

INDEX

For references to particular articles of treaties, see the Table of Treaties, p. xxxix.

A

- Act of State—
 - basis—
 - separation of powers, 65
 - Bernstein letter, 65-6
 - criterion—
 - acts by foreign State in own territory, 65, 108
 - recognition, relevance, 65
 - separation of powers, 108-9
- Admissibility—
 - See also under* European Court of Human Rights; United Nations Committee on Human Rights (UNHRC)
 - forum non conveniens*, 147-8
- Aliens—
 - constitutional rights, 403
 - exclusion—
 - right of, 376-7
 - jurisdiction. *See* Jurisdiction, aliens
- Applicable law—
 - federal State—
 - choice of law—
 - federal law, 123
 - place of injury, 124
- Arrest—
 - illegal—
 - constitutional issue, whether, 107 n. 11

B

- Burden of proof—
 - Constitution, breach, 378-9
 - diplomatic premises—
 - ‘used for purposes of maintaining a diplomatic or consular mission’, 12
 - fair trial, 548
 - inhuman or degrading treatment, 510
 - legislation, challenge to, 397
 - State immunity, execution—
 - purpose, 12
 - State immunity, jurisdiction, 41-2, 144-5, 156-7, 163-4
 - war crimes—
 - knowledge that act constituted war crime or crime against humanity, 542, 596-7
 - lawful authority, 597
 - superior orders, 599

C

- Canada—
 - aliens—
 - exclusion—
 - right of, 376-7

Canada (*cont.*)

- burden of proof—
 - Charter of Rights and Freedoms, breach, 378-9
 - fair trial, 548
 - legislation, challenge to, 397
 - war crimes—
 - knowledge that act constituted war crime or crime against humanity, 542, 596-7

Charter of Rights and Freedoms—

- aliens—
 - entitlement to protection of, 403
 - extraterritorial application, 379, 381, 388, 403, 417, 418, 423
 - Section 7 (right to life, liberty and security/fundamental justice)—
 - extradition involving death sentence, compatibility, 374-83, 418-23
 - extraterritorial jurisdiction, and, 573-4
 - retrospective jurisdiction over war crimes, compatibility, 574-5
 - Section 11(d) (fair trial)—
 - delay in introducing war crimes legislation, 576
 - Section 12 (cruel and unusual punishment)—
 - extradition involving death sentence, compatibility, 374, 382, 386, 396-402, 417-18
 - lesser of penalties to prevail, 576
 - Section 15 (discrimination)—
 - extraterritorial legislation, 577

death penalty. *See under* extradition *and* inhuman or degrading treatment *below*

double criminality—

- jurisdiction, basis for—
 - judge/jury responsibility to determine whether double criterion met, 536-7
 - war crimes/crimes against humanity jurisdiction, and, 533, 536-7

extradition—

- balance of interests, 421
- comity, 416, 420
- conditions in receiving State, relevance, 381, 416
- death penalty, in case of—
 - arbitrary sentencing, 379
 - assurances that death penalty will not be carried out, need for, 382-4, 386, 404-6, 407, 410, 417-18, 423, 424-5, 477, 478
 - fundamental justice, breach of, whether, 374-80, 381-3

See also under inhuman or degrading treatment *below*

- Model Treaty on Extradition (1990), 376
- safe haven, risk, 377-8
- ‘shock to conscience’, whether, 377, 379, 382-3, 420-1
- deportation, distinguished, 377
- discretion, 422, 423
- double criminality, 416
- judicial review, 378-9, 388, 418, 419-20, 423
- procedure, 387-8
- reasons, whether necessary, 387-8
- reciprocity, 416, 422
- safe haven, risk of creating, 380, 407-8, 422-3
- security of extraditing State, 420

Extradition Act—

- Section 25—
 - Charter of Rights and Freedoms, compatibility, 417-23, 474, 476-8

- fair trial, 659-60
 - burden of proof, 548
 - defence counsel, propriety of closing statement, 547-8, 628-38
 - delay in introducing war crimes legislation, 576
 - improper calling of evidence, 545-8, 577-8, 639-58
 - lack of clarity in charge, 575-6
- fundamental justice—
 - balance of interests, 375, 379
 - war crimes—
 - retroactive/external jurisdiction, and, 572-7
- human dignity, 398-402
- inhuman or degrading treatment—
 - death penalty, 381, 398-402, 407
 - method of execution, relevance, 379-80
 - ‘death row’, 379-80
 - lesser penalty to prevail, 576
 - proportionality, 396-7, 399, 408
- international law—
 - matter of law for judge, 557, 571
- judicial review—
 - extradition, 378-9, 388, 418, 419-20
- jurisdiction—
 - actual commission of war crime/crime against humanity as condition precedent, 528, 531, 564-5
 - jury responsibility to determine, whether, 553-6, 561-6
 - whether to be established pre-trial or pre-judgment, 566-71
 - ‘deemed to have been committed’ within territory, 533-6, 614-20
 - creation of new offence, distinguished, 570-1
 - provisional ‘deeming’, 568-9
 - extraterritorial—
 - fundamental rights, breach, whether, 573-4
 - offences against ship of forum State, 532
 - piracy, 532
 - jury role in determining, 553-7, 561-6, 601-2, 619-26
 - international and domestic elements, distinguishable, whether, 623-6
 - legislative and adjudicatory, distinguished, 604-10
 - territorial, 531-2, 610-14
 - ‘deemed to have been committed’ within territory—
- double criminality requirement. *See above*
 - presumption of territoriality. *See* ‘deemed to have been committed’ within territory *above*
- law of—
 - Criminal Code—
 - Section 6(2) (territorial principle), 531, 610-14
 - Section 7(3.71) (war crimes), 525-663
- compatibility with Charter of Rights and Freedoms, 572-8
 - Geneva Conventions Act 1985—
 - Section 3(1) (offence under Canadian law), 532
- legislation—
 - challenge to—
 - burden of proof, 397
 - extraterritorial. *See* Charter of Rights and Freedoms, extraterritorial application *above*

- Canada (*cont.*)
- retroactive—
 - retrospective, distinguished, 574
 - legislation, interpretation—
 - guidelines—
 - intention of legislature, 396
 - natural justice—
 - extradition procedure, and, 388
 - proportionality—
 - inhuman or degrading treatment, 396-7
 - State responsibility—
 - acts outside its jurisdiction—
 - death penalty, 402-7, 417
 - extradition, following upon, 374
 - respect for other States, 417-18
 - war crimes—
 - defence—
 - lawful authority, 597-2
- See also superior orders below*
- burden of proof, 597
- permissibility under laws of place where act committed, 597
 - superior orders. *See below*
 - fault, need for, 595
 - See also* knowledge that act a war crime or crime against humanity, relevance *below*
 - knowledge that act a war crime or crime against humanity, relevance, 536, 541, 542-6, 558-61, 594, 627-8
 - burden of proof, 542, 558-61, 596-7
 - retroactivity, 564-5
 - breach of fundamental rights, whether, 574-5
 - retrospectivity, distinguished, 574
 - retrospectivity. *See* retroactivity *above*
 - superior orders, 598-9
 - burden of proof, 599
- See also* defence, lawful authority *above*
- whether—
 - question of fact for jury, 528-9, 552-7
 - question of law for judge, 536, 539-41, 570
- Capital punishment. *See* Death penalty
- Comity—
- extradition, 416, 420
 - federal State, within, 8
- Common foreign and security policy (CFSP)—
- fundamental rights—
 - effect, 217
 - transfer of prerogative powers, whether, 177-9
- Constitution—
- entrenched provisions—
 - amendment, 210-11, 212, 219
 - referendum, and, 220
 - right to remedy/resist if endangered, 210, 212, 220
- primacy, 260
- Constitutional review—
- acts of Community, 250-1

INDEX

669

- acts of national public authorities, limited to, 250-1
- declaration of constitutional compatibility of treaty—
 - binding effect, 260-1
 - legal nature, 261
 - procedure, 259-61
- direct and current violation of constitutional right, 213
- European Union, amendments, 226
- referenda, 190
- requirements—
 - judgment dependent on validity of norm, 193
- treaties. *See* Treaties, constitutional review
- Consular agent—
 - functions—
 - social, economic and political policy, grounded in, 128-9
- Consular relations—
 - Vienna Convention on Consular Relations (1961)—
 - consular functions, 128-9, 130
 - legality of actions, relevance, 130-1

D

- Death penalty—
 - See also* International Covenant on Civil and Political Rights *below*; *under* European Convention on Human Rights (1950)
 - delay in execution—
 - breach of Constitution, whether, 344-5, 347-56
 - Inter-American Commission on Human Rights, appeal to, 355-6
 - UNHRC, appeal to, 355-6
 - history, 375-6, 388-96, 445-6
 - inhuman or degrading treatment, whether, 350-6
 - appeals procedure, relevance, 350-5
 - fault of complainant, relevance, 350, 353-4
 - State practice, 445-6
- Democratic legitimacy. *See under* EC, transfer of powers to *above*
- Diplomatic agent—
 - functions—
 - export promotion, 59-60
- Diplomatic functions. *See* Diplomatic agent, functions
- Diplomatic premises—
 - definition—
 - residence of member of mission, 10
 - ‘used for purposes of maintaining a diplomatic or consular mission’—
 - burden of proof, 12
 - immunity—
 - taxation, 3-12
 - State immunity, and—
 - action relating to immovable property, whether, 4, 9, 11-13
- Diplomatic privileges and immunities—
 - State, beneficiary, whether, 6
 - Vienna Convention on Diplomatic Relations (1961)—
 - more favourable treatment, possibility, 6
 - State as beneficiary, 6
- Discrimination. *See* Freedom from discrimination

- Double criminality—
 jurisdiction, basis for—
 —‘deemed to have been committed within territory’, requirement for, 535-7,
 617-20
 —judge/jury responsibility to determine whether double criterion met, 536-7
 —*See also under* Extradition
 war crimes/crimes against humanity jurisdiction, and, 533, 536-7

E

- EC law, direct effect—
 directive—
 —76/207 (night work), 194-5
 requirements—
 —no need for further intervention, 195
 —unconditional and precise, 194, 195
 Economic and monetary union (EMU)—
 automaticity, 238
Bundestag/Bundesrat resolutions (December 1992), 207
 community of stability, as, 235, 238-40
 constitutional amendment, need for, 186-7, 189
 convergence criteria, 236-8
 —watering-down, protection against, 237-8
 democratic deficit, 214-15
 European Central Bank—
 —commitment to stability, and, 237, 239-40
 independence, 240-3
 Member States’ willingness, dependent on, 236, 238
 political union, inevitable, whether, 240-1
 reversibility of European Union, and, 212
 separable, whether, 240
 EEC Treaty (1957)—
 exercise of transferred power and extension, distinguished, 243
 interpretation—
 —competence to perfect Treaty, 243
 —effectiveness, 243
 EMU. *See* European Union Treaty (Maastricht) (1992)—
 economic and monetary union
 European citizenship—
 national identities, preservation of, 263
 voting rights, 263
 European Community (EC)—
 democratic deficit—
 —European basis of politics, and, 210, 219
 —lack of EC legislature, 209, 211-12, 223, 224
 —national parliaments, role, 209, 223, 228-9, 245
 —transparency of decision-making, need for, 223-4
Kompetenz/Kompetenz, 229-35
 new legal order—
 —independence of national and EC systems, 248
 proportionality—
 —obligation to observe, 245
 transfer of powers to—
 —constitutionality, 211-12
 —democratic legitimacy, 213-15, 221-6

- conferred by parliamentary approval, 223, 225
- majority voting, and, 222-3
- opportunities for Member States to influence, and, 222
- extension of rights to non-nationals, distinguished, 266, 268
- limited and specific, 221, 225-6, 229-30, 243
- See also Kompetenz/Kompetenz above*
- national identities, preservation of, 221, 245-6
- national spheres of activity, need to retain, 224-5, 241
- parliamentary powers, 208-9
- rule of law, subject to, 194
- separation of powers, and, 211
- sovereignty, effect on, 225, 228
- treaty, need for, 230, 243
- European Community law—
 - conflict with national law—
 - constitutional issue, whether, 248-9, 250-1
 - national courts' responsibility to resolve, 195
 - non-application of national law, 194
 - subsequent legislation, 248-9
 - constitutional review—
 - possibility, 251
 - national courts' role—
 - compatibility of national law, 249
 - review of European Community law, 194
 - to ensure effectiveness of Community law, 249
 - to resolve conflict, 195
 - national law, as, 248
 - primacy—
 - national courts' role, limitation on, 249
 - rule part of national law, 194
 - secondary EC law, 195
 - unwritten rule of primary EC law, 194
 - right to invoke before national courts, 195
- European Convention on Human Rights (1950)—
 - See also* European Court of Human Rights; International Covenant on Civil and Political Rights (1966)
 - amendment—
 - State practice, by, 308-9
 - applicability—
 - See also* State responsibility *below*
 - States not party, 301
 - territorial, 300-1
 - breach—
 - State responsibility. *See below*
 - death penalty—
 - extradition. *See* extradition, death penalty, in case of *below*
 - in non-member State—
 - obligation to refrain from act leading to, 307-9
 - permitted, whether, 307-9, 319-21
 - State practice, 308-9
 - effective remedy before national authority, right to—
 - interim measures—
 - non-availability against Crown, relevance, 317
 - judicial review, 316-17

European Convention on Human Rights (*cont.*)

European Union—

- social and home affairs, compliance with, 218

extradition—

- death penalty, in case of—

- See also* death penalty *above*

- assurances that death penalty will not be carried out, need for, 305-6, 320-1

- extradition to another country with jurisdiction as alternative, 312

- permissibility, 300, 305-6, 320-1

- suspension pending hearing, 275, 313

inhuman or degrading treatment—

- balance of interests, 302

- ‘death row’, 307-12

- age and mental state, 311-12

- conditions, 310-11

- length of detention, 310

- derogation—

- excluded, 302

- international standard, as, 302

interpretation—

- guidelines—

- Convention as a whole, 308

- object and purpose, 301

- spirit, 301

- social changes, need to reflect, 308

State responsibility—

- acts outside its jurisdiction, 299, 300-3, 404-6

- direct result of own action, 303

- foreseeable result of own action, 301, 303

- legal representation, lack of, 313-14

European Court of Human Rights—

admissibility—

- new issues, 314-15

Chamber—

- constitution, 275

- plenary court, relinquishment of jurisdiction to, 275

costs—

- legal fees, 318-19

- travel and subsistence, 318-19

judgment—

- compliance—

- Committee of Ministers of Council of Europe, responsibility, 318

Rules of Court—

- 21(3)(b), 275

- 30, 275

- 37(1), 275

- 37(2), 276

- 50, 275

- 50(3), 275

European Court of Justice (ECJ)—

- fundamental rights, protection, 216

jurisdiction—

- under international conventions, ratification, need for, 218

- role—
 - fundamental rights, protection, 211-19
- European Parliament—
 - democratic legitimacy—
 - uniform electoral law, need for, 224
 - legislature, whether, 211-12
- European Union—
 - amendments/extension—
 - binding, whether, 226, 231
 - constitutional review, 226
 - Member State approval, need for, 235
 - non-application, 226, 231
 - procedure, 235
 - ratification, need for, 228
 - authority derived from Member States, 228
 - reversibility—
 - EMU, and, 212
 - status—
 - economic community, as, 227
 - State, whether, 226
 - subsidiarity, 243-5
 - binding principle, 227
 - ECJ to monitor, 244
 - limitation of powers, as, 244
- European Union Treaty (Maastricht) (1992)—
 - common foreign and security policy (CFSP): *qv*
 - constitutional amendment, need for—
 - economic and monetary union (EMU), 186-7, 189
 - freedom of movement, 188
 - voting rights for non-nationals, 185-6, 263-4
 - constitutionality—
 - democratic deficit, 209
 - European Union provisions, 219-20
 - fundamental rights: *qv*
 - Kompetenz/Kompetenz*, 208-9
 - regions, infringement of powers, 211
 - voting rights for non-nationals, 211, 220
- EC powers, extension of, 214-15
- freedom of movement—
 - constitutional amendment, need for, 188
- fundamental rights: *qv*
- intergovernmental cooperation—
 - conversion to supranational competence, treaty amendment, need for, 218
 - justice and home affairs. *See below*
- justice and home affairs—
 - European Human Rights Convention (1950), and, 218
 - Geneva Convention on the Status of Refugees (1951), 218
- referendum—
 - right to, 212
- right to stand as candidate in municipal elections—
 - national sovereignty, compatibility with, 265
- Social Policy Protocol—
 - indirect amendment of national law, whether, 176-7
 - part of treaty, whether, 172-5

- European Union Treaty (*cont.*)
- annexation to Treaty of Rome (1957), relevance, 172-3
 - legislative intention, 173-5
 - Member State practice, 172-3
- sovereignty, threat to, 212
- voting rights for non-nationals—
- constitutional amendment, need for, 185-6, 211, 220
 - right to stand as candidate in municipal elections—
 - constitutional amendment, need for, 263-70
- Exhaustion of local remedies. *See under* United Nations Human Rights Committee (UNHRC)
- Extradition—
- See also* International Covenant on Civil and Political Rights (1966); *under* European Convention on Human Rights (1950)
 - agreement—
 - conflict with other obligations, 446 - balance of interests, 421
 - basis—
 - reciprocity. *See* reciprocity, need for *below* - comity, 416, 420
 - conditions in receiving State, relevance, 381, 416
 - death penalty, in case of—
 - arbitrary sentencing, 379
 - fundamental justice, breach of, whether, 374-80, 381-3
 - Model Treaty on Extradition (1990), 376
 - safe haven, risk, 377-8
 - ‘shock to conscience’, whether, 377, 379, 382-3, 420-1 - deportation, distinguished, 377
 - discretion, 422, 423
 - double criminality, 416
 - imposition of extraditing State’s views on another, 470 - judicial review, 378-9, 388, 418, 419-20, 423
 - procedure, 282-6, 387-8
 - reasons, whether necessary, 387-8 - reciprocity, 416, 422
 - reciprocity, need for, 416
 - safe haven, risk of creating, 380, 407-8, 422-3
 - security of extraditing State, 420

F

- Fair trial, 659-60
- See also under* International Covenant on Civil and Political Rights (1966)
 - burden of proof, 548
 - defence counsel, propriety of closing statement, 547-8, 628-38
 - delay in introducing war crimes legislation, 576
 - improper calling of evidence, 545-8, 577-8, 639-58
 - lack of clarity in charge, 575-6
- Federal State—
- comity within, 8
 - foreign relations—
 - inter-State relations, distinguished, 8
 - responsibility for—
 - federal government, 7-8

- Foreign relations—
 - constitutional conformity, need for, 267
 - federal State—
 - inter-State relations, distinguished, 8
 - responsibility, 7-8
 - justiciability, 178-9
 - right of suit to enforce laws and policies relating to, 4-5, 11-12
- France—
 - Constitution (1958)—
 - amendment—
 - sovereignty, limitations, 189
 - Article 54—
 - constitutional review of treaty, 183, 184, 185
 - Article 60 (referenda), 190
 - Article 88 (amendment consequent on Maastricht Treaty), 185-6, 187-8
 - Constitutional Council—
 - res judicata*, 183, 184, 187
 - task—
 - constitutional review of treaties, exclusive role, 189
 - constitutional review—
 - referenda, 190
 - treaties. *See* treaties, constitutional review *below*
 - European Union Treaty (Maastricht) (1992)—
 - constitutional amendment, need for—
 - economic and monetary union (EMU), 186-7, 189
 - freedom of movement, 188
 - voting rights for non-nationals, 185-6
 - Maastricht Treaty (1992). *See* European Union Treaty (Maastricht) (1992)
 - sovereignty—
 - constitutional amendment, limitations on, 189
 - treaties—
 - constitutional review—
 - absence of ratification by another signatory, relevance, 183-5
 - before legislative approval, admissibility, 184
 - expert opinion on international issues, need for, 183, 185
- Freedom from discrimination—
 - extradition as instrument of, 454, 455-7, 459, 472
 - extraterritorial legislation, whether, 577
- Fundamental justice—
 - See also* Fundamental rights and individual human rights
 - balance of interests, 375, 379
 - war crimes—
 - retroactive/external jurisdiction, and, 572-7
- Fundamental rights—
 - See also* Fundamental justice and individual human rights
 - breach by Community institution—
 - national courts' role, 216
 - general guarantee, 216
 - common foreign and security policy (CFSP)—
 - effect, 217
 - complementary roles of ECJ and national courts, 216, 218-19
 - ECJ role, 216-17, 218-19
 - absence of European Union jurisdiction, 216-17

Fundamental rights (*cont.*)

- Maastricht Treaty (1992)—
 - effect, 217
- national control of Community law, and, 209-10
- national courts' role, 216, 218-19
- protection—
 - ECJ role—
 - absence of European Union jurisdiction, 216-17
- territorial scope, expansion, 215-16

G

Germany, Federal Republic (FRG)—

- Basic Law (*GG*)—
 - Article 23(1) (amended), 206
 - Article 23 (amended), 206, 214, 219, 228, 243, 245
 - Article 38—
 - Maastricht Treaty (1992), compatibility, 208-9, 213-14, 219, 220-2
 - Article 52 (amended), 206
 - Article 79(3)—
 - entrenched, 212, 220, 221-2
 - Article 88 (*Bundesbank*) (amended), 206, 215
 - Article 100(1), 193
 - entrenched provisions—
 - amendment, 210-11, 212, 219
 - referendum, and, 220
 - right to remedy/resist if endangered, 210, 212, 220
- common foreign and security policy (CFSP)—
 - fundamental rights—
 - effect, 217
- constitutional review—
 - direct and current violation of constitutional right, 213
 - European Union, amendments, 226
 - requirements—
 - judgment dependent on validity of norm, 193
 - treaties. *See* treaties, constitutional review *below*
- democratic legitimacy. *See under* EC, transfer of powers to *above*
- EC—
 - democratic deficit—
 - European basis of politics, and, 210, 219
 - lack of EC legislature, 209, 211-12, 223, 224
 - national parliaments, role, 209, 223, 228-9, 245
 - transparency of decision-making, need for, 223-4
 - Kompetenz/Kompetenz*, 229-35
 - proportionality—
 - obligation to observe, 245
 - transfer of powers to—
 - constitutionality, 211-12
 - democratic legitimacy, 213-15, 221-6
 - limited and specific, 221, 225-6, 229-30, 243
- See also* *Kompetenz/Kompetenz above*
 - national identities, preservation of, 221, 245-6
 - national spheres of activity, need to retain, 224-5, 241
 - parliamentary powers, 208-9
 - rule of law, subject to, 194

- separation of powers, and, 211
- sovereignty, effect on, 225, 228
- treaty, need for, 230, 243
- EC law—
 - conflict with national law—
 - national courts' responsibility to resolve, 195
 - non-application of national law, 194
 - national courts' role—
 - review of EC law, 194
 - primacy—
 - rule part of national law, 194
 - secondary EC law, 195
 - unwritten rule of primary EC law, 194
 - right to invoke before national courts, 195
- EC law, direct effect—
 - directive—
 - 76/207 (night work), 194-5
 - requirements—
 - no need for further intervention, 195
 - unconditional and precise, 194, 195
- ECJ—
 - fundamental rights, protection, 216
 - jurisdiction—
 - under international conventions, ratification, need for, 218
- economic and monetary union (EMU)—
 - automaticity, 238
 - Bundestag/Bundesrat* resolutions (December 1992), 207
 - community of stability, as, 235, 238-40
 - convergence criteria, 236-8
 - watering-down, protection against, 237-8
 - democratic deficit, 214-15
 - European Central Bank—
 - commitment to stability, and, 237, 239-40
 - independence, 240-3
 - Member States' willingness, dependent on, 236, 238
 - political union, inevitable, whether, 240-1
 - reversibility of European Union, and, 212
 - separable, whether, 240
- EEC Treaty (1957)—
 - exercise of transferred power and extension, distinguished, 243
 - interpretation—
 - competence to perfect Treaty, 243
 - effectiveness, 243
- European Parliament—
 - democratic legitimacy—
 - uniform electoral law, need for, 224
 - legislature, whether, 211-12
- European Union—
 - amendments/extension—
 - binding, whether, 226, 231
 - constitutional review, 226
 - Member State approval, need for, 235
 - non-application, 226, 231
 - procedure, 235

Germany, Federal Republic (*cont.*)

- ratification, need for, 228
- authority derived from Member States, 228
- reversibility—
- EMU, and, 212
- status—
- economic community, as, 227
- State, whether, 226
- union of States, 227-8
- subsidiarity, 243-5
- binding principle, 227
- ECJ to monitor, 244
- limitation of powers, as, 244

European Union Treaty (Maastricht) (1992)—

- constitutionality—
- democratic deficit, 209

See also under EC above

- European Union provisions, 219-20
- fundamental rights. *See below*
- Kompetenz/Kompetenz*, 208-9
- Länder*, infringement of powers, 211
- voting rights for non-nationals, 211, 220
- democratic deficit—
- See also under EC above*
- economic and monetary union (EMU), 214-15
- EC powers, extension of, 214-15
- economic and monetary union (EMU). *See above*
- fundamental rights. *See above*
- intergovernmental cooperation—
- conversion to supranational competence, treaty amendment, need for, 218
- justice and home affairs. *See below*
- justice and home affairs—
- European Human Rights Convention (1950), and, 218
- Geneva Convention on the Status of Refugees (1951), 218
- referendum—
- right to, 212
- sovereignty, threat to, 212

fundamental rights—

- breach by Community institution—
- national courts' role, 216
- common foreign and security policy (CFSP)—
- effect, 217
- complementary roles of ECJ and national courts, 216, 218-19
- ECJ role, 216-17, 218-19
- absence of European Union jurisdiction, 216-17
- EMU—
- German Mark, loss of right to, 210, 215
- Maastricht Treaty (1992)—
- effect, 217
- national control of Community law, and, 209-10
- national courts' role, 216, 218-19
- territorial scope, expansion, 215-16

Länder—

- Maastricht Treaty (1992) as infringement of powers, 211

INDEX

679

- Maastricht Treaty (1992). *See* European Union Treaty (Maastricht) (1992)
 political union—
 —EMU, and, 240-1
 proportionality—
 —EC, obligation to observe, 245
 referendum, right to—
 —entrenched provisions of Constitution, and, 220
 —European Union Treaty (Maastricht) (1992), 212
 separation of powers—
 —transfer of powers to EC, and, 211
 sovereignty—
 —Maastricht Treaty (1992)—
 —threat to, 212
 —transfer of powers to Community. *See* EC, transfer of powers to *above*

H

- Human rights. *See* European Convention on Human Rights (1950); Fundamental justice; Fundamental rights; International Covenant on Civil and Political Rights (1966) *and* individual rights

I

- India—
 death penalty—
 —delay in carrying out, relevance, 352-3
 Inhuman or degrading treatment—
 See also International Covenant on Civil and Political Rights (1966); *under* European Convention on Human Rights (1950)
 death penalty, 381, 398-402, 407
 —method of execution, relevance, 379-80
 ‘death row’, 379-80
 lesser penalty to prevail, 576
 proportionality, 396-7, 399, 408
 Inhuman or degrading treatment, whether—
 death penalty. *See under* Death penalty; European Convention on Human Rights (1950); International Covenant on Civil and Political Rights (1966)
 Inter-American Commission on Human Rights—
 binding effect—
 —‘weight and respect’, 347
 recommendations—
 —binding effect. *See above*
 Interim measures—
 See also under United Nations Human Rights Committee (UNHRC)
 effective remedy before national authority—
 —non-availability against Crown, relevance, 317
 International Covenant on Civil and Political Rights (1966)—
 See also European Convention on Human Rights (1950); United Nations Human Rights Committee (UNHRC)
 applicability—
 —*See also* State responsibility *below*
 —persons within jurisdiction of State party, 486
 bilateral agreements—
 —consistency with Covenant, need for, 445, 500

International Covenant on Civil and Political Rights (*cont.*)

death penalty—

- in accordance with the law, 367, 368-9
- excluded, whether, 334, 434, 445-6, 447, 501-4, 511
- inhuman or degrading treatment. *See below*
- obligation not to reintroduce—
 - extradition as instrument for, 457, 458-9, 471, 504-5, 517-18, 519
 - Second Optional Protocol (1989), 394-5, 445, 446
- violations of Covenant as impediment, 334, 367, 368-70

discrimination—

- extradition as instrument of, 454, 455-7, 459, 472, 518

expulsion—

- in accordance with the law, 464-5

extradition—

- in accordance with the law, 464-5
- admissibility, 433
- arbitrary, 447
- conditions in receiving State, relevance, 512-13
- covered by Covenant, whether, 448-50, 464-5, 486, 514-15
- death penalty, in case of, 444-8
 - assurances that death penalty will not be carried out, need for, 446-7, 451, 468-71, 502-3, 506, 516
- equality of treatment, 454, 455-7
- extradition agreement obligation, 446, 453-4
- discretion, 446-7, 468
 - in case of death penalty, 453
- expulsion, distinguished, 434, 465, 514-15
- abolition of death penalty in extraditing State, relevance, 502
- fair trial, relevance, 447
- safe haven, risk of creating, 447, 519 n. 10

fair trial—

- death sentence cases—
 - arbitrariness, 370
 - special relevance, whether, 369-70
- failure to call witnesses, 332, 366
- inadequate time to prepare case, 366
- legal aid, 365, 368
- legal representation, right to—
 - death sentence cases, 366-7
 - nominated by State, 332-3, 366
- right to be present, 366-7

inhuman or degrading treatment—

- burden of proof, 510
- death penalty—
 - method, relevance, 379-80, 450-1, 503-4, 505, 506-7, 509-12, 513-14, 518, 519
- death row, 447-8
- delay in notification of stay of execution, 344
- general principle of international law, 510
- prolonged judicial proceedings—
 - death penalty, in case of, 334, 367-8, 434
- uniform standard, absence, 510

interpretation—

- guidelines—
 - object and purpose, 368, 369, 451

- ordinary meaning, 368
- phrases—
 - ‘least possible physical and mental suffering’, 503-4, 509-12, 513-14
 - ‘victim’. *See* United Nations Human Rights Committee (UNHRC), victim
- primacy, 446, 453-4
- prompt trial—
 - delay due to authorities’ oversight, 333-4
- remedies—
 - commutation of death sentence, 334
 - release from detention, 368
 - State representations to avoid death penalty, 504, 506
- retroactive legislation—
 - act criminal according to general principles of law at time committed, 574-5
- right to life—
 - death penalty, and, 451, 454-5, 516-17
 - extradition in death penalty cases, 460
 - delay in carrying out death penalty, and, 367
 - derogations, possibility, 451-3, 454-5
- State responsibility—
 - acts outside its jurisdiction, 433
 - defence of conditions in third State, 512-13
 - foreseeable result of own action, 445, 465-8, 470-1, 486, 500-1, 504, 507-8, 509, 516
 - hypothetical events, 502
- travaux préparatoires*—
 - death sentence, 368-70, 451
- International law—
 - extradition—
 - death penalty, in case of—
 - assurances that death penalty will not be carried out, need for, 435
 - general principle of—
 - inhuman or degrading treatment, 510
 - general principles of—
 - exhaustion of local remedies—
 - effective remedy, need for, 331
 - matter of law for judge, 557, 571

J

Jamaica—

Constitution—

- Section 17(1) (torture/inhuman or degrading treatment)—
 - delay in carrying out death sentence, whether, 347-56
- Section 25 (fair trial), 332
- Section 25 (rights of individual), 332, 354

death penalty—

- delay in execution—
 - breach of Constitution, whether, 344-5, 347-56
 - Inter-American Commission on Human Rights, appeal to, 355-6
 - UNHRC, appeal to, 355-6
- inhuman or degrading treatment, whether, 350-6
- appeals procedure, relevance, 350-5
- fault of complainant, relevance, 350, 353-4
- reference to Privy Council, duty of promptness, 340-2, 343

Jamaica (*cont.*)

inhuman or degrading treatment, whether—

—death penalty. *See above*

—‘death row’, 350

—remedies. *See below*

remedies—

—commutation of death sentence, 354-5, 356

Judicial review—

effective remedy before national authority, 316-17

extradition, 378-9, 388, 418, 419-20, 423

legality of government actions, limited to, 169

Jurisdiction—

actual commission of war crime/crime against humanity as condition precedent, 528, 531, 564-5

—jury responsibility to determine, whether, 553-6, 561-6

—whether to be established pre-trial or pre-judgment, 566-71

admiralty—

—aliens, between, 19 n. 6

aliens—

—between—

—admiralty jurisdiction, 19 n. 6

‘deemed to have been committed’ within territory, 533-6, 614-20

—creation of new offence, distinguished, 570-1

—double criminality requirement, 535-7, 617-20

—provisional ‘deeming’, 568-9

extraterritorial—

—fundamental rights, breach, whether, 573-4

—offences against ship of forum State, 532

—piracy, 532

jury role in determining, 553-7, 561-6, 601-2, 619-26

—international and domestic elements, distinguishable, whether, 623-6

nexus, 34-5, 90-2

—agent or instrumentality of foreign State, 90-2

—constituent State—

—whether limited to, 42, 92

—duty, 134-5

—federal State, within, 42, 92

—issue of negotiable promissory notes, 115-17

—issue of ticket in forum State, 46-7

—legal element of claim, need for, 133

—representation by agent, 146

—transaction as a whole, 18-19

personal, 117

—agent or instrumentality of foreign State, 42-3, 91-2

—due process requirements as basis, 146-7

—nexus. *See above*

previous visit by ship on which death occurred, 164-6

territorial, 531-2, 610-14

—‘deemed to have been committed’ within territory—

—double criminality requirement. *See above*

—presumption of territoriality. *See* ‘deemed to have been committed’ within territory *above*

Just satisfaction—

judgment as, 318

INDEX

683

Justiciability—
 foreign relations, 178-9

L

Legislation—
 challenge to—
 —burden of proof, 397
 extraterritorial, 379, 381, 388, 403, 417, 418, 423
 retroactive—
 —International Covenant on Civil and Political Rights (1966)—
 —act criminal according to general principles of law at time committed, 574-5
 —retrospective, distinguished, 574
 Legislation, interpretation—
 aids—
 —legislative history, 174-5
 guidelines—
 —intention of legislature—
 —changing practice, 396

M

Maastricht Treaty (1992). *See* European Union Treaty (Maastricht) (1992)

N

Nationals—
 treatment as, possibility, 268-9
 Natural justice—
 extradition procedure, and, 388

P

Political union—
 EMU, and, 240-1
 Proportionality—
 EC, obligation to observe, 245
 inhuman or degrading treatment, 396-7

R

Recognition, government—
 act of State, and, 65
 conditional, 5-6
 responsibility—
 —executive, 5-7
 Referendum—
 right to—
 —entrenched provisions of Constitution, and, 220
 Refugees, Geneva Convention on the Status of (1951) and Protocol (1967)—
 European Union—
 —justice and home affairs, compliance with, 218
 Regions—
 Maastricht Treaty (1992) as infringement of powers, 211

S

Separation of powers—
 transfer of powers to EC, and, 211

- Service of process—
 - abroad, 150
- Sovereignty—
 - constitutional amendment, limitations on, 189
 - Maastricht Treaty (1992)—
 - threat to, 212
 - right of non-nationals to stand in municipal elections, and, 265
 - transfer of powers to Community. *See* European Community (EC), transfer of powers to
- Spain—
 - Constitution—
 - Article 13(2) (voting rights)—
 - compatibility with Maastricht Treaty (1992), 254-70
 - text, 252
 - Article 93 (conclusion of treaties)—
 - basis for extension to non-national of right to stand as candidate in municipal elections, 266
 - breach of Community law, and, 248-9
 - indirect amendment of Constitution, scope for, 267-8
 - text, 247 n. 1
 - Article 95 (treaties: constitutional review)—
 - text, 252 n. 1
 - Article 96(1) (treaties as part of law)—
 - constitutional status of EC law, 249
 - text, 247 n. 2
 - primacy, 260
 - constitutional review—
 - acts of Community, 250-1
 - acts of national public authorities, limited to, 250-1
 - declaration of constitutional compatibility of treaty—
 - binding effect, 260-1
 - legal nature, 261
 - procedure, 259-61
- EC—
 - transfer of powers to—
 - extension of rights to non-nationals, distinguished, 266, 268
- EC law—
 - compatibility of national law—
 - trial court, sole competence to determine, 249
 - conflict with national law—
 - constitutional issue, whether, 248-9, 250-1
 - subsequent legislation, 248-9
 - constitutional review, possibility, 251
 - constitutional status, 248-9
 - national courts' role—
 - compatibility of national law, 249
 - to ensure effectiveness of Community law, 249
 - national law, as, 248
 - primacy—
 - national courts' role, limitation on, 249
- European citizenship—
 - national identities, preservation of, 263
 - voting rights, 263

INDEX

685

- European Union Treaty (Maastricht) (1992)—
 - constitutional amendment, need for—
 - right to stand as candidate in municipal elections, 263-70
 - voting rights for non-nationals, 263-4
 - right to stand as candidate in municipal elections—
 - national sovereignty, compatibility with, 265
- foreign relations—
 - constitutional conformity, need for, 267
- nationals—
 - treatment as, possibility, 268-9
- sovereignty—
 - right of non-nationals to stand in municipal elections, and, 265
- treaties—
 - constitutional amendment, need for, 260, 261, 262-3, 269, 270
 - constitutional review—
 - before legislative approval, 260
 - implementing legislation, 260
 - municipal law, and—
 - aid to interpretation, as, 251
 - conflict, constitutional issue, whether, 249
 - constitutional status, 248-9, 250-1
- State entity—
 - ‘agent or instrumentality of foreign State’—
 - Taiwan, 66
- critical date for determining status—
 - date of action, 143
- debts—
 - liability for each other’s, 54
- government department, 16, 23
- independence—
 - attribution of activities of other State entities, 92
 - fraud or injustice, 54
 - presumption of, 53-4, 91-2
 - test—
 - control, 53
 - ownership, 53, 54
- majority-owned State corporation, 120-2, 132
- national airline, 44-6, 49-54, 71-2
- official newspaper, 84
- State immunity, 16, 22-6, 49-4
- State immunity, execution—
 - diplomatic premises—
 - immovable property exception, whether, 49
 - purpose—
 - burden of proof, 12
 - commercial—
 - acquisition and use distinguished, 9-12
- waiver—
 - ‘and its agencies’—
 - entity, distinguished, 52-4
- State immunity, jurisdiction—
 - appearance required—
 - reasonable misunderstanding, 85-8

State immunity, jurisdiction (*cont.*)

basis—

—protection of prerogative, 108

burden of proof, 41-2, 144-5, 156-7, 163-4

commercial activities—

—acquisition and use, distinguished, 12-13

—definition, 18, 58

—deliberately unclear, 61

—development programme, development, 59

—direct effect in forum State, need for, 7

—export promotion, 59-61

—jurisdictional element, as, 155, 158-9

—legal suit, 35

—libel in official newspaper, 83-4, 90 n. 10

—loan agreement, 42

—nexus. *See below*

—private person test, 42, 121, 145

—transportation of people for public purpose, 121-2

consular acts, 128-31

counterclaim—

—cross-claim, distinguished, 17, 20-1

criminal proceedings, 153

development of concept, 8-9

direct effect in forum State, need for, 17

—*See also* Jurisdiction, nexus

—contractual payment, 42, 89-90, 97

—crash of foreign-owned plane abroad, 23-5

—loss of aircraft, 25

—suffering of pilot's family, 24-5

—debt, situs, 98-100

—destination of aircraft, 74

—financial loss, 89

—nationality, relevance, 89

—foreseeable, 88, 97 n. 2, 146

—loss and suffering of families of deceased, 23-5, 75

—mortgagee, loss of value of pledge, 35-6

—nationality of company suffering loss, relevance, 97

—payment into bank account, 98-100

—substantial, 88, 97 n. 2

discretionary act, 108

—planning/operations distinction, 129

employment contract, 57-61

—main terms as determining factor, 59

—nationality of employee, relevance, 60 n. 7

evidence of—

—discretion as to, 144

executive statement—

—to be accepted unless manifestly unreasonable, 10

interlocutory review, admissibility, 73

nature or purpose of transaction—

—act rather than actor, 107

—determining factor, 35, 60-1, 83, 121-2

—distinction, whether, 58-9

—mixed—

INDEX

687

- essential elements to determine, 68
 - nexus. *See* Jurisdiction, nexus
 - officials, 106-9
 - illegality of act, 108, 129-31
 - private acts—
 - impossibility in certain cases, 106-7, 108
 - servicing of aircraft, 75
 - sovereign activity—
 - central bank's sale of currency, 59
 - government policy, involvement in, 60
 - State entity: *qv*
 - treaty exception—
 - treaty of establishment, 31-2
 - waiver—
 - arbitration award, judgment confirming, 33
 - Civil Aviation Board permit, provision, 45-6, 74
 - implied—
 - legal proceedings, 114-15
 - waiver of jurisdiction in third State, 32
 - judgment in forum court, invocation as defence, 33-4
 - Warsaw Convention (1955), 74
 - State practice—
 - death penalty, 308-9
 - State responsibility—
 - See also* International Covenant on Civil and Political Rights (1966); *under* European Convention on Human Rights (1950)
 - acts outside its jurisdiction—
 - death penalty, 402-7, 417
 - extradition, following upon, 374
 - respect for other States, 417-18
- T
- Taiwan—
 - State immunity, entitlement, 66-7
 - status, 65, 66
 - Treaties—
 - constitutional amendment, need for, 260, 261, 262-3, 269, 270
 - constitutional review—
 - absence of ratification by another signatory, relevance, 183-5
 - before legislative approval; 184
 - expert opinion on international issues, need for, 183, 185
 - implementing legislation, 260
 - municipal law, and—
 - aid to interpretation, as, 251
 - conflict, constitutional issue, whether, 249
 - constitutional amendment, need for. *See above*
 - constitutional status, 248-9, 250-1
 - part of the law, 8
 - obligations—
 - consistency with multilateral convention, 445
 - protocols—
 - part of, whether—
 - annexation to another treaty, relevance, 172-3
 - parties' intention, 172-5

Treaties (*cont.*)

- treaty-making power—
 - limitation, 176
 - prerogative, 175-6
- validity—
 - presumption of official regularity, 6-7

Treaty interpretation—

- See also under* individual treaties

U

United Kingdom—

- EC law—
 - amendment—
 - Parliamentary approval, need for, 175-7
- effective remedy before national authority—
 - judicial review, 316-17
- European Union Treaty (Maastricht) (1992)—
 - common foreign and security policy (CFSP)—
 - transfer of prerogative powers, whether, 177-9
 - Social Policy Protocol—
 - indirect amendment of national law, whether, 176-7
 - part of treaty, whether, 172-5
- extradition—
 - procedure, 282-6
- foreign relations—
 - justiciability, 178-9
- interim measures—
 - effective remedy before national authority—
 - non-availability against Crown, relevance, 317
- judicial review—
 - effective remedy before national authority, 316-17
 - effective remedy before national authority, whether, 316-17
 - legality of government actions, limited to, 169
- justiciability—
 - foreign relations, 178-9
- law of—
 - European Parliamentary Elections Act 1978—
 - Section 6, 171
- legislation, interpretation—
 - aids—
 - legislative history, 174-5
- Maastricht Treaty (1992). *See* European Union Treaty (Maastricht) (1992)
- treaties—
 - protocols—
 - part of, whether, 172-5
 - treaty-making power—
 - limitation, 176
 - prerogative, 175-6
- United Nations Human Rights Committee (UNHRC)—
 - admissibility—
 - ‘being examined under another procedure of international settlement or settlement’, 362-3
 - Inter-American Commission on Human Rights, 329

- exhaustion of local remedies. *See below*
- victim. *See below*
- binding effect—
 - ‘weight and respect’, 347
- effective remedy, need for, 365-6
 - absence of legal aid, relevance, 365
 - constitutional motion bound to fail, 331-2, 355-6
 - general principle of international law, 331, 366
- evidence—
 - absence of opportunity to rebut, 346
- exhaustion of local remedies, 329, 363, 499-500
 - effective remedy, need for. *See above*
- interim measures—
 - request to State to take—
 - stay of extradition proceedings, 448, 471-2, 487, 504, 518
 - suspension of death sentence, 325, 326, 360
- jurisdiction—
 - ratione loci*, 433, 486
 - where State not party to Optional Protocol, 501
 - ratione materiae*, 433, 444, 486
 - review of national courts—
 - evaluation of facts, 356, 434-5, 501
 - instructions to jury, 366
- Rules of Procedure—
 - 86, 325, 326, 471-2, 487
 - 87, 329
 - 91, 325, 326, 360
 - 93(4), 435
- victim, 503, 508-9
 - joinder to merits, 487, 499, 500, 508
 - possible future events, 465-7
- views—
 - binding effect. *See above*
 - inadequacy of information, 460-4
 - misleading information, effect, 343, 345
- United States of America (USA)—
 - act of State—
 - basis—
 - foreign policy considerations. *See below*
 - Bernstein letter, 65-6
 - criterion—
 - acts by foreign State in own territory, 65, 108
 - foreign policy considerations, 65
 - recognition, relevance, 65
 - separation of powers, 108-9
 - admissibility—
 - forum non conveniens*, 147-8
 - applicable law—
 - choice of law—
 - federal law, 123
 - place of injury, 124
 - arrest—
 - illegal—
 - constitutional issue, whether, 107 n. 11

United States of America (*cont.*)Bernstein letter. *See under act of State above*

burden of proof—

—State immunity, execution—

—purpose, 12

—State immunity, jurisdiction, 41-2, 144-5, 156-7, 163-4

consular agent—

—functions—

—social, economic and political policy, grounded in, 128-9

diplomatic agent—

—functions—

—export promotion, 59-60

diplomatic premises—

—definition—

—residence of member of mission, 10

—‘used for purposes of maintaining a diplomatic or consular mission’. *See below*

—immunity—

—taxation, 3-12

—State immunity, and—

—action relating to immovable property, whether, 4, 9, 11-13

—‘used for purposes of maintaining a diplomatic or consular mission’—

—burden of proof, 12

diplomatic privileges and immunities—

—State, beneficiary, whether, 6

Federal Rules of Civil Procedure—

—Rule 60(b), 85-8

Federal Tort Claims Act (FTCA) 1938—

—Taiwan, application to, 66-7

foreign relations—

—inter-State relations, distinguished, 8

—responsibility for—

—federal government, 7-8

—right of suit to enforce laws and policies relating to, 4-5, 11-12

Foreign Sovereign Immunities Act (FSIA) 1976/82—

—28 USC 1603, 52-3

—28 USC 1603(d), 122

—28 USC 1603(e), 18, 34-5, 115-17

—28 USC 1330(b), 90-1

—28 USC 1605(a)(1), 13, 17, 18-20, 32-4, 114

—28 USC 1605(a)(2), 35-6, 45-7, 75, 82-3, 88-9, 96-7, 100, 115, 132-3, 145-6

—28 USC 1605(a)(5), 128

—28 USC 1607(b), 17, 20-1

—28 USC 1609, 8-11

—28 USC 1610, 31-2

—28 USC 1610(a)(4), 9-11, 13

—28 USC 1610(b), 52-4

—applicability—

—natural persons, 107

—exceptions—

—discretionary act. *See State immunity, jurisdiction, discretionary act below*

—legislative history—

—burden of proof, 41

—‘commercial activity’, 58

—presumption of independence of State entities, 54

Cambridge University Press

978-0-521-47460-3 - International Law Reports, Volume 98

Edited by E. Lauterpacht and C. J. Greenwood

Index

[More information](#)

INDEX

691

- ‘substantial and foreseeable’, 97 n. 2, 165
- waiver, 114-15
- phrases—
 - ‘based upon’, 133-4, 155-8
 - ‘carried on in the US’, 34-5
 - ‘direct effect’. *See* State immunity, jurisdiction, direct effect in forum State, need for *below*
 - ‘doing business’, 145
 - ‘political subdivision’, 108 n. 13
- purpose—
 - codification of restrictive immunity doctrine, 83
 - comity, 36
 - partial provision of remedy, 54
 - sole basis of jurisdiction over foreign State, 30, 66-7, 73-4, 114, 152-3
- forum—
 - plaintiff’s choice to be respected, 147-8
- jurisdiction—
 - admiralty—
 - aliens, between, 19 n. 6
 - aliens—
 - between, 19 n. 6
 - diversity—
 - critical date, 143
 - nexus—
 - agent or instrumentality of foreign State, 90-2
 - constituent State—
- whether limited to, 42, 92
 - duty, 134-5
 - employment contract, 135
 - issue of negotiable promissory notes, 115-17
 - issue of ticket in forum State, 46-7, 122-3
 - legal element of claim, need for, 133
 - representation by agent, 146, 155
 - transaction as a whole, 18-19
 - personal, 117
 - agent or instrumentality of foreign State, 42-3, 91-2
 - due process requirements as basis, 146-7
 - nexus. *See above*
 - previous visit by ship on which death occurred, 164-6
- law of—
 - Diplomatic Relations Act 1978—
 - Vienna Convention on Diplomatic Relations (1961), implementation of, 6
 - Racketeering Influenced and Corrupt Organizations Act (RICO) 1962, 149-53
 - mail/wire fraud, 151-2
 - pattern of activity, need for, 150-1
 - service of process outside US, 150
 - State immunity, jurisdiction, and, 152-3
 - Taiwan Relations Act 1982, 65, 66
- recognition, government—
 - act of State, and, 65
 - conditional, 5-6
 - responsibility—
 - executive, 5-7

United States of America (*cont.*)

Restatement of Conflict of Laws (Second)—

—Section 175 (place of injury), 124

service of process—

—abroad, 150

State entity—

—‘agent or instrumentality of foreign State’—

—President’s power to determine, 66

—Taiwan, 66

—critical date for determining status—

—date of action, 143

—debts—

—liability for each other’s, 54

—government department, 16, 23

—independence—

—attribution of activities of other State entities, 92

—fraud or injustice, 54

—presumption of, 53-4, 91-2

—test, 53, 54

—majority-owned State corporation, 120-2, 132

—national airline, 44-6, 49-54, 71-2

—official newspaper, 84

—wholly-owned State corporation, 30

State immunity, execution—

—assets—

—purpose. *See below*

—diplomatic premises—

—immovable property exception, whether, 49

—purpose—

—acquisition and use distinguished, 9-12

—burden of proof, 12

—waiver—

—‘and its agencies’, 52-4

State immunity, jurisdiction, 34-5

—appearance required—

—reasonable misunderstanding, 85-8

—basis—

—protection of prerogative, 108

—burden of proof, 41-2, 144-5, 156-7, 163-4

—commercial activities—

—acquisition and use, distinguished, 12-13

—definition, 18, 58, 61

—development programme, development, 59

—export promotion, 59-61

—investment promotion, 68

—jurisdictional element, as, 155

—legal suit, 35

—libel in official newspaper, 83-4

—loan agreement, 42

—nexus, need for. *See jurisdiction, nexus above*

—private person test, 42, 121, 145

—regular course of commercial conduct, 18, 146

—substantial contact with non-forum State, need for. *See jurisdiction, nexus above*

—transportation of people for public purpose, 121-2

- consular acts, 128-31
- counterclaim—
 - cross-claim, distinguished, 17, 20-1
- criminal proceedings, 153
- development of concept, 8-9, 57
- direct effect in forum State, need for, 17
- contractual payment, 42, 89-90, 97
- crash of foreign-owned plane abroad, 23-5
- debt, situs, 98-100
- destination of aircraft, 74
- financial loss, 89
- foreseeable, 88, 97 n. 2, 146
- loss and suffering of families of deceased, 23-5, 75
- mortgagee, loss of value of pledge, 35-6
- nationality of company suffering loss, relevance, 97
- payment into bank account, 98-100
- substantial, 88, 97 n. 2
- discretionary act, 108, 128-30
- planning/operations distinction, 129
- employment contract, 57-61
 - main terms as determining factor, 59
 - nationality of employee, relevance, 60 n. 7
- evidence of—
 - discretion as to, 144
- exceptions—
 - commercial activities. *See below*
 - treaty. *See treaty exception below*
- executive statement—
 - to be accepted unless manifestly unreasonable, 10
- interlocutory review, admissibility, 73
- nature or purpose of transaction—
 - act rather than actor, 107
 - determining factor, 35, 60-1, 83, 121-2
 - distinction, whether, 58-9
 - mixed, 68
- nexus, need for—
 - See jurisdiction, nexus above*
- officials, 106-9
 - consular acts. *See above*
 - illegality of act, 108, 129-31
- presumption of, 164
- private acts—
 - impossibility in certain cases, 106-7, 108
- servicing of aircraft, 75
- sovereign activity—
 - central bank's sale of currency, 59
 - government policy, involvement in, 60
- State entity. *See above*
- substantial contact with non-forum State, need for. *See jurisdiction, nexus above*
- treaty exception, 31-2
- waiver—
 - arbitration award, judgment confirming, 33
 - Civil Aviation Board permit, provision, 45-6, 74
- implied—

- United States of America (*cont.*)
 - legal proceedings, 114-15
 - waiver of jurisdiction in third State, 32
 - judgment in forum court, invocation as defence, 33-4
 - Warsaw Convention (1955), 74
 - State responsibility—
 - State entity—
 - preliminary question, whether, 42-3
 - Taiwan—
 - State immunity, entitlement, 66-7
 - status, 65, 66
 - treaties—
 - municipal law—
 - part of the law, 8
 - validity—
 - presumption of official regularity, 6-7

W

- War crimes—
 - burden of proof—
 - knowledge that act constituted war crime or crime against humanity, 542, 596-7
 - defence—
 - lawful authority, 597-602
 - See also* superior orders *below*
 - burden of proof, 597
 - fault, need for, 595
 - See also* knowledge that act a war crime or crime against humanity, relevance *below*
 - knowledge that act a war crime or crime against humanity, relevance, 536, 541, 542-6, 558-61, 594, 627-8
 - burden of proof, 542, 558-61, 596-7
 - retroactivity, 564-5
 - breach of fundamental rights, whether, 574-5
 - Canada, in, 564-5
 - retrospectivity, distinguished, 574
 - retrospectivity. *See* retroactivity *above*
 - superior orders, 598-9
 - burden of proof, 599
 - See also* defence, lawful authority *above*
 - whether—
 - question of fact for jury, 528-9, 552-7
 - question of law for judge, 536, 539-41, 570
- Warsaw Convention on International Carriage by Air (1929) and Hague Protocol (1955)—
 - State immunity—
 - waiver, 74
- Words and phrases—
 - forum non conveniens*, 147-8
 - in dubio pro reo*, 467