

INDEX

- act of will 18, 28, 88–90, 110, 116–7
actus reus condition *see* *Tatbestand*
 administrative law/legal scholarship 5–6, 65, 175–8, 211–2, 225
 analogy/analogical reasoning 32, 34, 52, 74, 131, 203–4, 210, 219, 258, 299, 301, 306, 322
 applicable law 43, 65, 88, 95, 98–101, 123–4, 126–7, 132
 application of the law 30, 73, 78–96, 99–100, 103, 117, 133, 139, 150, 160, 262, 266, 283, 291–2
 applicative construction of law’s meaning *see* interpretation_B
argumentum ab inconvenienti 167, 183, 188
 authority, epistemic 69, 152, 170
 balancing 5, 76, 81, 97, 125, 168–85, 190, 221, 223, 237, 241–2, 266 *see also* proportionality
 basic rights *see* human rights
 Baxter paradox *see* *opinio iuris conventionalis* and *consuetudinalis*
 belief 18, 27–31, 40, 59, 74–5 *see also* *opinio iuris*
 case-by-case analysis 175, 184, 252, 266
 case-law 3–6, 11, 43–67, 124, 134, 143–5, 155–9, 168, 170, 172–4, 185, 193–5, 198, 215–6, 220–1, 223, 231, 233, 243, 249, 251, 262–325
 civil law tradition 24–5, 32–6, 50–4, 102, 119
 coherence of law/argument/meaning 54–5, 68, 104, 111, 113–4, 117–20, 123, 126, 128, 131, 138, 142, 149, 158, 202, 205, 207, 209, 220
 common law tradition 17, 35, 44–5, 49, 50, 52–4, 136, 262–3
 compensation *see* expropriation
 provision, compensation condition
 as secondary obligation *see* selection argument
 concretisation of law 55–6, 80, 82, 90, 93, 100, 105–6, 110, 132, 134, 142, 152, 154–5, 160, 200, 205, 210
 conformity with external rules 111, 113–4, 117, 120, 123–4, 192, 202
 constitutional law/legal scholarship 5–6, 93–5, 129, 153–4, 175–8, 203, 219, 242
 constitutional rights *see* human rights
 contracting out 3, 17, 30–9, 112, 123–6, 132, 198, 200, 205–9, 256
 custom(s) *see* customary (international) law; state practice
 customary (international) law 11–42, 57–63, 70–9, 191–221
 is text *see* *lex (non) scripta*
 elements of 14–5, 17–8, 20–32, 39, 61–2, 72–5
 evidence/proofs of 14–22, 26–31, 37–41, 57–63, 72, 74–5
 default argument/position/standard 15, 33, 48, 199–200, 206–7, 216, 238, 250, 269, 314, 322
 deference 53, 55, 73, 175, 177–8, 239, 241
 derogation 5, 16–7, 37, 40, 84, 119, 123, 197, 208, 216, 308, 321 *see also* contracting out
 doubling argument 228–49, 260

- empirical method/research 43, 48,
 56–7, 67, 142, 156, 158, 177, 181
- empiricism, default 22–3, 69
- environment/environmental law
 113–4, 123, 166, 174, 184, 222, 227,
 232, 252, 260
- exception–rule dynamic 179, 192–209,
 221, 229–30, 236, 239, 250–1
- expropriation
 customary rule/norm 39–42, 57–63,
 105, 135, 191–221
- direct 40, 169, 174, 181, 189, 191, 210,
 213, 221–8, 231, 236, 246, 268, 278,
 295, 302–3
- intensity requirement/impact 186,
 252, 262, 267–97, 301–2, 304
- lawful–unlawful 176, 181, 208, 214,
 223, 230, 233–4, 236, 240, 242–9,
 254, 306–25
- legitimate purposes/objectives for 2,
 166, 170, 173–5, 177, 187, 196, 203,
 213, 222–3, 230, 252, 255, 258, 260
- object of 224, 267–8, 270–1, 277,
 281–2, 295–306
- partial 224, 226, 267, 271,
 294–306, 325
- permanence 268, 271–2, 286, 294
- regulatory 3, 141, 145, 157, 159,
 162–262, 289–90
- expropriation provision
 compensation condition 159–61,
 207, 228–49, 306–7, 310–1, 314,
 319–21, 323
- due process condition 160, 223, 231,
 241–2
- legality conditions 40, 153, 159–61,
 165, 167, 187, 191, 203, 208, 220,
 223, 227–49, 260–1, 267, 306, 311,
 319, 323
- process conditions 159–61, 228–49,
 260–1, 311, 315
- public purpose condition *see* public
 purpose
- structure of 1, 159–61, 186–262, 267,
 307, 318–25
- Type A/traditional 159–61, 181, 186–
 262, 264–7, 294–5, 303, 307, 319
- Type B 217, 250–60, 265–6
- factual importance 6, 42–3, 48–50,
 57–8, 98, 101, 142–3
- fragmentation of law 3, 11, 66, 68, 105,
 110, 112, 152–5, 209, 227, 265 *see*
also unity
- frame of possible meanings 95, 133,
 148–53, 185, 187, 191, 228, 243,
 249, 260, 262–7, 269, 302, 306,
 319–20, 323–4
- general principles of law 100, 110–1,
 176, 187, 191–5, 202–4, 218–20
- hermeneutic(s) 68, 70, 73, 79, 84, 89, 92,
 95–9, 104, 109, 141, 257
- hierarchy of norms *see* *Stufenbau*
 theory
- humanitarian law 12, 61
- human rights 12, 61, 112, 114, 170, 184,
 203–4, 219, 224, 242
- incorporation 13, 113, 123–4, 127–32,
 138, 191–2, 194, 198–208, 220,
 238–9, 254, 261
- intentions, party/common 114–7,
 120, 201
- interlinkage of doctrine and theory 3–6
- inter partes/inter se* abrogation *see*
 contracting out
- interpretation
 as a legal/judicial process 83–4, 86,
 91, 95–6, 105, 205
- interpretation_A 68–143, 149,
 204
- interpretation_B 68–143, 149–50,
 159–60, 201, 203–5
- pari materia* 106, 109, 134–9
- interpretation, rules of 70–79, 87, 111,
 113, 136–40, 172, 202–3, 235, 257
- customary 72–9, 110, 137–8, 202
- statutory 96, 99, 104
- Vienna Convention 69–79, 81, 92,
 96–104, 106–8, 110, 137, 139,
 141–2, 201, 321
- interpretative tools 68, 70, 79, 87–8,
 105–42, 203
- interpreter's perspective 81, 106–9, 132,
 139–40

- ius dispositivum*–*ius cogens* 17, 32–9,
 124, 126, 208–9
ius in rem–*ius in personam* 99–103, 300
- jurisprudence constante* 12, 50–4, 59
 jurisdiction of courts/tribunals 126–7,
 245, 267, 295–6, 300, 302–3
- language(s)
 ambiguity/vagueness/multivalence
 53, 55, 68, 70, 111–3, 128, 141, 151,
 186–7, 199, 220, 248, 263
 natural 6, 150, 263
- law
 change of 56, 80, 90–2, 141–2, 188,
 201, 204, 209, 221
 macro/micro structure 149, 153–4,
 159, 162, 171, 186, 189, 200, 206–7,
 210, 220–1, 228, 260
 making/creation 11, 17–9, 27, 33, 37,
 41, 59–61, 72, 87, 93, 125, 149, 151,
 201, 206, 221, 261, 263 *see also*
 norm, empowerment
lex (non) scripta 29, 72, 76, 137, 206, 322
lex specialis/generalis 12, 17, 32–9, 125,
 197, 207, 256, 306–24
- loss of
 (economic) use and enjoyment 169,
 270–1, 274–5, 279–81, 287, 290–
 1, 302
 use, management or control 165,
 267–8, 271, 280–5, 287–91
 value, profits or income 267–8, 271,
 273–6, 279–94, 304
- mainstream *see* orthodox international
 legal scholarship
- meaning
 ascertainment/construction 80, 82,
 91, 95, 122, 133 *see also*
 interpretation_A
 ascription/generation 91, 109, 136,
 138, 204 *see also* interpretation_B
 content 108–9, 121, 136, 138–9,
 150, 158
 ordinary and special 23, 113, 131,
 136, 138–40, 142, 168, 203,
 300
- meta-law/rules 47, 61, 122
 model treaties 41, 126, 136, 141, 163,
 181, 217, 250–9
- natural law doctrine 120, 198
 network of treaties 2–3, 6, 12–3, 28,
 30–3, 37–40
- New International Economic Order
 210, 214–7, 220
- non-discrimination 132, 160, 175, 179,
 183, 192, 223, 226, 230–4, 238–9,
 241, 246, 252, 255, 258–60
- norm
 conflict 5, 38, 119, 122, 165, 198, 205,
 208–9
 determinacy/indeterminacy/
 determinative of 6, 93, 103, 108,
 133, 142, 150, 160
 empowerment 18, 40, 63–6, 92, 97–8,
 100–1, 127, 264
 formulation 23, 29, 31–2, 41
 general–individual 6, 43–4, 50, 53,
 57, 62–7, 80, 82, 86, 90, 92–3, 101,
 106, 119, 135, 143–4, 152, 154–5,
 160, 210, 217, 262, 265, 325
 interaction 193, 198, 205–9, 221 *see*
also contracting out;
 incorporation; norm conflict
 specific–unspecific 3–5, 7, 45, 62, 65,
 86, 98, 120, 132, 136, 138–9, 142,
 152, 155, 160, 181, 197, 208, 210–1,
 215, 220–1, 239, 261–2, 325
 text 106, 120–1, 132–3
- normativist positivism *see* positivism,
 legal
- objective element *see* state practice
opinio iuris 11–42, 51, 57–62, 72–7, 192,
 214, 216–9, 256–7, 322
 Baxter Paradox 16, 28–32
conventionalis and *consuetudinalis*
 16, 28–32, 37–9, 256–7
- orthodox international legal
 scholarship 4–5, 11, 23, 31, 34, 45–
 6, 48, 57, 63–4, 69–70, 76, 78–87,
 92, 104, 107, 120, 123–4, 128, 130,
 134–5, 141–62, 173–5, 178, 190,
 200, 205, 207, 220–1, 269, 319, 324

- peer acceptance 108, 121, 124, 132, 136, 142, 204
- police powers doctrine 159, 164, 166–7, 171–83, 186–262, 264, 268–9, 292–3, 299
- political/policy arguments/reasons 2, 43, 55, 151, 159, 163, 167, 171–2, 177–8, 184, 187–8, 203, 228, 299
- positivism, legal 4, 6, 43, 67, 69, 118, 120, 144–61, 261
- practice *see* state practice
- pragmatic approach/method/level 5, 21, 27, 35, 56, 68, 97, 156–60, 184, 200–1, 205, 242–5, 248, 264–5, 324
- precedent
 binding/formal 45–9, 51–3, 134
 persuasive/de facto 50, 52–55, 142, 203
- proportionality analysis 5, 168, 172, 175–8, 183–4, 223, 231, 237, 241–2
see also balancing
- prospective prescribed behaviour 23, 62
- public purpose 160–1, 165–6, 175, 179, 181, 212, 222–41, 251, 259
- Pure Theory of Law 6, 63–5, 80, 87–96, 118, 146–52, 187, 264
- rational law, doctrine of 82, 110, 119–20
see also natural law
- ratione materiae/personae/temporis see*
 sphere of application/validity
- realism, legal 23, 54, 56, 67, 144, 154, 264
- reasoning, judicial/juridical 43, 50, 52–4, 58, 81, 87–8, 94, 97–8, 107, 121, 132, 135, 152, 177, 203, 294, 306
- Rechtsdogmatik see* scholarship, doctrinal
- regularity of behaviour 23, 29, 40–1, 61–2, 72, 77 *see also* state practice, *usus/usage*
- regulatory measure 141, 162, 166, 173–5, 183, 188, 192, 197, 225, 227, 230, 233, 241, 246, 250, 254–5, 258, 260
- renvoi* 112–5, 123, 128, 132–6, 164, 171, 191, 200–4, 238, 261, 299
- reparation 207, 244–9, 267, 306–25 *see also* state responsibility
- restitution 309–10, 312, 315–6, 323–4
- right to regulate 5, 112–3, 117, 164, 166–7, 171–5, 179–81, 186–262
- scholarship
 doctrinal 4–6, 22, 42, 57, 83, 120, 144–61, 170, 176, 184, 191, 264–6, 318
 new doctrinal 146, 151–6, 158, 160, 184, 264
- selection argument 228–49, 309, 311–2, 316–9
- semantics 139, 141, 157–8, 168–9
- socio-psychology/socio-linguistics 6, 94, 142, 157–8, 205
- sole effects doctrine 166, 170–1, 178–80, 186–7, 210, 222, 225, 228, 252, 269, 277
- sphere of application/validity 37, 39, 62, 66, 99, 102–3, 152, 207–8, 295
- stare decisis* 44–8, 50, 52, 134
- state practice 11–42, 51, 57–62, 72–7, 92, 141, 192, 200, 206, 215–9, 256, 322
 verbal act problem 20–8
- state responsibility 207, 251, 307–10, 317–24
- structural analysis 1, 17, 36, 43, 116, 133, 148–9, 153, 159–60, 162, 171, 184–5, 187, 207
- Stufenbau* theory 63–4, 88–90, 93, 100, 148–9
- subjective element *see opinio iuris*
- subsequent practice 59, 136, 140–2
- systemic integration 70, 76, 103, 105–43, 191, 202–5, 236
- taking into account of external rules
 111, 121–3, 127, 131–2, 136–7, 220
- Tatbestand* 18, 23, 29, 58, 62, 72, 74, 77, 153, 160–262, 268–271, 278, 284, 293, 296, 299, 302, 325
- taxation 4, 62, 162, 174, 179, 182, 196, 211–2, 282
- travaux préparatoires* 31, 41, 47
- treaty text 16, 24, 28–9, 41, 68, 116–7, 120, 126, 131–3, 139, 207

INDEX

357

- unity/unification of law/meaning 4–5,
7, 56, 62, 68, 70, 96, 103, 105–43,
152–3, 155, 158, 191, 200, 209, 249,
290 *see also* fragmentation
unwritten law *see* *lex (non) scripta*
use of force and self-defence law 182,
200, 238, 301
- usus/usage* 17, 23–6, 39–40, 58, 61–2,
72, 74, 77 *see also* state practice
validity of norms/treaties 33, 36–7,
40, 63, 77, 119, 147–50, 207–9,
261
Vernunftrecht see rational law