

Index

- African Union 2
- aggression, prohibition of 15, 74–5, 191, 205
 - secondary *jus cogens* obligations and no-competences 27, 193, 194
- Åland Island Convention 159–60
- amnesties 1
 - torture, prohibition of 26, 177, 193
- apartheid 16
- Aquinas, Thomas de 53, 56
- arbitration tribunals 3
- armed conflict 16
- arms embargo 120–121, 157, 162
- asylum 2

- Basic Norm 42–3
- best interests of the child 146–7, 151–2, 172

- Cançado Trindade, AA 91
- children: best interests of the child 146–7, 151–2, 172
- Christian naturalism 57
- Cicero 53
- commitment and legal idealism 107–9
- common heritage of mankind 18
- consent
 - modification of *jus cogens* norms 94–5
 - legal idealism 94–5, 98–101, 206
 - legal positivism 95–7, 206
 - state 94, 101–2
 - legal idealism 81–3, 102, 106–9, 206
 - legal positivism 102–6, 137, 206
- Convention on the Continental Shelf 22
- Convention on the Law of the Sea 10, 200–201, 202
 - Art 109: unauthorized broadcasting 176, 179
 - Art 111: enforcement jurisdiction of coastal state 148, 150–151
- Convention on the Rights of the Child
 - Art 3(1): best interests of the child 146–7
- Council of Europe 2
- crimes against humanity 4, 16, 30–34, 35, 145–6, 173–4
 - secondary *jus cogens* obligations and no-competences 27, 193, 194
- criminal proceedings 172
- cruel, inhuman or degrading punishment or treatment 16
- cultural life, right to participate in 128
- customary international law 12, 13, 30, 119, 145, 167
- conflict between *jus cogens* and 20–21, 24, 31
- environment 156–7
- legal idealism 82, 83
- legal positivism 65–7, 75, 137, 141
 - second order norms 76–80, 95, 96, 97, 103, 106, 112–13, 142, 205
 - state consent 103–6
- persistent objection theory 104–6, 137
- self-defence 184, 187
 - necessary and proportionate 186–7
- Statute of the ICJ: Art 38 75, 82, 96
 - creating and establishing law 67–73

- Vienna Convention on the Law of Treaties 8, 20–21, 22, 24, 66–7, 68
- death penalty
juveniles 17
- declarations of states, unilateral 3, 9, 23, 164
no-obligations 25, 74
- deontic logic 36, 48, 61, 164, 178
- detention
prolonged arbitrary 18
- development, right to 18, 147
- diplomatic protection 3–4
- domestic courts 2
- Dworkin, R 48, 58–9, 90, 124, 139
- enforcement and compliance 127–8
- entailment 86–7, 99, 106, 114
- environment 100, 114, 127, 151, 156–7
- equality 17, 89, 91, 161
of arms 128, 131
before the law 17
Radbruch 57–8, 60
secondary *jus cogens* obligations and no-competences 27
states: sovereign 15, 18, 90
- equidistance principle 15, 18, 22, 141, 147
- erga omnes* obligations 12, 121–2, 139–41, 166–8
legal idealism 143
legal positivism 141–3
- erga omnes partes* obligations 139, 141, 162–3
- ethnic minorities
right of remedial secession 50
- European Convention on Human Rights (ECHR)
Art 3: torture 160–161
Art 6: fair trial 131
- European Court of Human Rights 2, 131
- European Union
Court of Justice of the 2–3
- exclusive economic zone (EEZ) 158
- expression, freedom of 61–2
- extradition 2, 4, 161
torture, prohibition of 26, 27
- fair trial, right to 128, 131, 147, 151–2
- Finnis, J 55, 56, 68–73, 76, 79, 91, 172
- fishing 114, 127, 128–9, 148, 158
- food 128, 172
right to adequate 18, 147
- force, prohibition of use of 15, 18, 89, 141, 182–8, 189–91, 192–3
- forced disappearances 17, 27–8
- forced labour 17
- formalist moderated duty-holder 156–7, 162–3, 166–8, 171
- formalist observer 157–8, 168–9, 171, 173, 174, 184
- formalist plain duty-holder 157, 166–8, 171
- fragmentation of international law 3, 9, 140
- France
Gaddafi case 20
- free trade, right to 18, 147
- Fuller, L 56–7
- future, outlook for 209–13
- GATT (General Agreement on Tariffs and Trade) 162
- general principles of law 65–6, 75, 76, 82, 83, 96, 141
- genocide 16, 21, 89, 90, 120
secondary *jus cogens* obligations and no-competences 26, 193, 194
- global constitutional order 87
- global warming 100
- good faith 17, 18, 56, 57, 90, 147
- goods, basic (Finnis) 56
- Hart, HLA 43–4, 47
- high seas 43, 200, 201, 202
freedom of the 17, 18, 99–100, 127, 147, 148, 150–151, 179
- unauthorized broadcasting 176, 179

- Hobbes, T 54
- human dignity 86, 91, 115, 131, 142, 161
- human rights 1, 17, 18–19, 50, 87, 114, 147, 172
- best interests of the child 146, 151–2, 172
- cultural life, right to participate in 128
- European Court of 2, 131
- expression, freedom of 61–2
- fair trial, right to 128, 131, 147, 151–2
- Inter-American Commission of 138–9
- Inter-American Court of 2, 91
- liberty and security, right to 128
- life, right to 17, 90, 141
- self-determination, right to *see separate entry*
- torture, prohibition of *see separate entry*
- identification of *jus cogens* norms 110–133, 207–8, 211
- how to provide justification
- legal idealism 122–33, 207–8
- legal positivism 115–22, 207
- necessary justification
- legal idealism 113–14, 207
- legal positivism 112–13, 207
- ideologist 160–161, 165–6, 171–3, 174
- immunity 1, 2, 4, 20–21, 23, 24, 30–34, 35–6, 71–3, 113, 145–6, 173–4
- secondary *jus cogens* obligations and no-competences 27
- individuation of norms 175–203, 209, 211
- enforcement of primary *jus cogens* obligations 191–2
- legal idealism 192, 195–6
- legal positivism 192–5
- exceptions to *jus cogens* norms 182–3
- legal idealism 182–3, 189–91
- legal positivism 182–9
- jus cogens* and international responsibility law 196–200
- legal idealism 199, 200, 202–3
- legal positivism 199, 200–202
- proper criteria for
- legal idealism 180–182
- legal positivism 178–9
- inhuman, cruel or degrading punishment or treatment 16
- integrity, law as 58–9, 90
- Inter-American Commission of Human Rights 138–9
- Inter-American Court of Human Rights 2, 91
- intergovernmental organisations 90
- International Court of Justice (ICJ) 3
- Arrest Warrant* 20–21, 145
- Bosnia Genocide* 21
- East Timor* 167
- jurisdiction of 26
- Jurisdictional Immunities of the State* 20, 23, 24, 29–34, 35–6, 163, 173–4, 191–2, 195, 196
- North Sea Continental Shelf* cases 22
- sources of international law: Statute of the 41, 67–73, 75, 82, 96, 136–7, 141
- Use of Nuclear Weapons* Advisory Opinion 186–7
- international crimes 18–19
- International Criminal Court (ICC) Statute 165
- equal application (Art 27(1)) 161
- international criminal law 1
- International Criminal Tribunal for the Former Yugoslavia (ICTY) 2, 20, 125
- International Criminal Tribunal for Rwanda (ICTR) 2
- international humanitarian law 16, 17, 30, 31–2, 114, 186–7, 188
- rape, prohibition of 16
- International Labour Organization (ILO) 2
- International Law Commission (ILC) 3–4, 8–9, 10, 20, 116, 140

- Articles on Responsibility of International Organizations (ARIO) 4, 23, 196–7, 199
 - Art 26 177–8, 197
- Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) 3, 8–9, 23, 196, 197–203
 - Art 2 179
 - Arts 4–11 187–8
 - Art 13 179
 - Art 25 200, 201
 - Art 26 177–8, 197, 198–9, 200–202
- Guide to Practice on Reservations to Treaties 23
 - unilateral declarations of states 3, 9, 23
- international *ordre public* 87, 90
- international organisations
 - Articles on Responsibility of International Organizations (ARIO) 4, 23, 177–8, 196–7, 197, 199
 - no-obligations 25
 - interpretation, treaty 129–33
 - involuntary servitude 17
- jurisdiction, duty to exercise 26
- jus gentium* 53–4, 91
- justice 52, 86, 128, 172
 - access to 17
 - Radbruch 57–8, 59–60, 90
- juveniles
 - death penalty 17
- Kelsen, H 41–3, 46, 47
- law and value
 - legal idealism 52, 53–9, 90
 - legal positivism 44–5
- legal certainty
 - legal idealism 57–8
 - legal positivism 49
- legal idealism 37–8, 210–211
 - coexistence of conceptions from legal positivism and 211–13
- consent, state 81–3, 102, 106–9, 206
 - first and second order norms 83, 84–5, 100, 196
- identification of *jus cogens* norms
 - deductive method 122
 - how to provide justification 122–33, 207–8
 - immanent ideals 123–4
 - inductive-deductive method 122–3
 - necessary justification 113–14, 207
 - teleological arguments 129–33
 - transcendent ideals 123, 124
- individuation of norms 176–8
 - enforcement of primary *jus cogens* obligations 195–6
 - exceptions to *jus cogens* norms 182–3, 189–91
 - jus cogens* and international responsibility law 199, 200, 202–3
 - proper criteria for 180–182
 - law and legal structure 60–62
 - ideals as constitutive of law 61
 - ideals as standard 60
 - law and social order 50–53
 - immanent ideals 52, 53, 88, 98
 - transcendent ideals 51–2, 53, 88, 98
 - law and value 52, 53–9
 - basic aspirations 55
 - basic goods 56
 - Fuller: eight basic criteria 56–7
 - jus gentium* 53–4
 - law as integrity 58–9, 90
 - objective law 54–5
 - Radbruch: justice 57–8, 90
 - social contract theory 54
 - modification of *jus cogens* norms 94–5, 98–101, 206
 - normative conflict
 - proper definition of context 163, 169–73
 - scope of *jus cogens* 134–5
 - obligations *erga omnes* 143
 - personal 138–9

- principles 149–53
- source of *jus cogens* obligations and no-competences 63–5, 205–6
 - appeals from the contrary 81–6
 - explanation in positive terms 86–92
 - validity of legal norms 59–60
- legal positivism 37–8, 59, 210–211
- coexistence of conceptions from legal idealism and 211–13
- concept of law 41–4
 - Basic Norm 42–3
 - primary and secondary rules 43–4
 - Rule of Recognition 44
- consent, state 102–6, 137, 206
- exclusive and inclusive 40
- first and second order norms 75–80, 84–5, 195, 205
- erga omnes* obligations 141–2
- identification of *jus cogens* norms 115
 - modification of *jus cogens* norms 95–6, 97
 - normative conflict 163–9
 - principles 148
 - state consent 103, 104–6
- identification of *jus cogens* norms
 - how to provide justification 115–22, 207
 - necessary justification 112–13, 207
- individuation of norms 176–8
 - constitutive norms 178–9
 - enforcement of primary *jus cogens* obligations 192–5
 - exceptions to *jus cogens* norms 182–9
- jus cogens* and international responsibility law 199, 200–202
 - proper criteria for 178–9
 - regulative norms 179, 183–4
- law and legal structure 47–9
- law and social order 49–50
- law and value 44–5
- modification of *jus cogens* norms 95–7, 206
 - normative conflict
 - proper definition of context 163–9, 173
 - scope of *jus cogens* 134–5
 - obligations *erga omnes* 141–3
 - personal 135–8
 - principles 147–9
 - source of *jus cogens* obligations and no-competences 63–5, 73–80, 205
 - challenge 65–7
 - creating and establishing law 67–73
 - validity of legal norms 46–7
 - systemic 46–7
- legal structure and law
 - legal idealism 60–62
 - legal positivism 47–9
- legality 57
- lex specialis derogat legi generali* 48, 119
- liberty and security, right to 128
- life, right to 17, 90, 141
- limitation, statutes of 28
- Locke, J 54
- marine environment 100, 127, 151
 - see also* fishing; high seas
 - metaperspective, necessity of 34–9
- minority groups
 - right of remedial secession 50
- modification of *jus cogens* norms 94–5
 - legal idealism 94–5, 98–101, 206
 - legal positivism 95–7, 206
- morality
 - legal idealism 50, 59–60
 - legal positivism 44–5, 46–7, 48, 49–50, 59
- natural law 53–4, 91
- naturalism 95
 - Christian 57
- no-competence rule 24, 25–6, 74, 204, 205

- see also* source of *jus cogens* obligations and no-competences
- no-obligations 24–6, 74, 204, 205
- non-discrimination 17, 91, 142–3, 161
- secondary *jus cogens* obligations and no-competences 27
- non-governmental organisations (NGOs) 90, 109
- non-use of force 15, 18, 89, 141, 182–8, 189–91, 192–3
- nonrefoulement, principle of 18
- nonstate entities 90, 108–9
- normative conflict 28–34, 48, 154–74, 208
- concept of conflict of norms 156–61
- definition
 - formalist moderated duty-holder 156–7, 162–3, 166–8, 171
 - formalist observer 157–8, 168–9, 171, 173, 174, 184
 - formalist plain duty-holder 157, 166–8, 171
 - ideologist 160–161, 165–6, 171–3, 174
 - teleologist 159–60, 166, 171–3, 174
- proper definition of context 161–3
 - jurisdictional immunities of state 173–4
 - legal idealism 163, 169–73
 - legal positivism 163–9, 173
- North American Free Trade Agreement (NAFTA) 162
- Nuremberg Military Tribunal 30
- objective law (Scelle) 54–5
- obligations *erga omnes* 12, 121–2, 139–41, 166–8
 - legal idealism 143
 - legal positivism 141–3
- obligations *erga omnes partes* 139, 141, 162–3
- open international market 87
- opinio juris* 67–8, 102–3, 136, 142, 143
- identification of *jus cogens* norms 112, 115–16, 122, 123
- modification of *jus cogens* norms 97
- practical, empirical and juridical judgements 68–73
- Organization of American States (OAS) 2
- Organization for Security and Co-operation in Europe (OSCE) Treaty on Open Skies 159–60
- pacta sunt servanda* 17, 18, 56, 90, 113
- pacta tertiis nec nocent nec prosunt* 76
- piracy 16
- primary *jus cogens* obligations 26
- principles 172
 - general principles of law 65–6, 75, 76, 82, 83, 96, 141
 - scope of *jus cogens* 143–4
 - differences between principles and rules 144–7
 - legal idealism 149–53
 - legal positivism 147–9
 - prima facie* duty to act 148, 151, 152–3
- property, right to 18
- Prosecutor v Furundžija* 20
- purposiveness or utility 57–8
- racial discrimination 142–3
- Radbruch, G 57–8, 59–60, 90, 124, 139
- rape, prohibition of widespread 16, 195, 196
 - secondary *jus cogens* obligations and no-competences 26, 193, 194
- rational reconstruction 37
- Raz, J 47
- regional custom 136, 137–8
- relative normativity of international law 119–20
- religious minorities
- right of remedial secession 50

- reparation for damages
 - at request of injured party 18, 90
- reservations to treaties 3, 22–3, 95–6, 164
 - no-obligations 25, 74
 - secondary *jus cogens* obligations and no-competences 25, 26, 74
- Roman law 53
- Rousseau, JJ 54
- Rule of Recognition 44, 58

- Scelle, G 54–5, 98
- scope of *jus cogens* 134–53, 208
 - obligations *erga omnes* 139–41
 - legal idealism 143
 - legal positivism 141–3
 - personal 135
 - legal idealism 138–9
 - legal positivism 135–8
 - principles 143–7
 - legal idealism 149–53
 - legal positivism 147–9
- secondary *jus cogens* obligations and no-competences 28–9, 34, 74–5, 80, 99, 125–6, 132, 154–5, 163, 170–171, 173, 175, 181, 184–5, 194–6, 205
 - analysis of Jurisdictional Immunities of the State case 29–34
 - examples 26–8, 193–4
 - legal obligations 23–4, 26, 74, 204–5
 - no-competence rule 24, 25–6, 74, 204, 205
 - no-obligations 24–6, 74, 204, 205
- self-defence 15, 43, 183–4, 186–7, 189–91, 192–3
 - anticipatory 184
- self-determination, right to 15, 74–5, 155, 166–7, 170, 180–182, 189
 - secondary *jus cogens* obligations and no-competences 26–7, 193, 194
- separation thesis 40, 44–5, 50
- servitude, involuntary 17
- slavery 15, 89

- social contract theory 54
- social order and law
 - legal idealism 50–53
 - legal positivism 49–50
- source of *jus cogens* obligations and no-competences 63–92, 211
 - introduction
 - four distinctions 63–4
 - meaning of source 64
 - legal idealism 205–6
 - appeals from the contrary 81–6
 - common basic needs 84–5
 - consent 81–3
 - explanation in positive terms 86–92
 - first and second order norms 83, 84–5
 - ideals inextricable part of legal system 89–90
 - ideals and social community 88–90
 - lex superior* 82–83
 - legal positivism 73–80, 205
 - challenge 65–7
 - circularity and infinite regress 80
 - creating and establishing law 67–73
 - first order norms 75, 76–80, 84–5, 205
 - second order norms 75–80, 84–5, 205
- sovereign equality of states 15, 18, 90
- sovereignty, respect of 15
- sovereignty, state 55, 89, 147
- space, obligation not to prevent access to 18
- Special Court for Sierra Leone 2
- Special Tribunal for Lebanon 2
- state responsibility
 - Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) 3, 8–9, 23, 196, 197–203
 - Art 2 179
 - Arts 4–11 187–8
 - Art 13 179
 - Art 25 200, 201

- Art 26 177–8, 197, 198–9, 200–202
- teleologist 159–60, 166, 171–3, 174
- Timor Gap Treaty 167
- Tladi, D 4, 65–6
- tort 27, 29–34, 173–4, 205
- torture, prohibition of 5, 16, 20, 26, 43, 74–5, 84–5, 100–101, 105, 124–5, 155, 160–161, 169, 177
- secondary *jus cogens* obligations and no-competences 26, 27, 193, 194
- trade, right to free 18, 147
- traditional approach 5–7
- identifying criteria 5, 6, 9–14, 116, 204
- suggested examples 15–19
- Vienna Convention 7–9
- legal consequences 5–6, 9, 10, 204
- suggested examples 23–8
- Vienna Convention 19–23
- why discussants disagree 28–34
- metaperspective, necessity of 34–9
- unilateral declarations of states 3, 9, 23, 164
- no-obligations 25, 74
- United Nations 2
- Charter 15, 42, 165
- conflict of obligations 21–2, 48, 83, 118–19, 120, 162
- prohibition of use of force 15, 18, 141, 182–6, 189–91
- self-defence 184–5
- General Assembly
- aggression 191
- self-determination 180–182, 189
- Security Council 1, 21–2, 41–2, 83, 95, 119, 120–121, 157, 161, 162, 179, 183–4, 185, 188, 189–91
- utility or purposiveness 57–8
- value and law
- legal idealism 52, 53–9, 90
- legal positivism 44–5
- Verdross, A 55
- Vienna Convention on Diplomatic Relations 10
- Vienna Convention on the Law of Treaties 1969 (VCLT) 19–25
- Art 31 130, 132–3
- Art 33 133
- Art 53 7–10, 11, 19–20, 23–5, 34–5, 66–7, 68, 73–4, 76–80, 81, 82, 94, 97, 102–3, 117, 122, 136–7, 143–4, 182, 185
- Art 64 11, 20, 24–5, 185
- no-obligations 24–5
- void treaties 24
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 23
- Art 31 130, 132–3
- Art 32 133
- Art 33 133
- Art 53 7, 8, 136–7, 143–4, 182
- no-obligations 25
- waivers 23
- war crimes 16, 30–34, 35, 63–4, 89, 93–4, 95, 96, 145–6, 173–4, 191–3, 195, 196
- secondary *jus cogens* obligations and no-competences 27, 193, 194
- weapons of mass destruction 141
- Weil, P 119