



REVISITING THE RELEVANCE OF BARCELONA TRACTION

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ABSTRACT

The paper begins by briefly examining facts of the case Barcelona Traction. In an obiter dictum, the court in this case identified a new category of international obligations called *erga omnes* - which are obligations owed by the States towards the international community as a whole in the interest of protecting basic values common to all.

Although there was a difference between the ratio and the obiter dicta (*erga omnes*) in this case, this paper seeks to analyse why the concept of *erga omnes* evolved and gives various instances from the judgement itself which try to justify that the international commercial activities of the States are in the interest of the entire international community and therefore are obligations *erga omnes*.

Background

In its judgment in the second phase of the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)¹, the Court rejected Belgium's claim by fifteen votes to one. The claim, which was brought before the Court on 19th June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company which was incorporated in Canada.

The objective sought by the state of Belgium was reparation for damage alleged to have

been sustained by Belgian nationals, who were shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State.

On behalf of Belgian nationals who had invested in a Canadian corporation, Belgium sued Spain on the premise that Spain was responsible for acts in violation of international law that had caused injury to the Canadian corporation and its Belgian shareholders.

The International Court of Justice held that Belgium had no legal interest in the matter to justify bringing a claim. Although Belgian shareholders suffered, if a wrong was done to the company, it was only the company's rights that could have been infringed by Spain's actions. It would only be if direct shareholder rights, such as to dividends, were affected, that the state of the shareholders would have an independent right of action. The Court in this case held that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

The Court in its judgement held that it was a general rule of international law that when an unlawful act was committed against a company, only the state of incorporation of the company could sue, and because Canada had chosen not to, there was no claim which could be sustained by Belgium. Further the court held that the idea of a "diplomatic protection" of shareholders was unsound because it would create confusion

¹ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain); Second Phase, [1970] ICJ,

ICJ Reports 1970, (ICJ) [1970] ICJ, ICJ Reports 1970 (ICJ).



and insecurity in economic relations, as shares are 'widely scattered and frequently change hands'.

It was in this case that the court distinguished between two different categories of obligations.

One kind was the obligations of a State towards the international community as a whole, which was the concern of all states and for whose protection all states have a 'legal interest'.

These obligations are fundamentally different from those existing vis-a-vis another State. 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*.²

Such obligations derive, in contemporary international law, from the outlawing acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Some of the corresponding rights of protection have entered into the body of general international law while others are conferred by international instruments of a universal or quasi-universal character.³

Further, it was stated by the court in this case that the performance of obligations that are the subject of diplomatic protection are not of the same category as obligations *erga omnes* and thus, it cannot be held in the present case

that all States have a legal interest in its observance.

This in essence meant that for Belgium to be able to have *jus standi*, it would first have to establish that the losses suffered by the Belgian shareholders in Barcelona Traction were the result of violation of obligations of which the State of Belgium itself was a beneficiary.

Therefore, it is existence or inexistence of such a right which is the decisive factor in determining Belgium's capacity or lack thereof to bring about an action against the Spanish State.

The Evolution of *Erga Omnes* and its Necessity in International Commercial Activities

Although in the instant case it was ruled that the obligations in context of diplomatic protection do not fall within the ambit of *erga omnes* because all States do not have a common interest in its legal observance, however, the coming forth of the concept of *erga omnes* itself is a significant step in legal evolution and goes on to show why the evolution of this concept was essential in truly understanding the importance of obligations owed by States towards the treatment of aliens in their international commercial activities.

Justice Riphagen holds in his dissenting opinion, and rightly so, that the distinction drawn by the court between obligations of a *State erga omnes* (i.e; obligations of a State which exist towards certain other States under general international law), and obligations of a State which only exist

² *ibid* [33]

³ *ibid* [34]



towards a State with which it has entered into "treaty stipulations" is a problematic classification because it seems impossible hold that the economic interests of a State can be protected through obligations on other States only by virtue of "treaty stipulations" ⁴

The Court's conclusion that such aggrieved shareholders must take recourse to the treaty stipulations is of little value in the face of the apparent need of legal protection of international shareholders since conventional treaties were the means of offering diplomatic protection to shareholders long ago. Today, with the advent of forums like the ICJ, the vacuum for such diplomatic protection must be resolved in accordance with the present day international law rather than by subscribing to treaty stipulations of a century long gone.

The Court in its majority opinion states-

"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." ⁵

However, the Court fails to take into account whether the treatment afforded to Barcelona Traction by the organs of the Spanish State fell within the ambit of Spain's international obligations and thus also fails to appreciate the nature of the rules of customary international law which are applicable in this

⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain); Second Phase, International Court of Justice (ICJ), 5 February 1970* [1970] International Court of Justice, Dissenting

case, especially the ones concerning the rights and obligations of States in the field known as "*the treatment of aliens*".

This complete segregation between the rules of customary international law concerning the responsibility for the treatment of aliens, and the rules of municipal law, determines the very content of the rights and obligations of States on the international arena. This requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.

While examining rules of municipal law the Court holds that, under municipal law, the *rights* of the shareholders are not affected by measures taken against the company and from this it follows that the State of which the shareholders in a company are nationals has also no right that might be injured in the international arena by measures taken by another State against the said company.

The basis of *Jus Standi* of a state depends upon the existence of a connection or a link between the State concerned which has been adversely affected in a particular situation by the conduct of another State. Thus, it is this conduct imputed on States that forms the core of creation of "obligations" and "rights" between states in their mutual relations.

However, the court reasons its verdict on the distinction between "mere interests" and "rights" and it is this reasoning that leads the

Opinion of Justice Riphagen (International Court of Justice).

⁵ *Barcelona Traction* (n1)[33]



Court to conclude that it is “mere interest” of the shareholders and not a “right” that has been violated since the alleged acts were directed against the company and not against shareholders.

However, in the absence of such protection, the small investors would now be less likely to invest in multinational corporations since this judgement discourages investors from placing capital abroad in a corporation which has a nationality different from his own.

This will not only reduce the investment in multinational corporations but will also inhibit the growth of developing nations where such capital could have been invested.

In reality what this case does concern is rules of customary international law with regards to obligations and rights of the States in their mutual relations and the body of rules of Customary International law tries to protect the interests of the International community in respect of the fundamental freedoms of people as well as that of international commerce.

The nature of rights and obligations, is different in international law, because these obligations and rights are consistent with the requirements of the entire international community.

The idea behind the protection of "human rights" in public international law has always been present in international decisions

concerning the responsibility of States for the treatment of aliens. Thus, the different methods adopted by the municipal law of different countries are irrelevant to the attainment of the objectives of the rules of customary international law.⁶ The conclusion of the Court being that Belgium lacks *jus standi* is based solely on the nature and interrelation of the rights of the company and the rights of the shareholders under municipal law.⁷ Therefore, a company's juristic personality is not by any means the only decisive factor concerned with the obligations or the rights of States in the matter of the "treatment of aliens".⁸

Furthermore, it is well established that the conditions under which the international responsibility of a State arises, and the conditions under which another State is entitled to require reparation for an injury caused to it, are completely independent of the content of the municipal law of the States in question.⁹

The judgment even observes that the diplomatic protection of foreigners is closely linked with international commerce¹⁰ and further recognizes that "when a State admits into its territory foreign investments, it assumes obligations concerning the treatment to be afforded them"¹¹ but on the other hand, the Court denies to the State whose nationals have made such investments any protection at the international level apart from "treaty stipulations".¹²

⁶ *ibid* [10]

⁷ *ibid* [38]

⁸ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (n1) [55]

⁹ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Dissenting Opinion of

Justice Riphagen (International Court of Justice) (n4) [3] 335

¹⁰ *ibid* [37]

¹¹ *ibid* [33]

¹² *ibid* [90]



While it is true that when a State admits into its territory foreign investments, it does not thereby become an insurer of that part of another State's wealth which those investments represent"¹³, and that the infringement of the territorial integrity and political independence of a State cannot be compared with that of an infringement of the fundamental freedoms of a human person, or with that of an injury to international commerce. Nevertheless, from the legal point of view, it is in fact a matter of State interests being protected by the imposition of obligations on other States.¹⁴

The most realistic and practical protection that can be offered to an investor in cases where the host state injures the interest of a foreign investor through wrongful acts directed against corporate personality within the host territory while the nationality of such corporate entity is that of a different third state is through diplomatic protection exercised by his own state's government.

The question whether a state can be allowed to bring about a claim on behalf of its national for an injury suffered to his interest in a corporation of a third state has been answered affirmatively by the American Law institute in the Restatement of Foreign Relations of Law.¹⁵ Section 143 of the same provides that a state would be liable for damages caused to an alien shareholder under three conditions- (1) a "significant portion of stock is alien owned",

- (2) the corporation fails to obtain reparation for reasons beyond the control of the shareholders;
- (3) the corporation has not waived or settled its claim.

This rule thus envisages a situation where a shareholder's state would be able to successfully sustain a claim for its national. Such a rule provides an apt mechanism to deal with a situation where the investor/shareholder is allowed to seek redress, thereby providing an escape from the ruling of Barcelona Traction, which foreclosed the opportunity of investors from seeking protection of their national states.

However, the decision reached at by the ICJ in this case is the opposite of such a rule and creates a vacuum leaving the shareholders powerless and remediless in international law having no effective remedy for their injuries.

Further, the Court also looks into special circumstances under which the general rule (i.e.; the State under whose municipal law the company was incorporated would have jurisdiction) might not take effect. In this regard, the court brought up two situations in which a State, other than the one in which the company was incorporated may have jurisdiction.

While these two conditions lead to the non-application of the simple and strict rule,

¹³ *ibid* [86]

¹⁴ Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Dissenting Opinion of

Justice Riphagen (International Court of Justice (n4) [8] 340

¹⁵ Restatement (Second) of Foreign Relations Law of the United States (1965) Section 173.



however still the court considered in the first case - "the case of the company having ceased to exist"¹⁶ as being solely within the view of existence under municipal law, failing to take into account the object of the company.

With regards to the second possibility dealt with in the Judgment¹⁷ which was "the lack of capacity of the company's national State to act on its behalf". Here again, the court concludes that, the creation of a corporate entity by the municipal law of a particular State is the sole relevant consideration without explaining how such a formality can of itself give rise, in international law, to a legally protected interest of that State in the business of the company. By the Court's ruling that the corporate domicile alone can seek redress, and that in the absence of a rule in international law that confers such a right on the shareholder's state, if different from the corporation's state,¹⁸ had the effect that such a ruling left the shareholders who made an investment in a foreign state remediless.

Considering the fact that there has been tremendous growth in the arena of foreign investments in the last century, both nations as well as the investors in such nations have mutually benefitted from such growth and this has also led to an outpace of the flow of capital and has also resulted in increasing the basic standards of living in the developing countries.

States have a real interest in the development

of its international commerce, and this international commercial activity of a State affects the economy as a whole. This is also why the State which relies upon such responsibility does not represent the injured person but is representing its own interest in that person's activities in international commerce.

In fact, customary international law protects the interest which a State has in its international commerce because international commerce is of interest to the entire international community.

CONCLUSION

Despite there being an absence of cases before the ICJ of proper cases involving *Erga omnes*, the development of the concept itself is a significant step towards its success as it has developed quickly, and has been integrated into other areas of law. One of the most notable of such areas is that of State responsibility. An instance of this can be found in the ILC's text¹⁹. As per Article 48 of ILC's text, each State has the right to invoke another State's responsibility in case in case of breach of an obligation owed towards the international community as a whole, indicating that the essence of the concept of *erga omnes* is that there might arise situations where the rules governing concept of locus stand might have to be looked beyond, in cases where the community interests are at stake.

From this it follows that since the interests of the State in its commercial activities are also the interest of the entire international

¹⁶ *ibid* [64] - [68]

¹⁷ *ibid* [69] - [84]

¹⁸ Preston G Lutz," Diplomatic Protection of Corporations and Shareholders- Capacity of the

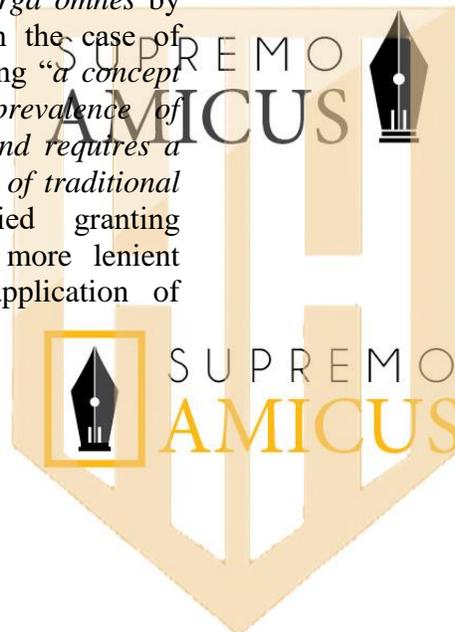
Government to Espouse Claims of Shareholders of a Foreign Corporation" 2019

¹⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001



community at large, the States owe duty in the arena of international commercial activity not only to those States with whom such obligations might arise out of “treaty stipulations”, but to the entire international community, thus making such obligations “*erga omnes*”, meaning that all States have a legal interest in the protection of such rights since they have implications on the whole international community.

The concept also has been adopted in areas outside the realm of State responsibility. An apt example of this, can be seen in the extension of the concept of *erga omnes* by Justice Trindade’s opinion in the case of *Belgium vs Senegal* ²⁰ as being “*a concept that is committed to the prevalence of superior common values* ²¹ and requires a wide ranging reinterpretation of traditional common law...” it implied granting immediate protection under more lenient conditions and horizontal application of human rights law. ²²



²⁰ *Belgium v Senegal*, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, United Nations [UN]; International Court of Justice [ICJ]", International Court of Justice

²¹ *ibid*

²² Christian J. Tams and Antonios Tzanakopoulos, "Barcelona Traction at 40: The ICJ as an Agent of Legal Development", 2019