same contents. In this context, and in response to the Belgian allegation of denial of justice by the Spanish courts, Spain expressed the view that

denial of justice is always a damage inferred on a particular State, the State to which the injured person belongs, and not States in general. Another State cannot bring a claim and invoke the international responsibility for such damage: *no State is authorized to intervene and safeguard the rights of other States*.⁴¹

Elaborating on this point, Ago (who was counsel for Spain) explained that denial of justice committed against a particular person is not a kind of crime towards the international community as a whole or towards each one of its members; it is an international delict committed by a State towards the State to which the person in question belongs.⁴²

Thus, in rejecting the Belgian allegation of denial of justice,⁴³ Spain examined the possibility that, in the case of an international ‘crime’, any State may invoke the international responsibility of another State irrespective of the nationality of the injured person. While the expression ‘obligations *erga omnes*’ cannot be found anywhere in the pleadings and oral arguments (or, at least, the present writer did not find it),⁴⁴ the premises for the International Court’s dictum were there. On the basis of these elements, it seems reasonable to conclude that the dictum was not a ‘gratuitous statement’, but reflected the International Court’s attempt to provide a ‘full measure of exhaustiveness’ in its response to the arguments put forward by the parties in the course of the

⁴¹ *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, i, pp. 194–5 (‘Exceptions préliminaires présentées par le Gouvernement Espagnol’). The French original reads as follows: ‘un déni de justice est un préjudice causé à un Etat déterminé, à l’Etat national de la personne intéressée et non pas à la généralité des Etats. Un autre Etat ne peut pas s’en plaindre et ne peut pas faire valoir une responsabilité internationale comme conséquence d’un tel fait: *aucun Etat n’est autorisé à intervenir pour sauvegarder les droits des autres.*’

⁴² *Ibid.*, ii, p. 212. The French original reads as follows: ‘le déni de justice commis à l’égard d’une personne déterminée n’est pas une sorte de crime envers la communauté internationale tout entière ou envers chacun de ses membres; c’est un délit international commis par un Etat envers l’Etat national de la personne en question.’

⁴³ On the concept of denial of justice, see Brownlie, *Principles*, pp. 529–30. See also Fitzmaurice, ‘The Meaning of the Term “Denial of Justice”’, 13 *B. Y.I.L.* (1932), pp. 93–114.

⁴⁴ In reviewing the pleadings of a case such as the *Barcelona Traction*, a student comes across similar difficulties to those encountered by the judges called to master its written case-file, which alone amounted to 60,776 pages. (See Sette Camara, ‘Behind the World Bench’, *International Law in an Evolving World. Liber Amicorum in Tribute to Professor Eduardo Jiménez de Aréchaga* (Montevideo, 1994), p. 1071.) Several members of the International Court have lamented the excessive length of pleadings and oral arguments. See, for example, Jennings, ‘New Problems at the International Court of Justice’, *ibid.*, pp. 1062–5; Guillaume, ‘The Future of International Judicial Institutions’, 44 *I.C.L.Q.* (1995), pp. 853–4. Critical considerations on the same point are developed in Bowett, Crawford, Sinclair and Watts, ‘The International Court of Justice: Efficiency of Procedures and Working Methods. Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law’, 45 *I.C.L.Q.* (1996), Supplement, pp. S4–9 (paras. 10–23).

proceedings. (This conclusion is not meant to deny that broader considerations may also have been present to the International Court when pronouncing its dictum, but to underline that any such broader considerations cannot be regarded as *excluding* specific considerations relating to the *Barcelona Traction* case.)

The judgment in the *Barcelona Traction* case (Second Phase) was backed by a considerable degree of consent within the International Court, and only one judge appended a dissenting opinion. The passage on obligations *erga omnes* attracted the support of all judges. Judge *ad hoc* Riphagen, who was the only dissenting judge from the judgment of the International Court, wrote as follows:

The Judgment seems to draw a distinction between *obligations* of a State *erga omnes*, obligations of a State which exist towards certain other States under general international law, and obligations of a State which only exist towards a State with which it has entered into 'treaty stipulations'. This distinction can of course be drawn. But it is still difficult to hold that this distinction would necessarily correspond to an *a priori* classification in accordance with the nature of the *interests* protected by such obligations, a classification which is already in itself a fairly doubtful one.⁴⁵

Thus, despite some other sentences in his dissenting opinion that seem to qualify the view expressed in this passage,⁴⁶ Judge *ad hoc* Riphagen endorsed the concept of obligations *erga omnes*.⁴⁷ On this specific point, his disagreement from the majority of the International Court had more to do with the criteria of identification of obligations *erga omnes*, and the practical consequences deriving from them, than with the concept itself.⁴⁸

IV. THE DISTINCTION BETWEEN *RATIO DECIDENDI* AND

⁴⁵ I.C.J. Reports 1970, p. 340. The French original reads as follows: 'L'arrêt semble faire une distinction entre les *obligations* d'un Etat *erga omnes*, les obligations d'un Etat qui existent envers certains autres Etats d'après le droit international général et des obligations d'un Etat qui n'existent envers un autre Etat qu'en raison de 'stipulations conventionnelles'. On peut, certes, faire cette distinction. Encore est-il difficile d'admettre que cette distinction correspondrait nécessairement à une classification *a priori* suivant la nature des *intérêts* protégés par ces obligations, classification qui est déjà en soi assez douteuse.'

⁴⁶ In an earlier passage, Judge *ad hoc* Riphagen had written that the distinction of principle between different types of obligations, drawn by the International Court in paras. 33, 34 and 87 of its judgment, 'seems very artificial and cannot in any case justify the *essential* legal consequences which the judgment attaches to this distinction' ('paraît bien artificielle et ne peut en aucun cas justifier les conséquences juridiques *essentielles* que l'arrêt attache à cette distinction'). (Ibid., pp. 338–9.)

⁴⁷ One should not neglect the relationship that always exists between a judgment (or an advisory opinion) and the opinions appended to it. See Jennings, 'The International Judicial Practice of the International Court of Justice', 59 *B.Y.I.L.* (1988), pp. 42–4; Bedjaoui, 'La "fabrication" des arrêts de la Cour internationale de Justice', *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Paris, 1991), pp. 104–5.

*OBITER DICTUM: (C) DEVELOPMENTS AFTER THE DICTUM ON
OBLIGATIONS ERGA OMNES*

After the *Barcelona Traction* case, references to the concept of obligations *erga omnes* have occurred both in judgments and advisory opinions rendered by the International Court⁴⁹ and pleadings of the parties.⁵⁰ Relevant materials for the study of the concept can also be found in the practice of States (apart from pleadings),⁵¹ and in the judgments and advisory opinions of other courts.⁵² Some of these instances will be discussed in the course of this work.

In the international literature, the picture is composite. In the legal writings of some countries, the concept is mentioned or examined in general treatises on public international law,⁵³ and in the very few works that have been

⁴⁸ Several years after the judgment, in his capacity as Special Rapporteur on the codification of the law of State responsibility, Riphagen referred often to the concept of obligations *erga omnes*. Some of these references are cited later in this work.

⁴⁹ Some of the references appearing in the context of the *Nuclear Tests, Nicaragua, East Timor* and *Bosnia-Herzegovina* cases, as well as the *Namibia* and the two *Nuclear Weapons* advisory opinions, will be examined (or simply cited) in the course of this work, without, however, any pretension to exhaustiveness. These references should be sufficient to allow a different conclusion from that drawn by some writers, according to whom the International Court's dictum on obligations *erga omnes* is an isolated case. (See, for example, Cahier, 'Changements et continuité du droit international. Cours général de droit international public', 195 Hague *Recueil* (1985, VI), p. 295; Sinclair, 'State Responsibility and the Concept of Crimes of States', Weiler, Cassese and Spinedi (eds.), *International Crimes of State*, p. 225.)

⁵⁰ In addition to the pleadings and oral arguments which will be mentioned later in this work, references to the concept of obligations *erga omnes* (which will not be examined in this work) can be found, for example, in some written and oral statements relating to the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization)*, and the *Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)*, such as: 'Request by the World Health Organization for an Advisory Opinion on the Legality of the Use of Nuclear Weapons in View of their Effects on Human Health and the Environment – Written Observations Submitted by the Government of Solomon Islands to the International Court of Justice' (10 June 1994), para. 3.89 (note 211), and 'Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons – Written Observations Submitted by the Government of Solomon Islands to the International Court of Justice' (20 June 1995), para. 398 (note 212); 'Request by the World Health Organization for an Advisory Opinion on the Legality of the Use of Nuclear Weapons in View of their Effects on Human Health and the Environment – Further Written Observations Submitted by the Government of Solomon Islands to the International Court of Justice' (20 June 1995), paras. 4.94–6 (notes 68 and 74); oral submission presented by the representative of the Government of Mexico (H.E. Ambassador Sergio Gonzalez Galvez, Undersecretary of Foreign Relations) at the public sitting of 3 Nov. 1995 (uncorrected Verbatim Record, CR 95/25), p. 60; oral submission presented by the representative of the Government of the Philippines (Mr Merlin M Magallona, Agent) at the public sitting of 9 Nov. 1995 (uncorrected Verbatim Record, CR 95/28), pp. 78–9. (The writer is grateful to Mr Eduardo Valencia-Ospina, Registrar of the International Court, for providing him with a copy of the mimeographed text of the written observations, and to Dr Laurence Boisson de Chazournes, formerly Assistant Professor, Graduate Institute of International Studies, Geneva, for providing him with a copy of the uncorrected Verbatim Record.)

expressly dedicated to the subject.⁵⁴ In the scientific production of some other countries, the concept has not yet found its 'consecration' in the general treatises,⁵⁵ but is occasionally discussed in monographs on various international topics.⁵⁶

Most often, the subject of obligations *erga omnes* has been approached from the perspective of a particular area of the law (mainly, but not exclu-

⁵¹ See, for example, 'Letter dated 29 August 1980 from the Chairman of the Group of 77 to the President of the Conference' (Doc.A/Conf.62/106), *III United Nations Conference on the Law of the Sea. Official Records*, xiv, pp. 111–14.

⁵² See, for example, Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC–10/89 of 14 July 1989, Series A No. 10, para. 38.

⁵³ Besides the pages from *Oppenheim's International Law* cited in the Preface, above, see for example Brownlie, *Principles*, pp. xlvii and 598 (including note 2); Cassese, *International Law in a Divided World* (Oxford, 1986), pp. 28–30; Ott, *Public International Law in the Modern World* (London, 1987), pp. 245 and 292; Wallace, R., *International Law. A Student Introduction*, 2nd edn. (London, 1992), p. 171; Henkin, Pugh, Schachter and Smit, *International Law Cases and Materials*, 3rd edn. (St. Paul, Minn., 1993), pp. 555–8; Combacau and Sur, *Droit international public*, 2nd edn. (Paris, 1995), pp. 533–5, 542–3, 686; Dupuy, P. M., *Droit international public*, 3rd edn. (Paris, 1995), pp. 284 (para. 356), 319–21 (para. 403), 363–4 (para. 457), 377 (para. 477) and 459–61 (para. 554); Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, 5th edn. (Paris, 1994), pp. 734–5 (para. 483) and 898–901 (para. 585); Reuter, *Droit international public*, 6th edn. (Paris, 1983), pp. 269–71; Verdross and Simma, *Universelles Völkerrecht*, 3rd edn. (Berlin, 1984), pp. 40–1; Podesta Costa and Ruda, *Derecho internacional publico*, updated edn. (Buenos Aires, 1984), ii, pp. 203–4; Carrillo Salcedo, *Curso de derecho internacional publico* (Madrid, 1991), pp. 204–7; Diez de Velasco Vallejo, *Instituciones de derecho internacional publico*, i, 10th edn. (Madrid, 1994), pp. 78, 85, 709 and 728–31; Gonzalez Campos, Sanchez Rodriguez and Andres Saenz de Santa Maria, *Curso de derecho internacional publico*, 5th edn. (Madrid, 1992), pp. 301–6; Pastor Ridruejo, *Curso de derecho internacional publico y organizaciones internacionales*, 6th edn. (Madrid, 1996), pp. 68 and 573–7; Giuliano, Scovazzi and Treves, *Diritto internazionale. Parte generale*, 3rd edn. (Milan, 1991), pp. 484–92; Conforti, *Diritto internazionale*, 4th edn. (Naples, 1992), pp. 363–6; Da Silva Cunha, *Direito Internacional Publico. Introducao e Fontes*, 5th edn. (Coimbra, 1991), p. 25. As will be seen from several citations throughout this work, references to the concept of obligations *erga omnes* appear also in many of the general courses given at the Hague Academy after 1970. Among these, the most extensive treatment is to be found in the general courses given by Schachter in 1982 (see its revised edition, published as a separate volume headed *International Law in Theory and Practice* (Dordrecht, 1991), pp. 196–8, 208–13, 342–5 and 381–3) and Weil in 1992 ('Le droit international', pp. 284–91 specifically, and the whole of chapter VII (pp. 261–312) for the wider phenomenon of what Weil calls 'supernorms', or 'normes à autorité renforcée').

⁵⁴ See Juste Ruiz, 'Las obligaciones "erga omnes" en derecho internacional publico', *Estudios de Derecho Internacional. Homenaje al Profesor Miaja de la Muela* (Madrid, 1979), i, pp. 219–33; Frowein, 'Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung', *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler* (Berlin, 1983), pp. 241–62; Picone, 'Obblighi reciproci ed obblighi erga omnes degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento', Starace (ed.), *Diritto internazionale e protezione dell'ambiente marino* (Milan, 1983), pp. 15–135; Casado Raigon, 'Las obligaciones "erga omnes" en el derecho internacional contemporaneo', 6 *La Ley* (29 Jan. 1985, No. 1120), pp. 1–4; Annacker, *Die Durchsetzung von erga omnes Verpflichtungen vor dem Internationalen Gerichtshof* (Hamburg, 1994); ea., 'The Legal Régime of Erga Omnes Obligations in International Law', 46 *Austrian Journal of Public and International Law* (1994), pp. 131–66. To these writings, one should add Weil, 'Towards Relative Normativity in International Law?', 77 *A.J.I.L.* (1983), pp. 413–42 (an article dealing

sively, the law of international human rights), or by reference to other concepts.⁵⁷ In particular, an extensive literature has been evolving on the relationship between the concepts of obligations *erga omnes* and international crimes of States.⁵⁸ Although some of the arguments developed by the parties in the *Barcelona Traction* case already foreshadowed a distinction between international delicts and international crimes (as was mentioned in the previous section of this chapter), it is indisputable that the dictum on obligations

extensively, though not exclusively, with obligations *erga omnes*). In the *Encyclopedia of Public International Law*, there is regrettably no separate article on obligations *erga omnes*, but various articles are relevant to the concept, above all: Mosler, 'International Legal Community', Heidelberg *Encycl.*, vii, pp. 309–12; Jaenicke, 'International Public Order', *ibid.*, vii, pp. 314–18; Frowein, 'Jus cogens', *ibid.*, vii, pp. 327–30. For bibliographical references on the relationship between the concepts of obligations *erga omnes* and norms of *jus cogens*, and between the concepts of obligations *erga omnes* and *actio popularis*, see, respectively, sections I and VI of Chapter 10, below.

⁵⁵ For example, with respect to the Russian (and formerly Soviet) literature, the writer could not find any reference to the concept of obligations *erga omnes* in Kudriavtsev (ed.), *Kurs mezhdunarodnogo prava v semi tomakh* (Moscow, 1989–93), or in any of the most recent editions of treatises on public international law such as Ignatenko (ed.), *Mezhdunarodnoe pravo*, 2nd edn. (Moscow, 1995); Kolosov and Kusnetsov (eds.), *Mezhdunarodnoe pravo* (Moscow, 1995). Likewise, in two examples from the literature of former socialist States, there is no discussion of the concept of obligations *erga omnes* in either Bierzanek and Symonides, *Prawo miedzynarodowe publiczne*, 3rd edn. (Warsaw, 1994), or Diaconu, *Curs de drept international public*, 2nd edn. (Bucharest, 1995).

⁵⁶ See, for example, in the Russian literature, Lukashuk, *Funktsionirovanie mezhdunarodnogo prava* (Moscow, 1992), especially pp. 43–4 (including note 34 for bibliographical references), 101 and 114; Movchan, *Mezhdunarodnyi pravoporiadok* (Moscow, 1996), p. 70. In the Polish literature, see Czaplinski, *Skutki prawne nielegalnego uzycia sily w stosunkach miedzynarodowych* (Warsaw, 1993) (*International Legal Effects of the Illegal Use of Force*, in Polish, with English summary), pp. 104–6, 154–90 (with a discussion of the concepts of obligations *erga omnes*, *actio popularis* and international crimes in the context of the illegal use of force) and 229–3, paras. 3.3 and 4.4 (with an English summary of the chapters containing the pages of the book referred to above). See also Mik, 'On the Specific Character of State Obligations in the Field of Human Rights', 20 *P. Y.I.L.* (1993), pp. 129–33.

⁵⁷ See, for example, Schachter, 'Les aspects juridiques de la politique américaine en matière de droits de l'homme', 23 *A.F.D.I.* (1977), pp. 58–62; International Law Association, *Report of the Sixty-first Conference held at Paris. August 26th to September 1st, 1984* (Aberystwyth, 1985), p. 82; Hanz, *Zur völkerrechtlichen Aktivlegitimation zum Schutze der Menschenrechte* (Munich, 1985), pp. 72–4 and 110–17; Bryde, 'Verpflichtungen Erga Omnes aus Menschenrechten', *Multilaterale Staatsverträge erga omnes und deren Inkorporation in nationale IPR-Kodifikationen—Vor- und Nachteile einer solchen Rezeption* (Heidelberg, 1986), pp. 165–90 (with English summary); Cocuzza, 'State Involvement in Terrorist Activities and Economic Sanctions: The Libyan Case', 7 *The Italian Yearbook of International Law* (1986–1987), pp. 209–15; Macdonald, 'The Principle of Solidarity in Public International Law', Dominicé, Patry and Reymond (eds.), *Etudes de droit international en l'honneur de Pierre Lalive* (Basel and Frankfurt, 1993), pp. 276–7 and 285; Vierdag, 'Some Remarks about Special Features of Human Rights Treaties', 25 *Netherlands Yearbook of International Law* (1994), p. 129; Francioni, 'Patrimonio comune della cultura. Sovranità e conflitti armati', 106 *Studi senesi* (1994), pp. 18–19; Provost, 'Reciprocity in Human Rights and Humanitarian Law', 65 *B. Y.I.L.* (1994), especially pp. 385–7; Oellers-Frahm, 'Die Einsetzung des "Internationalen Tribunals über Kriegsverbrechen im ehemaligen Jugoslawien" durch den Sicherheitsrat', Beyerlin, Bothe, Hofmann and Petersmann (eds.), *Recht. Festschrift Bernhardt*, pp. 747–9; Bleckmann, 'General Theory of Obligations under Public International Law', 38 *G. Y.I.L.* (1995), pp. 32–3; Weisburd, 'The Effect of Treaties and Other Formal International Acts On the Customary

erga omnes has had a decisive influence on the refinement of this distinction by the International Law Commission in its codification of the law of State responsibility.⁵⁹ In particular, this influence is reflected in the list of examples of international crimes provided by the International Law Commission, which includes:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.⁶⁰

To sum up, there is a tendency, in the international literature, to dilute the examination of obligations *erga omnes* by referring to other concepts and, when specifically discussing obligations *erga omnes*, to concentrate on their corresponding rights and remedies. As a result of this attitude, almost thirty years after the International Court's dictum in the *Barcelona Traction* case the very concept of obligations *erga omnes* still lacks a precise definition. Hence the need to address this topic.

Law of Human Rights', 25 *Georgia Journal of International and Comparative Law* (1995/96), pp. 106–8; Nakatani, 'Economic Sanctions and Compliance: Theoretical Aspects' (paper submitted to the American Society of International Law/Japanese Association of International Law/Canadian Council of International Law (ASIL/JAIL/CCIL) Joint Meeting—Atlanta, 25 March 1996), para. 4.1.B.

⁵⁸ In addition to the writings on international crimes that are cited below in this section (most of which contain references to obligations *erga omnes*), see Picone, 'Interventi delle Nazioni Unite e obblighi *erga omnes*', Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (Milan, 1995), pp. 517–78; de Hoogh, *Obligations 'Erga Omnes' and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague, 1996).

⁵⁹ This remark is made, for example, in Jiménez de Aréchaga, 'The Work and the Jurisprudence of the International Court of Justice 1947–1986', 58 *B.Y.I.L.* (1987), pp. 21–2; Ruda, 'Some of the Contributions of the International Court of Justice to the Development of International Law', 24 *N.Y.U.J.I.L.P.* (1991), pp. 53–5. In justifying the distinction between international crimes and international delicts, Ago's 'Fifth Report on State responsibility' (Doc.A/CN.4/291, and Add. 1 and 2) referred extensively to the concept of obligations *erga omnes*.

⁶⁰ Text adopted by the International Law Commission upon completion of its first reading of Part I of the draft Articles on State responsibility. The text of the draft Articles is reproduced in Brownlie, *Basic Documents*, pp. 426–37. Among the many writings on international crimes, see Graefrath, Oeser and Steiniger, 'Internationale Verbrechen—Internationale Delikte', 22 *Deutsche Aussenpolitik* (1977), pp. 90–101; Marek, 'Criminalizing State Responsibility', 14 *Revue belge de droit international* (1978–79), pp. 460–85; Dupuy, P. M., 'Observations sur le "crime international de l'Etat"', 84 *R.G.D.I.P.* (1980), pp. 449–86; Cardona Llorens, 'La responsabilidad internacional por violacion grave de obligaciones

The complexity and novelty of the subject suggest a cautious approach. Whenever definite answers would be premature, the writer will restrict his contribution to providing elements for discussion; whenever bolder statements are legitimate, the writer will put forward his views while respecting any contrary opinions. Perhaps the words used by Lesky in the preface to his history of Greek literature can be repeated here, because they capture the spirit that also animates the present work:

An author's right to his own opinion can always be reconciled with the appreciation of other points of view, and often enough it becomes the scholar's duty to confess either that we simply do not know or that there is still doubt.⁶¹

esenciales para la salvaguarda de intereses fundamentales de la comunidad internacional (el "crimen internacional")", 8 *Anuario de derecho internacional* (1985), pp. 265–336; Carella, *La responsabilità dello Stato per crimini internazionali* (Naples, 1985); Cassese, 'Remarks on the Present Legal Regulation of Crimes of States', *International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (Milan, 1987), iii, pp. 49–64; Conforti, 'In tema di responsabilità degli Stati per crimini internazionali', *ibid.*, pp. 99–111; Rigaux, 'Le crime d'Etat. Réflexions sur l'article 19 du projet d'articles sur la responsabilité des Etats', *ibid.*, pp. 301–25; Sahovic, 'Le concept du crime international de l'Etat et le développement du droit international', *ibid.*, pp. 364–9; Gilbert, 'The Criminal Responsibility of States', 39 *I.C.L.Q.* (1990), pp. 345–69; Rosenstock, 'Crimes of States—an Essay', Ginther, Hafner, Lang, Neuhold and Sucharipa-Behrmann (eds.), *Völkerrecht zwischen normativen Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (Berlin, 1994), pp. 319–34. More generally, on the responsibility for breach, and on the enforcement, of obligations *erga omnes*, see Starace, 'La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale', 153 *Hague Recueil* (1976, IV), pp. 265–317; Frowein, 'Collective Enforcement of International Obligations', 47 *Z.a.ö.R.V.* (1987), pp. 73–8; *id.*, *International Law in the Period after Decolonization* (Lagos, 1988), pp. 7–11; *id.*, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *Hague Recueil* (1994, IV), especially pp. 405–22; Focarelli, 'Le contromisure pacifiche collettive e la nozione di obblighi *erga omnes*', 76 *Riv. dir. int.* (1993), pp. 52–72; Alland, *Justice privée et ordre juridique international. Etude théorique des contre-mesures en droit international public* (Paris, 1994), pp. 352–7. Those who (unlike the present writer) can read Japanese can also refer to Nakatani, 'The Functions and the Legality of Economic Sanctions under International Law—A Study of the Legal Consequences of International Wrongful Acts' (published in six parts in vols. 100 and 101 of *Kokka Gakkai Zassi—The Journal of the Association of Political and Social Sciences* (1987 and 1988)), especially chapter 1, sections 2 and 3; chapter 2, section 1.

⁶¹ *A History of Greek Literature*, English trans. Willis and de Heer of the second German edition, 1963 (London, 1966), p. xiv. In the German original of the first edition, the passage reads as follows: 'Das Recht des Autors, seine eigene Stellung zu vertreten, ist mit der Würdigung anderer Sehweise durchaus vereinbar, und nicht selten wird auch das Einbekenntnis unseres Nichtwissens oder nicht gelöster Zweifel zur wissenschaftlichen Pflicht.' (*Geschichte der griechischen Literatur* (Bern, 1957–8), p. 8.)

V. CONCLUSIONS

The main conclusion that can be drawn from the analysis developed in this introductory chapter is that the International Court's pronouncement on obligations *erga omnes*, while *obiter dictum*, (a) addressed some arguments put forward by the parties in their pleadings, (b) was unanimously endorsed by the judges sitting on the bench, and (c) has been acquiring increasing influence ever since the judgment in the *Barcelona Traction* case. From this, it follows that the real issue is to elucidate the concept of obligations *erga omnes* rather than undertake a fruitless discussion on the formal authority of the International Court's pronouncement in which it first appeared.

The dictum in the *Barcelona Traction* case identifies two characteristic features of obligations *erga omnes*. The first one is *universality*, in the sense that obligations *erga omnes* are binding on all States without exception. The second one is *solidarity*, in the sense that every State is deemed to have a legal interest in their protection. Of these two characteristic elements, the second one (solidarity) is linked with wider issues of enforcement and legal standing in international law. The first one (universality), which has been unduly neglected in the international literature (at least in the specific context of obligations *erga omnes*), raises complex theoretical problems. In particular, it appears difficult to reconcile this element with the structure of international society, which is composed of independent entities giving rise, as a rule, to legal relations on a consensual basis.

The concept of obligations *erga omnes* does not represent, though, the first attempt to go beyond reciprocal relations among States based on consent. Therefore, it is appropriate to examine, as a starting point of this work, a few selected 'reconfigurations' of obligations *erga omnes*.