

Contents

<i>Foreword</i>	<i>page</i> xiii
<i>Preface</i>	xv
<i>Notes on citation</i>	xvii
<i>Table of cases</i>	xviii
<i>List of abbreviations</i>	xxviii
Introduction	1
Part I Background to the <i>erga omnes</i> concept	17
1 Clarifications	19
1.1 Countermeasures and ICJ proceedings	19
1.2 The notion of standing	25
1.2.1 Standing as a normative concept	28
1.2.2 Standing as a flexible concept	32
1.2.3 The diversity of rules governing standing	36
1.2.4 Interim conclusions	40
1.3 Standing to enforce individual legal positions	40
1.3.1 The basis of the distinction	41
1.3.2 Categories of individual legal positions	42
1.3.2.a Bilateral legal rules and similar situations	42
1.3.2.b Special injury	44
1.4 Concluding observations	46
2 Traditional approaches to standing	48
2.1 Restrictive tendencies	52
2.1.1 A structural analysis of multilateral obligations	53
2.1.1.a Three categories of obligations	54
2.1.1.b The legal regime	58

viii CONTENTS

2.1.2	A restrictive interpretation of treaty provisions: the <i>South West Africa case</i>	63
2.2	Expansive tendencies	69
2.2.1	Treaty-based rules of standing	70
2.2.1.a	Unequivocal treaty clauses	71
2.2.1.b	Equivocal clauses broadly interpreted: the <i>Wimbledon case</i>	76
2.2.2	The position in the absence of special treaty regulations	80
2.2.2.a	Interdependent obligations	80
2.2.2.b	Status treaties	80
Background		81
Standing to react against breaches		83
2.2.2.c	The duty to comply with judgments of the International Court of Justice	87
2.2.2.d	Basic humanitarian standards	89
2.3	Concluding observations	94
Part II	Legal issues raised by the <i>erga omnes</i> concept	97
3	Distinguishing types of <i>erga omnes</i> effects	99
3.1	Terminological imprecision	101
3.2	The traditional meaning of the term	103
3.3	'Other' <i>erga omnes</i> effects in the ICJ's jurisprudence	106
3.3.1	The traditional meaning	107
3.3.2	The territorial restriction of obligations	110
3.3.3	The descriptive function	112
3.4	Concluding observations	115
4	Identifying obligations <i>erga omnes</i>	117
4.1	The question of sources	120
4.1.1	The Court's jurisprudence	121
4.1.2	Further considerations	123
4.2	Distinguishing obligations <i>erga omnes</i> from other customary obligations	128
4.2.1	The structural approach	130
4.2.1.a	The strong version	131
4.2.1.b	The moderate version	133
4.2.1.c	Interim conclusion	135
4.2.2	The material approach	136

	CONTENTS	ix
4.2.2.a	The point of reference	136
4.2.2.b	The required threshold of importance	138
	Obligations <i>erga omnes</i> and norms of <i>jus cogens</i>	139
	The merits of a comparative approach	141
	Implications for the <i>erga omnes</i> concept	146
	Interim conclusion	151
	Beyond <i>jus cogens</i> : obligation <i>erga omnes</i> not deriving from peremptory norms	151
	Dispositive obligations <i>erga omnes</i> ?	152
	Relevant factors	153
4.3	Concluding observations	156
5	Standing to institute ICJ proceedings	158
5.1	The <i>Barcelona Traction</i> dictum	162
5.2	Possible counter-arguments	165
5.2.1	Isolated pronouncements?	165
5.2.2	An <i>obiter dictum</i> lacking legal relevance?	167
5.2.3	The international community as the exclusive beneficiary?	173
5.2.4	Contradictions within the judgment?	176
5.2.5	Inconclusive jurisprudence since 1970?	179
5.2.5.a	The <i>Nuclear Tests</i> cases	180
5.2.5.b	The <i>East Timor</i> case	182
	Obligations <i>erga omnes</i> and the indispensable third-party rule	183
	The issue of standing	185
5.2.5.c	The <i>Genocide</i> case	187
5.2.5.d	The <i>Nicaragua</i> case	187
5.2.5.e	The <i>Gabčíkovo</i> case	190
5.2.5.f	Summary	192
5.2.6	A restrictive, contextual interpretation?	193
5.3	Concluding observations	196
6	Standing to take countermeasures	198
6.1	The Court's jurisprudence	201
6.1.1	The <i>Barcelona Traction</i> case	202
6.1.2	The <i>Namibia</i> and <i>Hostages</i> cases	204
6.1.3	The <i>Nicaragua</i> case	205
6.1.4	Interim conclusions	207

X CONTENTS

6.2 International practice	207
6.2.1 Specific instances of state practice	208
6.2.1.a Actual violations	209
Western countries - Uganda (1971-1978)	210
European countries - Liberia (1980)	211
G77 and socialist countries - colonial regimes (1970s-1990s)	211
Western countries - Poland (1981)	213
United States - Soviet Union (1981)	214
Western countries - Argentina (1982)	215
Western countries - Soviet Union (1983)	217
Western countries - South Africa (1985-1986)	217
Various countries - Iraq (1990)	219
European and Commonwealth countries - Nigeria (1995)	220
African States - Burundi (1996)	221
European countries - Yugoslavia (1998)	223
Various countries - Zimbabwe (2002-2003)	224
6.2.1.b Statements implying a right to take countermeasures	225
G7 declarations on aircraft hijacking (1978/1981)	225
Western countries - Iran (1979-1980)	226
6.2.1.c Actual non-compliance justified differently	227
Netherlands-Surinam (1982)	227
European countries-Yugoslavia (1991)	228
6.2.1.d An assessment	228
A preliminary evaluation	230
Counter-arguments examined	231
The relevance of the <i>erga omnes</i> concept	232
The selectivity of practice	234
The dominance of western practice	235
A lack of <i>opinio juris</i>	237
The requirement of collective action	240
Interim conclusion	241

6.2.2	Governments' comments on the ILC's work on State responsibility	241
6.2.2.a	Comments made during the first reading	242
6.2.2.b	Comments made during the second reading	245
6.2.2.c	Interim conclusions	248
6.3	Concluding observations	249
7	<i>Erga omnes</i> enforcement rights and competing enforcement mechanisms	252
7.1	Identifying areas of conflict	256
7.1.1	Overlapping legal rules	256
7.1.2	Different enforcement rights	258
7.1.2.a	Treaty-based systems of enforcement: a survey	259
7.1.2.b	Specific types of conflict	261
7.2	Addressing conflicts	263
7.2.1	Contracting out of decentralised enforcement by States	263
7.2.1.a	Direct recourse by individuals	263
7.2.1.b	Institutional enforcement	264
7.2.1.c	Summary	268
7.2.2	Contracting out of specific forms of decentralised enforcement	268
7.2.2.a	General considerations	268
	The exclusivity thesis	269
	Alleged support in international jurisprudence	269
	Its rejection	271
	Guidelines for the analysis of specific conflicts	276
	Explicit conflict rules	276
	Effectivity	277
	Formal indications of effectivity	278
	The character of the breach	278
	Summary	279
7.2.2.b	Contracting out of ICJ proceedings	279
	Non-exclusivity clauses	280
	Implied non-exclusivity	282
	Flexible exclusivity clauses	283
	Interim conclusion	286

xii CONTENTS

7.2.2.c Contracting out of countermeasures	286
No inter-State procedures available	288
Inter-State procedures available	289
Non-judicial procedures	289
Judicial procedures	291
Interim conclusion	299
7.2.3 Special factors restricting treaty enforcement	300
7.2.3.a Article 51 UNC	300
7.2.3.b The effects of reservations	302
7.3 Concluding observations	304
Conclusion	306
<i>Bibliography</i>	312
<i>Index</i>	351