Index

abusive treatment see ill-treatment
Ackerman, B. 308
Acosta Arcarazo, D. 86
Addo, M. 224
Al Qaida
  conflict as non-international armed conflict 307, 308, 309
  sanctions committee 33, 39–40, 41–2, 44, 47–8, 49
Alvarez, J. 85
Amar, A. 270
Anderson, D. 54, 66, 67, 70, 74, 91
Anderson, K. 309–10
Arendt, H. 94, 298
Army Field Manual on Interrogations 248–9, 255
Arnold, R. 330
ASEAN Convention on Counter-Terrorism 86
asset freezing 57, 63, 66, 67, 70, 74–5, 160
see also sanctions
asylum seekers
  asylum right of terrorist suspects 215–20
  EU Asylum Procedures Directive 217
  inhuman or degrading treatment 217, 218
  non-refoulement (non-return) rule 221, 222–4
see also refugees
Austin, J. 80
Australia, Independent National Security Legislation Monitor (INSLM) 71
Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
Avbelj, M. 40
Avigad, D. 298
Azmy, B. 254
Baker, C. 165
Banks, W. 153
Barak-Erez, D. 330
Barron, D. 191
Bassok, O. 283–304, 324
Bennett, W. 238
Benvenisti, E. 329
Berman, H. 81
Bernhardt, R. 18
Beyerlin, U. 82
Bigo, D. 149
Bivens question 205
black flag test 287–8
see also legality of military operations
blacklists 147, 160–62, 326
Blank, L. 312, 314, 321
Blum, G. 289, 293, 310
Bohrer, Z. 285
Boister, N. 82
Bojin, L. 226
Borch, F. 283
Boyron, S. 213
Brand, J. 114, 118
Burch Elias, S. 159
Burke-White, W. 120
Burnett, C. 200, 207, 266
Cahill, J. 88
Calabresi, S. 116
Callies, G. 81, 83
Cameron, I. 20, 66, 72
Canada
Abdelrazik v. Canada (Minister of Foreign Affairs) 336
Canada (Justice) v. Khadr 122

337
Constitutionalism across borders in the struggle against terrorism

extra-territorial scope of constitutional Charter of Rights 121–2, 123
information technology usage 108–9
R. v. Hope 121–2
R. v. Tessling 108–9
R. v. Tse 116–18
“reasonable” searches and accountability 116–19
“special advocates” 158

Cannizzaro, E. 56
Carrera, S. 174
cellphone search 182, 183
Chesney, R. 247, 251, 311, 319–20, 321
children, abuse prevention 223
Chong, J. 240
Choudhry, S. 87
Chrisafis, A. 178
civil prosecutions 73, 192–3, 211, 253, 257–8, 312
CJEU (Court of Justice of the European Union) see EU, CJEU cases
Cleveland, S. 196, 206, 236, 247
‘closed material proceedings’ (CMP) 64–5, 73, 76
coercive tactics 166, 167–8, 201–2, 240, 249, 253, 255, 256
Cohen, A. 296, 297, 302, 303
Cohen, S. 90–91
Colangelo, A. 234
Cole, D. 123, 141, 148, 169–88, 197, 214, 275, 324
Condon, J. 256
Constitution, US see US Constitution headings
constitutional rights, extra-territorial obligations of European states 213–14
constitutional-democratic states, domestic intelligence surveillance 148–51, 152–4, 162, 163–5, 167
constitutionalism, substantive see substantive constitutionalism
Conte, A. 55, 71
Convention Against Torture 165, 246–7
see also torture
Cooper, K. 52–77, 94, 324

Cotterell, R. 81
counter-terrorism
financial sanctions regimes see legal reform of counter-terrorism
financial sanctions regimes in EU
transnational law see transnational counter-terrorism law dynamics

Cox, S. 234
Craig, A. 296, 297, 299, 304
Cremona, M. 23
criminal law
evidence dilemma, material support as crime 157
intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4
International Criminal Court (ICC) Statute 286
ship-based detention, criminal justice system protection 241–2, 255–7
and terrorist attacks 307–8, 311, 312
cross-border shootings 197–9
Curtin, D. 151–2
Cuyvers, A. 66
Da Costa, K. 162
Darnstädt, T. 169
Daskal, J. 158, 191–212, 229, 238, 239, 250, 312, 319, 324
data protection
ECHR protection 177–8
EU Data Protection Directive, EU 172, 173, 174
PATRIOT Act and telephonic metadata program 101–2, 103, 113, 114–15
reciprocal privacy 172–3, 182, 183
screening procedures for personalized data 166
telephone data collection 107–8, 182, 183
third party disclosure 103, 119–20
transnational counter-terrorism law dynamics 86–7
see also information disclosure; privacy
David, T. 73
Index

Davis, F. 86, 93
De Buírca, G. 44, 56, 57, 94, 332
De Hert, P. 49
De Londras, F. 93
De Wet, E. 31, 35–51, 79, 324, 326–7, 332–4
death penalty cases 201–2
Deeks, A. 205
Demarest, G. 165
deporation, rights of terrorist suspects 220–27
see also sanctions
De Rosa, M. 247
detention
combatant detention in international armed conflicts 307, 312
habeas corpus see habeas corpus
judicial review 316–18, 318–19
preventive detention 159–60
ship-based see ship-based detention and extra-territorial application of US constitutional rights
targeted killing and detention operations abroad 207–12
Dickson, B. 206, 213–32, 324
Dinstein, Y. 285, 286, 287, 288, 290, 304
disaggregation problem 89–90
disclosure of information see information disclosure
Donohue, L. 87, 114, 119, 149
Dotan, Y. 290
Dotson Zimdahl, S. 116
Douglas, L. 80
Downs, G. 329
dragnet surveillance 171, 174, 178, 183
driftnet surveillance 162–3, 166
dual character of First Amendment (structural–individual rights distinction) 270–72
dualist approach (EU implementing measures as distinct from legality of UN resolution) 56–7, 61, 63, 69, 70–74
Dublin III Regulation, EU 217–18
due process rights
legal reform of counter-terrorism financial sanctions regimes in EU 58–9, 63, 64, 66, 68, 72
ship-based detention and US Constitution’s Due Process Clause 250, 251, 254–5, 256, 257
transnational seizures and US Fifth Amendment due process rights 191, 192–3, 197, 198, 199–200, 206
Dupuy, P. 36

ECHR see European Convention on Human Rights
Eckes, C. 66
ECtHR see European Court of Human Rights
Ejima, A. 125–45, 324, 325
digital surveillance 105–15, 119–20
see also surveillance
Ellmann, S. 305–22, 324
enforcement processes, transnational counter-terrorism law dynamics 84–90
Escudé, C. 66
EU
Asylum Procedures Directive 217
counter-terrorism financial sanctions regimes see legal reform of counter-terrorism financial sanctions regimes in EU
Data Protection Directive 172, 173, 174
Dublin III Regulation 217–18
EU-US Passenger Name Records (PNR) agreement 188
EU-US Safe Harbor Agreement invalidation 170, 187
EU-US Terrorist Finance Tracking program 188
‘Eurodac’ Regulation and sharing of asylum seekers’ fingerprints 217
extra-territorial obligations see extra-territorial obligations of European states
privacy protections see reciprocal privacy, European privacy protections
Qualification Directive 217, 218
Reception Conditions Directive 217
regional counter-terrorism law adoption 86
Third Anti-Money Laundering Directive 89
EU, CJEU cases
Commission v. Germany 174
Digital Rights Ireland 174, 336
European Parliament v. Council of the EU 69
Kadi I 21–5, 38–9, 40–41, 42, 47, 50, 55, 61, 93–4, 161, 327–8, 332
Kadi II 26–8, 39, 40, 41–2, 43–4, 47, 50, 58–9, 60, 61–2, 63, 64, 68, 161, 332, 335
Les Verts 3
Melli Bank v. Council 42
Mohamed El Morabit v. Council 43
NS and ME Jointed Cases 217–18
Österreichischer Rundfunk 174
People’s Mojahedin Organization of Iran v. Council of the European Union 62, 67, 68
R, Aden and others v. Council and Commission 67
Schrems 170, 187
Sison v. Council of the European Union 63, 68
Society for the Protection of Unborn Children v. Grogan 223
Stitching Al-Aqsa v. Council 67, 68
ZZ v. Secretary of State for the Home Department 64, 150
EU, CJEU practice
judicial favoring of human rights over United Nations Security Council sanctions 38–45
legal reform of counter-terrorism financial sanctions regimes 55–65
role 327–9, 332–6
Rules of Procedure of the General Court proposals 64–5
European Convention on Human Rights (ECHR)
extra-territorial obligations of European states 218–19, 225, 226, 227–8
reciprocal privacy 174–7
European Court of Human Rights (ECHR) 328–9
extrajudicial detention 245–6
“margin of appreciation” doctrine 175
minimum criminal procedure protections 165
and non-refoulement 222–4
relativist approach 226–7
role 327–9, 332–6
European Court of Human Rights (ECHR), cases
A v. United Kingdom 59
Aksoy v. Turkey 246
Al-Dulimi & Montana Management v. Switzerland 48–9, 50, 61, 161, 328, 334–5
Al-Jedda v. United Kingdom 45, 47
333, 334
Al-Nashiri v. Poland 336
Al-Skeini v. United Kingdom 121, 154, 176, 206, 227–30, 336
Babar Ahmad v. United Kingdom 224
Bankovic v. Belgium 176, 206, 227–8, 333
Behrami and Behrami v. France 327–8, 332–3
Bosphorus v. Ireland 3, 49, 334–5
Brogan v. United Kingdom 246
Chahal v. United Kingdom 42, 222, 224–5
Copland v. United Kingdom 175
Cyprus v. Turkey 228
E v. United Kingdom 223
El-Masri v. the Former Yugoslav Republic of Macedonia 336
Finogenov v. Russia 222–3
Hassan v. United Kingdom 230, 336
Jaloud v. the Netherlands 336
Jones v. United Kingdom 227
Klass v. Germany 174
Liberty v. United Kingdom 177
McKay v. United Kingdom 246, 250
Malone v. United Kingdom 175
Marper v. United Kingdom 175
MSS v. Belgium and Greece 218
Müslim v. Turkey 225
NA v. United Kingdom 218–19
Nada v. Switzerland 30–31, 45–7, 50, 61, 72, 326–7, 328, 332, 333–4
Open Door Counselling and Dublin Well Woman Centre v. Ireland 223
Othman v. United Kingdom 226
Rotaru v. Romania 175
Saadi v. Italy 222, 225
Saramati v. France, Germany and Norway 328, 332–3
Shamayev v. Georgia and Russia 225
Sharifi v. Italy and Greece 218
Soering v. United Kingdom 222
Sufi and Elmi v. United Kingdom 219
Uzun v. Germany 175
Weber and Saravia v. Germany 118–19, 175, 177
evidence dilemma in global anti-terror campaign 146–68, 324–5
asset freezing 160
blacklists 147, 160–62, 326
designation of organization as “terrorist” 157–8
domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167
domestic police regulation comparison 148–50, 152–3, 164–5

driftnet surveillance 162–3, 166
evidence acquired by illegal means and torture 164, 165, 166, 167–8

evidence problems 148–55
individuals, concerns over focus on 148, 149, 151, 152–4, 155, 160–62, 164, 165, 166, 167
intelligence agencies in non-democratic and/or non-constitutional states 152, 154, 163–4, 167
intelligence services regulation 148–55, 163–4
intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4
labelling requirement, need for 166
legal reform, need for 165–8
material support as crime 157
military commissions instead of civilian courts 158
new terrorism offenses, vagueness concerns 155–8
novel courts and trial rules 158–9
originator control principle 151
precrimes comparison 156–7
preventive detention 159–60
right to remain silent 164
screening procedures for personalized data 166
secretly sourced evidence in legal proceedings, concerns over use 150–51
“special advocates” 158
threatening behaviour towards individuals 166
UN Security Council “1267 sanctions” lists 160–61
evidence use in judicial review 43–4
excessive force, use of 197–9, 208
see also ill-treatment
extra-territorial application of US Constitution 260–80
application zones 275–9
Bill of Rights overview and constitutional protection 262–6, 273, 276
dual character of First Amendment (structural–individual rights distinction) 270–72
extending constitutional rights abroad 262–74
Fifth Amendment 191, 192–3, 197, 198, 199–200, 206
First Amendment 260–80
Foreign Terrorist Organization (FTO) list 279
Fourth Amendment 103–11, 119–20, 122, 123, 179–81, 194–5, 197–9, 202–4, 206–8, 211
"impracticable and anomalous" standard 276–7
**Insular Cases** 262–6, 275
nonresident aliens 266, 268, 272–5
preservation of or non-interference with local culture, concerns over 277–8
resolving tension in favor of 270–72
ship-based detention see ship-based detention and extra-territorial application of US constitutional rights
sovereignty issues 276–8
Suspension Clause 192, 196, 197, 236–7, 266, 272, 278, 314, 317
Third Restatement of Foreign Relations Law 275
Uniformity Clause 262–3
unreasonable searches and seizures see US constitutional protection against unreasonable searches and seizures
extra-territorial obligations of European states 213–32
Asylum Procedures Directive 217
asylum right of terrorist suspects 215–20
Common European Asylum System 216–17
constitutional rights and obligations 213–14
Dublin III Regulation 217–18
‘Eurodac’ Regulation and sharing of asylum seekers’ fingerprints 217
European Convention on Human Rights (ECHR) 218–19, 225, 226, 227–8
European Court of Human Rights (ECHR) and **non-refoulement** 222–4
European Court of Human Rights (ECHR) relativist approach 226–7
inhuman or degrading treatment of asylum seekers 217, 218
international human rights law (IHRL) 214, 226–7, 228, 229–30
Memoranda of Understanding (diplomatic assurances) 224–7
prevention of abuse of children 223
Qualification Directive 217, 218
Reception Conditions Directive 217
Refugee Convention 218, 219–21, 222–3
right to free speech or right to freedom of association 223
rights of terrorist suspects not to be deported, extradited or subjected to sanctions 220–27
risk of being subjected to ill-treatment 222–4, 225–7
rule of non-refoulement (non-return) for asylum seekers 221, 222–4
security forces engaged in counter-terrorism operations abroad 227–30
‘third country nationals’ exclusion from refugee status 218
UN Convention Relating to the Status of Refugees limitations 215–16, 221
extradition rights of terrorist suspects 220–27
see also sanctions
Fabbri, F. 1–12, 47, 61, 119, 123, 141, 148, 169–88, 214, 324, 326, 330
Falkoff, M. 234
Fassbender, B. 40, 55
Financial Action Task Force 88, 89
financial sanctions regimes see legal reform of counter-terrorism
financial sanctions regimes in EU fingerprints, ‘Eurodac’ Regulation and sharing of asylum seekers’ fingerprints 217
Fiss, O. 114
Flynn, E. 85
Foreign Intelligence Surveillance Act (FISA) and Court 104, 118
and PRISM program, US 102–3, 112–14, 148
<table>
<thead>
<tr>
<th>Foreign Terrorist Organization (FTO) list</th>
<th>279</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foucault, M.</td>
<td>90</td>
</tr>
<tr>
<td>Fowler, S.</td>
<td>114, 119</td>
</tr>
<tr>
<td>France data privacy protection</td>
<td>178</td>
</tr>
<tr>
<td>special procedural and evidentiary rules for national security cases</td>
<td>158</td>
</tr>
<tr>
<td>Fraser, N.</td>
<td>94–5</td>
</tr>
<tr>
<td>free speech, right to</td>
<td>223</td>
</tr>
<tr>
<td>FREEDOM Act, USA</td>
<td>119</td>
</tr>
<tr>
<td>Frowein, J.</td>
<td>18</td>
</tr>
<tr>
<td>fundamental rights tradition, transnational seizures</td>
<td>200–202, 204</td>
</tr>
<tr>
<td>future reform potential, EU</td>
<td>65–76</td>
</tr>
<tr>
<td>future research, transnational counter-terrorism law dynamics</td>
<td>95–7</td>
</tr>
<tr>
<td>Gaeta, P.</td>
<td>285</td>
</tr>
<tr>
<td>Garland, D.</td>
<td>90</td>
</tr>
<tr>
<td>Garlicki, L.</td>
<td>323–36</td>
</tr>
<tr>
<td>Gearty, C.</td>
<td>61</td>
</tr>
<tr>
<td>Germany data privacy protection</td>
<td>177, 178</td>
</tr>
<tr>
<td>domestic intelligence-gathering</td>
<td>149, 153–4</td>
</tr>
<tr>
<td>labelling requirement</td>
<td>166</td>
</tr>
<tr>
<td>special procedural and evidentiary rules for national security cases</td>
<td>158</td>
</tr>
<tr>
<td>Ginsborg, L.</td>
<td>21, 25–6, 58, 65, 161</td>
</tr>
<tr>
<td>Ginsburg, T.</td>
<td>83</td>
</tr>
<tr>
<td>global governance development</td>
<td>85–6</td>
</tr>
<tr>
<td>globalization and migration of responses and ideas</td>
<td>323–6</td>
</tr>
<tr>
<td>Goldsmith, J.</td>
<td>205, 242, 247, 321</td>
</tr>
<tr>
<td>Gonzalez, A.</td>
<td>211</td>
</tr>
<tr>
<td>Goodwin-Gill, G.</td>
<td>82</td>
</tr>
<tr>
<td>GPS (global positioning system) use</td>
<td>109–10</td>
</tr>
<tr>
<td>Greenwald, G.</td>
<td>102–3</td>
</tr>
<tr>
<td>Greer, S.</td>
<td>330</td>
</tr>
<tr>
<td>Grief, N.</td>
<td>224</td>
</tr>
<tr>
<td>Gross, O.</td>
<td>175</td>
</tr>
<tr>
<td>Guantanamo Bay detainees</td>
<td>120, 180, 196, 234–6, 249, 251–4, 277–8</td>
</tr>
<tr>
<td>habeas corpus availability and law of war</td>
<td>313–14, 315</td>
</tr>
<tr>
<td>and Guantanamo Bay</td>
<td>120, 180, 196, 234–6, 249, 251–4, 277–8</td>
</tr>
<tr>
<td>ship-based detention</td>
<td>236–7, 252–5</td>
</tr>
<tr>
<td>and transnational seizures</td>
<td>192–3, 196</td>
</tr>
<tr>
<td>US constitutional protection against unreasonable searches and seizures</td>
<td>119–20</td>
</tr>
<tr>
<td>see also detention Habermas, J.</td>
<td>92</td>
</tr>
<tr>
<td>Hafetz, J.</td>
<td>229, 233–59, 318, 324</td>
</tr>
<tr>
<td>Hakimi, M.</td>
<td>245, 321–2</td>
</tr>
<tr>
<td>Halutz, D.</td>
<td>294–5, 298</td>
</tr>
<tr>
<td>Hamilton, V.</td>
<td>292, 297, 298, 299, 301, 302</td>
</tr>
<tr>
<td>Harel, A.</td>
<td>296</td>
</tr>
<tr>
<td>Harnon, E.</td>
<td>287</td>
</tr>
<tr>
<td>Hart, H.</td>
<td>80</td>
</tr>
<tr>
<td>Hayden, J.</td>
<td>270</td>
</tr>
<tr>
<td>Hayes, B.</td>
<td>160, 161</td>
</tr>
<tr>
<td>heard, right to be</td>
<td>42, 46, 49, 50, 57</td>
</tr>
<tr>
<td>Hendry, J.</td>
<td>65</td>
</tr>
<tr>
<td>Hepple, B.</td>
<td>82</td>
</tr>
<tr>
<td>HIG (High-Value Detainee Interrogation Group)</td>
<td>240–41</td>
</tr>
<tr>
<td>Hight, K.</td>
<td>202</td>
</tr>
<tr>
<td>Hill-Cawthorne, L.</td>
<td>230</td>
</tr>
<tr>
<td>Hollenberg, S.</td>
<td>66</td>
</tr>
<tr>
<td>Hornung, G.</td>
<td>177</td>
</tr>
<tr>
<td>Horton, S.</td>
<td>249</td>
</tr>
<tr>
<td>Hosenball, M.</td>
<td>238</td>
</tr>
<tr>
<td>Hovell, D.</td>
<td>40</td>
</tr>
<tr>
<td>human rights</td>
<td>331–2</td>
</tr>
<tr>
<td>Inter-American Court of Human Rights</td>
<td>206, 329</td>
</tr>
<tr>
<td>international law see international human rights law; international humanitarian law judicial favoring see judicial favoring of human rights over United Nations Security Council sanctions</td>
<td></td>
</tr>
</tbody>
</table>
and legality of military operations standards, legal reform of counter-terrorism financial sanctions regimes in EU 55, 57, 71 UK Human Rights Act and extra-territorial scope 121, 123 UN Human Rights Committee see UN Human Rights Committee UN law 16, 17, 18–19, 20, 21, 22–3, 24–5, 26, 28–34 Hurwitz, A. 216 ICCPR (International Covenant on Civil and Political Rights) 28, 29, 126, 207, 245, 246, 247, 248 Sayadi and Vinck v. Belgium 28–30, 61 ICJ see International Court of Justice ICRC (International Committee of the Red Cross) 238, 243, 244, 245, 308, 311, 312–13, 314 IHL see international humanitarian law (IHL) IHRL see international human rights law (IHRL) ill-treatment evidence dilemma and threatening behaviour towards individuals 166 excessive force, use of 197–9, 208 inhuman or degrading treatment of asylum seekers 217, 218 risk of being subjected to 222–4, 225–7 unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314 see also torture illegal means, evidence acquired by 164, 165, 166, 167–8 see also evidence dilemma in global anti-terror campaign ‘impracticable and anomalous’ standard, extra-territorial First Amendment 276–7 ‘incident to arrest’ doctrine 110–11 individuals concerns over focus on 148, 149, 151, 152–4, 155, 160–62, 164, 165, 166, 167 dual character of First Amendment (structural–individual rights distinction) 270–72 and legality of military operations see legality of military operations personal data protection see under data protection smart sanctions and targeted individuals 20, 22–5, 26–34 threatening behaviour towards individuals, evidence dilemma in global anti-terror campaign 166 information disclosure Fourth Amendment and sharing information with third party 179, 180–82 Japan, Act on Access to Information Held by Administrative Organs (AAIAO) 130–31, 138, 144–5 nuclear power plants, Japan 142–3 security sensitive information, EU 61, 64–5, 69, 73–4 unauthorized disclosure punishment, Japan 137–8, 141 see also data protection; intelligence gathering; privacy Ingram, D. 238 intelligence gathering domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167 intelligence agencies in non-democratic and/or non-constitutional states 152, 154, 163–4, 167 intelligence units’ role 300–301 war-model versus crime-model 146–7, 148–9, 153–4 see also evidence dilemma in global anti-terror campaign; information disclosure; surveillance
Index

Inter-American Court of Human Rights 206, 329
International Committee of the Red Cross (ICRC) 238, 243, 244, 245, 308, 311, 312–13, 314
International Court of Justice (ICJ) 327
Democratic Republic of Congo v. Uganda 228
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 228
Lockerbie case (Libya v. US) 19
International Covenant on Civil and Political Rights (ICCPR) 28, 29, 126, 207, 245, 246, 247, 248
International Criminal Court (ICC) Statute 286
international human rights law (IHRL) extra-territorial obligations of European states 214, 226–7, 228, 229–30
ship-based detention 236, 241, 244–5, 246, 247–8, 254, 255
international humanitarian law (IHL) lex specialis and transnational seizures 205–6, 207, 208–9
ship-based detention 236, 239, 240, 241, 244–5, 246, 249, 253–6
interrogation restrictions and ship-based detention 244–9, 254–5, 257–9
see also torture
Israel humanitarian law protection of civilians in Gaza Strip 320
legality of military operations 288–90, 296–8, 300
Winograd Commission 303
Jackson, V. 1–12, 101–24, 324
Jangl, M. 316
Japan access limitation and security clearance 136–7, 143
Act on Access to Information Held by Administrative Organs (AAIAO) 130–31, 138, 144–5
Act on the Protection of Specially Designated Secrets (APSDS) 125, 126–7
defence operations 134, 141–2
Diet Act reform 144
diplomacy 134–5, 141–2
freedom of the press 138–9, 143
global anti-terrorism policies, effects of 128
implementation and oversight mechanism 139–40, 141–2
Japan–United States Defense Co-operation 132
justification for 127–8, 132
National Public Service Act (NPSA) and secrecy requirement 128–31, 141
National Security Strategy (NSS) and international cooperation 132
Nishiyama 129–31, 139
nuclear power plants and information disclosure 142–3
‘Proactive Contribution to Peace’ policy 132
Public Records and Archives Management Act (PRAMA) 144–5
purpose 133–4
secrecy law and ‘National Security Council’ 125–45, 325–6
secrecy law history 131–2, 141
Security Acts 133
Self-Defense Forces Act 129
Specially Designated Secrets (SDS), offer to other administrative organs and foreign governments 137, 141–2
Specified Harmful Activities prevention 135
Terrorist Activities prevention 135–6, 141–2
unauthorized disclosure punishment 137–8, 141
United States–Japan security framework 129–30, 132
Jenkins, D. 158
Jenks, W. 36
JJessup, P. 81

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 01/19/2019 06:18:30AM
via free access
Constitutionalism across borders in the struggle against terrorism

Johnson, J. 250
Johnson, M. 237
judicial favoring of human rights over
United Nations Security Council
sanctions 35–51, 326–7, 329–30, 332–4
Al Qaida sanctions committee 39–40,
41–2, 44, 47–8, 49
CJEU practice 38–45
ECtHR practice 45–50
evidence use in judicial review 43–4
human-rights-based hierarchy 37, 44,
45–6, 48–9
international organization
membership effects 49
interpretation concerns 47, 49
legal order fundamental rights 40–41,
43–5
legal uncertainty issues 44–5, 47, 50
norm conflict definition 36
Ombudsperson through UNSC
Resolution 1904 (2009) 39–40,
44
right to be heard 42, 46, 49, 50
right to judicial review before EU
courts 43–4, 46
sanction listing and de-listing
procedures 39–44, 46, 47–8, 50
sanctions list review 42–3
systemic integration issues 47
targeted sanctions 39, 45–7
travel restrictions 45–6
UN Resolution 1267 (1999) sanctions
regime 46–7
UN Resolution 1483 (2003) 48–9
judicial review
law of war see under law of war,
unraveling
military commissions instead of
civilian courts 158
right to full, EU 56–7, 58–61, 63, 68,
69
ship-based detention 244–9, 254–5,
257–9
UN law 17, 19, 20, 24, 26–7, 33
jus cogens boundaries 22–3, 56, 63
Kahan, D. 304
Kaido, Y. 143
Kaufman, C. 81
Keitner, C. 123
Kelman, H. 292, 297, 298, 299, 301,
302
Kelsen, H. 15–16, 18, 35, 65
Kennedy, D. 295, 310
Kent, A. 193, 197, 202, 257
Kerr, O. 181
Knop, K. 87
Knowles, R. 234
Koh, H. 80, 81, 82, 244, 246, 310
Kokott, J. 58
Korenica, F. 49
Koskenniemi, M. 96
Kreß, C. 308
Kretzmer, D. 208
Krisch, N. 18, 93
Kumar, M. 158–9
labelling requirement 166
see also evidence dilemma in global
anti-terror campaign
Lambert, H. 82
language, military operations and legal
‘language rules’ 301–2
Larik, J. 47, 61
Laughlin, S. 277
Lauterpacht, H. 304
Law, D. 105
civil prosecutions 312
armed conflict and terrorism 306–12
combatant detention in international
armed conflicts 307, 312
courts’ role in determining where
hostilities are taking place
314–15
criminal law and terrorist attacks
307–8, 311, 312
expansion of rights 313–21
habeas availability in areas of
hostilities 315
| habeas availability military detainees | 313–14 |
| International Committee of the Red Cross (ICRC) | 308, 311, 312–13, 314 |
| judicial review of conditions of detention for military detainees | 316–18 |
| judicial review of executive’s choice to exercise military detention authority | 319 |
| judicial review of targeting | 319–21 |
| judicial review of the continued need for military detention | 318–19 |
| non-international armed conflict | 307, 308–9 |
| person held as enemy combatant | 319 |
| POW status, lack of | 307, 316 |
| right of self-defense | 309–10 |
| Suspension Clause entitlement | 314, 317 |
| terrorism as armed conflict | 309–11 |
| torture of noncitizens abroad | 318 |
| unregulated and abusive treatment in detention and Eighth Amendment | 308, 309, 311, 314 |
| Lederman, M. | 247, 251 |
| legal order fundamental rights | 40–41, 43–5 |
| legal reform of counter-terrorism financial sanctions regimes in EU | 52–77 |
| ‘closed material proceedings’ (CMP) | 64–5, 73, 76 |
| disclosure of security sensitive information | 61, 64–5, 69, 73–4 |
| due process rights | 58–9, 63, 64, 66, 68, 72 |
| ECJ decisions | 55–65 |
| EU implementing measures as distinct from legality of UN resolution (dualist approach) | 56–7, 61, 63, 69, 70–74 |
| EU Rules of Procedure of the General Court proposals | 64–5 |
| future reform potential | 65–76 |
| human rights standards | 55, 57, 71 |
| international efforts, limited effects of | 52–3 |
| *jus cogens* boundaries | 56, 63 |
| property rights and freezing of assets | 57, 63, 66, 67, 70, 74–5 |
| proscription in priority to financial sanctions listing | 74–6 |
| prosecution in priority to financial sanctions listing | 72–4 |
| right of defence | 59, 60–61, 63 |
| right to be heard | 57 |
| right to full judicial review | 56–7, 58–61, 63, 68, 69 |
| sanctions listings debate | 53–4, 62 |
| statement of reasons to affected parties | 62–3 |
| time factors, criticism of | 61–2 |
| UN Convention for the Suppression of the Financing of Terrorism | 72, 74 |
| UNSCR 1267 scheme, core problem | 54–5 |
| UNSCR 1267 scheme impact | 52–4 |
| UNSCR 1267 scheme, listings copying as ‘mandatory duty’ | 67 |
| UNSCR 1267 scheme, narrative summary reform | 57–8, 60–61, 62 |
| UNSCR 1267 scheme, private entities and individuals as targets | 54 |
| UNSCR 1373 and legislative designs of individual states | 59, 66–72, 75–6 |
| UNSCR 1535 Counter-Terrorism Committee Executive Directorate proposal | 71–2 |
| UNSCR 1730, listing and delisting procedures | 55, 58 |
| UNSCR 1822, listings review | 59–60 |
| UNSCR 1904, Ombudsperson role | 58, 59, 60, 69 |
| legal uncertainty issues | 44–5, 47, 50 |
| legality of military operations | 283–304 |
| eyesight role in past massacres and unmediated encounter with victims | 291–3 |
Constitutionalism across borders in the struggle against terrorism

Geneva Convention on legal advisers 302
intelligence units’ role 300–301
International Criminal Court (ICC) Statute 286
Israeli Defense Forces (IDF), Early Warning Procedure 288–90
Israeli Defense Forces (IDF), International Law Department (ILD) and targeted killings policy 296–8
Israeli Defense Forces (IDF), Time Critical Targets 297, 300
legal advisor role 299–302
legal approval strengthens appearance of authorization 297–8
legal ‘clearance’ effects 298–9
legal ‘language rules’ 301–2
modern battlefields and detachment effects 293–5
orders that are manifestly unlawful, black flag test 287–8
orders that are manifestly unlawful, reason-based and emotion-based approaches 286–90, 295
segmentation of functions and individual responsibility 299–301
superior order defense 285–7
Lemaitre, F. 169
Lenart, J. 216–17
Leo, R. 153, 164
Łętowska, L. 330
Levi, M. 79
Levi-Barzilai, V. 294
lex specialis of international humanitarian law 205–6, 207, 208–9
Liang, J. 286
Livni, E. 296
Lizza, R. 169
Loader, I. 96
Lobel, J. 271
Luban, D. 284, 303
MacAskill, E. 102–3
McBride, J. 165
McMahon, R. 54
Maffei, S. 158
Marauhn, T. 82
Margulies, P. 243
Marques da Silva, S. 88
Marschik, A. 71
material support as crime 74, 76, 157, 203, 269
Mayer, J. 167
Melzer, N. 309
Memoranda of Understanding, extra-territorial obligations of European states 224–7
Merriam, J. 265–6, 296, 297, 301
Miklaszewski, J. 237
Milanovic, M. 30, 36, 121, 176, 206
military commissions instead of civilian courts 158
military operations interference concerns 205–6, 208–10
legality see legality of military operations
ship-based detention and Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
Miranda warnings 211, 239, 240–41, 255, 256
Mitsilegas, V. 93, 173
modern battlefields and detachment effects 293–5
see also legality of military operations
Mordarai, G. 257
Morocco, torture use 154–5
Mosko, Y. 294, 298
Murphy, C. 66, 78–97, 324
Nakashima, E. 111
national systems domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167
domestic police regulation comparison 148–50, 152–3, 164–5
legal diffusion between national legal systems 82, 87, 88 and reciprocal privacy, EU 173–4, 179
sovereignty issues 16, 18, 276–8 see also individual countries
Neocleous, M. 96 Neuman, G. 121, 194, 196–7, 202, 235, 266, 277, 278
new terrorism offenses, vagueness concerns 155–8
New Zealand, Terrorism Suppression Amendment Act 70–71
Ní Aoláin, F. 183
NIAC see non-international armed conflict (NIAC)
‘no-spy’ agreements 185 see also reciprocal privacy
Nollkaemper, A. 37
non-democratic/non-constitutional states, intelligence agencies 152, 154, 163–4, 167
non-international armed conflict (NIAC) 307, 308–9
ship-based detention 243–4, 245, 246, 247, 254–5
non-refoulement (non-return) rule for asylum seekers 221, 222–4
non-traditional international armed conflict and non-state actors 209–10
Noone, G. 239, 243
Noorda, H. 72
nuclear power plants and information disclosure, Japan 142–3
Nussbaum, M. 304
Olson, L. 308
Ombudsperson role 39–40, 44, 58, 59, 60, 69
originator control principle 151 see also evidence dilemma in global anti-terror campaign
Osiel, M. 285, 286, 287, 295, 304
Paust, J. 313
Pearlstein, D. 191, 314
Pejic, J. 244, 245, 255
Peppetti, J. 234 personal data protection see under data protection
Peters, A. 48, 94, 120–21
Philbin, P. 235
physical incapacitation, scrutiny of 200, 201–2 see also torture
Pictet, J. 243
Poli, S. 23, 56
police regulation comparison 148–50, 152–3, 164–5
Ponsa, C. 277
Posner, E. 266
POW status 243, 254, 307, 316
precrimes, comparison with 156–7 see also evidence dilemma in global anti-terror campaign
preventive detention 159–60 see also detention
PRISM program, US 102–3, 112–14
privacy and dissent in Supreme Court 105–11 proportionality principles in privacy intrusions 118–19
reciprocal see reciprocal privacy right and Fourth Amendment 105–15, 119–20
see also data protection; information disclosure; reciprocal privacy
private sector role in rule-making and enforcement 88–9
property rights and freezing of assets, EU 57, 63, 66, 67, 70, 74–5 proportionality principles in privacy intrusions 118–19
protection against unreasonable seizures see US constitutional protection against unreasonable searches and seizures
Public Records and Archives Management Act (PRAMA), Japan 144–5
Puerto Rico, Consejo de Salud Playa de Ponce v. Rullan 276
Qualification Directive, EU 217, 218
Constitutionalism across borders in the struggle against terrorism

Rajogopal, B. 84
Ramraj, V. 78, 79, 84
Rapaport, A. 293, 300, 301
reasonableness requirements and Fourth Amendment 206, 208, 210, 211
Reception Conditions Directive, EU 217
reciprocal privacy 169–88
dragnet surveillance 171, 174, 178, 183
EU-US Passenger Name Records (PNR) agreement 188
EU-US Safe Harbor Agreement invalidation 170, 187
EU-US Terrorist Finance Tracking program 188
surveillance beyond borders, US and EU parallels 171
transatlantic legal framework, need for 171, 184–8
US National Security Agency (NSA) domestic metadata program 181–3
US National Security Agency (NSA) global electronic surveillance, and Transatlantic Trade and Investment Partnership (TTIP) negotiations 187, 188
US National Security Agency (NSA) telephone data collection 107–8, 182, 183
reciprocal privacy, European privacy protections 172–8
Data Protection Directive 172, 173, 174
ECHR extra-territorial application 176–7
ECHR privacy protections 174–7 and national security laws 173–4 personal data protection 172–3 surveillance operations of EU member states conducted outside EU 174
reciprocal privacy, US privacy law 178–84
Fourth Amendment and sharing information with third party 179, 180–82
Fourth Amendment and US officials’ searches of foreign nationals abroad 179–80
FREEDOM Act 183
information shared with third-party service providers 180–81
national security surveillance 179 ‘no-spy’ agreements 185
Privacy and Civil Liberties Oversight Board 182–3
Refugee Convention 218, 219–21, 222–3
refugees
Refugee Convention 218, 219–21, 222–3
‘third country nationals’ exclusion from refugee status 218
UN Convention Relating to the Status of Refugees limitations 215–16, 221
see also asylum seekers
Repeta, L. 126
Resnik, J. 118, 207
Rettman, A. 174
rights
First Amendment structural–individual rights distinction 270–72
human see human rights
of asylum seekers 215–20
of defense, individual 59, 60–61, 63
of national self-defense 309–10
of terrorist suspects not to be deported, extradited or subjected to sanctions 220–27
to be heard 42, 46, 49, 50, 57
to due process 191, 192–3, 197, 198, 199–200, 206
to free speech or the right to freedom of association 223
to freedom from unreasonable searches and seizures see US constitutional protection against
Index

unreasonable searches and seizures
to full judicial review 43–4, 46, 56–7, 58–61, 63, 68, 69
to remain silent 164
Roach, K. 84, 87
Roberts, A. 37
Rocha Machado, M. 89
Rosand, E. 85
Roxstrom, E. 227
rule-making or enforcement processes, transnational counter-terrorism law dynamics 84–90
Sadurski, W. 330
Said, W. 157
Saito, T. 131
Salinas de Frías, A. 220, 225
sanctions
asset freezing 57, 63, 66, 67, 70, 74–5, 160
financial sanctions regimes see legal reform of counter-terrorism financial sanctions regimes in EU
judicial favoring of human rights see judicial favoring of human rights over United Nations Security Council sanctions
listing and de-listing procedures 39–44, 46, 47–8, 50, 53–4, 62
rights of terrorist suspects not to be subjected to 220–27
smart sanctions and targeted individuals 20, 22–5, 26–34
travel restrictions 45–6
UN regime 326–32
Sands, P. 80
Sassòli, M. 308
Satterthwaite, M. 247
Saul, B. 78
Savage, C. 238, 240, 246, 249
Schauer, F. 270
Scheinin, M. 15–34, 58, 65, 66, 71, 79, 161, 324, 326
Scheppel, K. 118, 123, 146–68, 258, 324–5
Schmidt, M. 238
Schmitt, E. 240
Schmitt, M. 296, 297, 301
Schnabel, C. 177–8
Schulhofer, S. 246
Schultz, T. 80
searches, unreasonable see US constitutional protection against unreasonable searches and seizures
dog sniffing searches 109
secrecy law, Japan see Japan, secrecy law and ‘National Security Council’
secretly sourced evidence 150–51
see also evidence dilemma in global anti-terror campaign
security
access limitation and security clearance, Japan 136–7, 143
disclosure of security sensitive information, EU 61, 64–5, 69, 73–4
forces engaged in counter-terrorism operations abroad 227–30
Security Acts, Japan 133
UN Security Council see UN Security Council headings
seizures
transnational see transnational seizures
unreasonable see US constitutional protection against unreasonable searches and seizures
Self-Defense Forces Act, Japan 129
self-defense right 59, 60–61, 63, 309–10
Serrano, R. 240
Shaffer, G. 83, 84
Shilalita, C. 296
Shelton, D. 35
ship-based detention and extra-territorial application of US constitutional rights 233–59
Army Field Manual on Interrogations 248–9, 255
Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
coercive interrogation 240, 249, 253, 255, 256
constitutional protection, extending 253–9
Constitution’s Due Process Clause 250, 251, 254–5, 256, 257
Convention Against Torture 246–7
criminal justice system protection 256–7
criminal law-based requirement of prompt presentment 241–2
ex post civil damages actions 257–8
federal anti-torture statute 258–9
Geneva III on temporary detention of POWs 243, 254
Guantanamo Bay restrictions, effects of 234–6, 251–4
habeas rights 236–7, 252–5
High-Value Detainee Interrogation Group (HIG) 240–41
International Committee of the Red Cross (ICRC) access 238, 243, 244, 245
International Covenant on Civil and Political Rights (ICCPR) and prohibition of arbitrary detention 245, 246, 247, 248
international human rights law (IHRL) 236, 241, 244–5, 246, 247–8, 254, 255
international humanitarian law (IHL) 236, 239, 240, 241, 244–5, 246, 249, 253–6
judicial access and restrictions on interrogation under international law 244–9, 254–5, 257–9
*Ker-Frisbie* rule 257
*Khattalah* case 238–40, 241, 242, 256, 259
law-of-war and criminal detention dual track approach 255–6
law-of-war authority 239–40
*Miranda* ‘public safety’ warnings 239, 240–41, 255, 256
National Defense Authorization Act (NDAA) 249
non-international armed conflict (NIAC) 243–4, 245, 246, 247, 254–5
territorial limitations 234–42
Uniform Code of Military Justice (UCMJ) 258–9
US domestic law 249–53
War Crimes Act 258–9
*Warsame* and *al-Libi* cases 237–40, 242, 245, 251, 255, 256
Shishido, J. 129, 139
Shochat, Y. 300
Sifton, J. 258
silence, right to remain silent 164
Simon, J. 91
Sivakumaran, S. 244
Slaughter, A. 78–9, 92, 120, 329
Slobogin, C. 180
smart sanctions and targeted individuals 20, 22–5, 26–34
see also sanctions
Snowden, E. 7, 8, 103, 126, 162, 170, 171, 178, 186
Sobotta, C. 58
South Africa, anti-apartheid lawyering 321
sovereignty issues 16, 18, 276–8
see also national systems
Spain
data privacy protection 178
special procedural and evidentiary rules for national security cases 158
‘special advocates’ 158
see also evidence dilemma in global anti-terror campaign
Stahlberg, T. 26
state systems see national systems
Steinhauer, J. 183
Steyn, J. 236
Stoeva, P. 84, 89
Stone Sweet, A. 330
Stroobants, J. 169
Stutz, W. 164
Su, A. 223, 260–80, 324
substantive constitutionalism 17, 18–21
and formal hierarchy clash 21–31
see also constitution headings
Index

Sullivan, G. 160, 161
Suro, R. 150
surveillance
dragnet 171, 174, 178, 183
driftnet 162–3, 166
electronic 105–15, 119–20
reciprocal privacy 171, 174
US Foreign Intelligence Surveillance Act 102–3, 112–14, 148
see also intelligence gathering
Suskind, R. 160
Swire, P. 149
Switzerland, A v. Federal Department of Economic Affairs 48

Tal-Shir, A. 294, 301
targeted individuals, and smart sanctions 20, 22–5, 26–34
targeted killings 207–12, 296–8, 319–21
Taylor, G. 39, 40, 41
Taylor, M. 255
Teitel, R. 283
telephone data collection 107–8, 182, 183
territoriality
and extension of constitutional rights abroad, US 192–9
limitations and ship-based detention 234–42
see also extra-territorial headings
Thaman, S. 165
thermal imaging 108–9
Thimm, J. 186
‘third country nationals’ exclusion from refugee status, EU 218
third parties, Fourth Amendment and data disclosed to 103, 119–20, 179, 180–82
Thomas, G. 164
threatening behaviour towards individuals 166
see also evidence dilemma in global anti-terror campaign
time factors
criticism of length of time to resolve legal disputes concerning EU financial sanctions regime 61–2

Israeli Defense Forces (IDF), Time Critical Targets 297, 300
Tladi, D. 39, 40, 41
Tonkin, H. 88
torture
Convention Against Torture 165, 246–7
evidence acquired by 164, 165, 166, 167–8
noncitizens abroad 318
physical incapacitation scrutiny 200, 201–2
ship-based detention and federal anti-torture statute 258–9
see also ill-treatment; interrogation transatlantic legal framework, need for 171, 184–8
see also reciprocal privacy
transnational counter-terrorism law dynamics 78–97
bi-lateral agreements 86–7
Bivens question 205
comparative law methods 83
counter-terrorist finance law 91–4, 96–7
critique development 90–95
data surveillance and privacy concerns 86–7
disaggregation problem 89–90
future research 95–7
global governance development 85–6
‘internalization’ of rules into national legal systems 82
legal diffusion between national legal systems 82, 87, 88
private sector role in rule-making and enforcement 88–9
regional government adoption of counter-terrorism law 86, 89
rule-making or enforcement processes 84–90
Terrorist Finance Tracking Programme (TFTP) 86
UN Counter-Terrorism Committee 85–6
UN Security Council resolution 1373 85, 89, 96

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 01/19/2019 06:18:30AM via free access
UN Security Council resolution 1617 and counter-terrorist finance 89
UN Security Council resolution 2178 and global response to national security threat 96
transnational seizures 191–212
aliens and ‘ascending scale of rights’ 105
coercive tactics 201–2
context-specific application 199–200, 204, 205, 207–9, 210
cross-border shootings 197–9
death penalty cases 201–2
excessive force, use of and Fourth Amendment rights 197–9, 208
Fifth Amendment due process rights 191, 192–3, 197, 198, 199–200, 206
Fourth Amendment’s reference to ‘the people’ as term of art 194–5, 202–3
fundamental rights tradition 200–202, 204
and habeas corpus 192–3, 196
and International Covenant on Civil and Political Rights (ICCPR) 207
lex specialis of international humanitarian law 205–6, 207, 208–9
military operations’ interference concerns 205–6, 208–10
Miranda warnings 211, 239, 240–41, 255, 256
non-traditional international armed conflict and non-state actors 209–10
physical incapacitation scrutiny 201–2
procedural protections and Fifth Amendment 210–11
protection against unreasonable seizures 200–202, 204
reasonableness requirements and Fourth Amendment 206, 208, 210, 211
seizures of persons and triggering of application of the Fourth and Fifth Amendments 199–207
Suspension Clause 192, 196, 197
targeted killing and detention operations abroad 207–12
territoriality and extension of constitutional rights abroad, US Supreme Court’s conflicting approaches to 192–9
universalist approach to constitutional rights application 194
warrantless searches and Fourth Amendment 194–6, 202–4, 211
teach restrictions 45–6
see also sanctions
Tshwane Principles 128
TTIP (Transatlantic Trade and Investment Partnership) negotiations 187, 188
Tushnet, M. 321
Tzanakopoulos, A. 38, 40, 41, 45
Tzanou, M. 23, 56, 178
UCMJ (Uniform Code of Military Justice), ship-based detention 258–9
UK
armed forces protection when engaged in military operations abroad 229
asylum claims 219–20
data privacy protection 177–8
domestic intelligence-gathering 149
extended detention aboard a ship 247–8
extradition orders 224
GCHQ dragnet surveillance reports 174, 178
Human Rights Act and extra-territorial scope 121, 123
intelligence gathering, cooperative efforts 150–51
Investigatory Powers Tribunal 150
Proscribed Organisations Appeal Commission (POAC) 76
‘special advocates’ 158
Index

Terrorist Asset-Freezing Act (TAFA) 69, 70
UN 1373 implementation rules 66–70, 75–6
UK, cases
A v. Secretary of State for the Home Dept (No 2) 226
Ahmed v. HM Treasury 336
Al-Sirri v. Secretary of State for the Home Department 219–20
Al-Skeini v. Sec’y of State for Defence 121, 123
Horvath v. Secretary of State for the Home Department 220
IA (Iran) v. Secretary of State for the Home Dept 216
Januzi v. Secretary of State for the Home Department 220
Liberty v. General Communications Headquarters 150–51
Lord Alton of Liverpool and others (Re The People’s Mojahadeen Organization of Iran) v. Secretary of State for the Home Department 76
R (JS) (Sri Lanka) v. Secretary of State for the Home Department 219
R (Sivakumar) v. Secretary of State for the Home Dept 219
R (Smith) v. Oxfordshire Assistant Deputy Coroner 229
R (Ullah) v. Special Adjudicator 225–6
RB (Algeria) v. Secretary of State for the Home Dept 225
Serdar Mohammed v. Ministry of Defense 248
Smith v. Ministry of Defence 229
Tv. Secretary of State for the Home Department 220
Youssef v. Secretary of State for Foreign and Commonwealth Affairs 62
UN Convention for the Suppression of the Financing of Terrorism 72, 74
UN Convention Relating to the Status of Refugees limitations 215–16, 221
UN Counter-Terrorism Committee 85–6
UN Human Rights Committee (UNHRC) 327
Sayadi and Vinck v. Belgium 28–30, 328
UN law 15–34, 326
Constitution definition 15–17
Grundnorm 16, 18, 34
hierarchy of legal norms 16–17, 18, 19, 21–32
human rights see human rights
judicial review 17, 19, 20, 24, 26–7, 33
smart sanctions and targeted individuals 20, 22–5, 26–34
substantive constitutionalism see substantive constitutionalism
UN Charter as Constitution 18–19
UN Security Council anti-terrorism laws 19–21
Chapter VII powers 18, 19, 20, 22–5, 26–31, 32
UN Security Council Resolution 1267 judicial powers 20–21
legal reform of counter-terrorism financial sanctions regimes in EU 52–4, 54–5, 57–8, 60–61, 62, 67
listings copying as ‘mandatory duty’ 67
narrative summary reform 57–8, 60–61, 62
private entities and individuals as targets 54
sanctions regime 46–7, 160–61
terrorist listing regime 20, 21–2, 25, 26–8, 29–30, 33
UN Security Council Resolution 1373 legislative designs of individual states 59, 66–72, 75–6
permanent legislative powers 20–21
transnational counter-terrorism law dynamics 85, 89, 96

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 01/19/2019 06:18:30AM
via free access
UN Security Council Resolution 1535, Counter-Terrorism Committee Executive Directorate proposal 71–2
UN Security Council Resolution 1617, and counter-terrorist finance 89
UN Security Council Resolution 1730, listing and delisting procedures 55, 58
UN Security Council Resolution 1822 listings review 59–60
UN Security Council Resolution 1904 Ombudsperson role 58, 59, 60, 69
UN Security Council Resolution 2178, global response to national security threat 96
UN Security Council sanctions see judicial favoring of human rights over United Nations Security Council sanctions
unauthorized disclosure punishment, Japan 137–8, 141
Uniform Code of Military Justice (UCMJ), ship-based detention 258–9
universalist approach to constitutional rights application 194
unlawful orders 286–90, 295 see also legality of military operations
unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314 see also ill-treatment
US
Bill of Rights overview and constitutional protection 262–6, 273, 276 constitutional rights abroad 192–9
First Amendment see extra-territorial First Amendment
Foreign Intelligence Surveillance Act and PRISM program 102–3, 112–14, 148
Foreign Relations Law 275
Freedom Act 183
intelligence gathering and criminal evidence collection, separation of 153
material support as crime 157
military commissions instead of civilian courts 158
National Defense Authorization Act (NDAA) 249
National Security Agency (NSA) 169–70, 180–84, 186–7, 188
PATRIOT Act 101–2, 103, 113, 114–15
PRISM program 102–3, 112–14, 148 privacy law see reciprocal privacy, US privacy law right to remain silent 164 surveillance beyond borders, US and EU parallels 171 transnational proscription concerns 76
United States–Japan security framework 129–30, 132
War Crimes Act 258–9
US, cases
Aamer v. Obama 316
ACLU v. Clapper 114
Al Alwi v. Obama 249
Al Bihani v. Obama 249
Al Odah v. United States 277
Al-Aulaqi v. Panetta 205
al-Libi 237–40, 242, 245, 251, 255, 256
Al-Maajleh v. Gates 120, 236–7
Al-Maajleh v. Hagel 120, 236–7
Al-Marri v. Spagone 253
American Civil Liberties Union v. Clapper 183
Asahi Metal Indus. Co. v. Super. Ct. of Cal. 273
Atamirzayeva v. United States 197
Atkins v. Virginia 201
Balzac v. Porto Rico 262, 264
Berger v. New York 106
Best v. United States 206
Bivens 205
Index

<table>
<thead>
<tr>
<th>Page Range</th>
<th>Case Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>272</td>
<td>Byars v. United States 2</td>
</tr>
<tr>
<td>179</td>
<td>California v. Greenwood 179</td>
</tr>
<tr>
<td>109</td>
<td>City of Ontario, Cal. v. Quon 109</td>
</tr>
<tr>
<td>103, 112–13, 183</td>
<td>Clapper v. Amnesty International</td>
</tr>
<tr>
<td>241</td>
<td>Corley v. United States 241</td>
</tr>
<tr>
<td>241</td>
<td>County of Riverside v. McLaughlin 241</td>
</tr>
<tr>
<td>256</td>
<td>Dickerson v. United States 256</td>
</tr>
<tr>
<td>268–9, 270, 273</td>
<td>DKT v. Agency for International Development 268–9, 270, 273</td>
</tr>
<tr>
<td>262</td>
<td>Dorr v. United States 262</td>
</tr>
<tr>
<td>262</td>
<td>Duncan v. Louisiana 262</td>
</tr>
<tr>
<td>2</td>
<td>Elkins v. United States 2</td>
</tr>
<tr>
<td>109</td>
<td>Florida v. Jardines 109</td>
</tr>
<tr>
<td>201</td>
<td>Ford v. Wainwright 201</td>
</tr>
<tr>
<td>201</td>
<td>Fouca v. Louisiana 201</td>
</tr>
<tr>
<td>205, 205, 257</td>
<td>Frisbie v. Collins 205, 257</td>
</tr>
<tr>
<td>278</td>
<td>Gambino v. United States 278</td>
</tr>
<tr>
<td>279</td>
<td>Garces v. Ceballos 279</td>
</tr>
<tr>
<td>105–6</td>
<td>Goldman v. United States 105–6</td>
</tr>
<tr>
<td>201</td>
<td>Gregg v. Georgia 201</td>
</tr>
<tr>
<td>277–8</td>
<td>In Re Guantanamo Detainees 277–8</td>
</tr>
<tr>
<td>267, 270, 272</td>
<td>Harig v. Agee 267, 270, 272</td>
</tr>
<tr>
<td>236, 307, 318</td>
<td>Hamdan v. Rumsfeld 236, 307, 318</td>
</tr>
<tr>
<td>318</td>
<td>Harbury v. Deutsch 318</td>
</tr>
<tr>
<td>197–8, 199</td>
<td>Hernandez v. United States 197–8, 199</td>
</tr>
<tr>
<td>179</td>
<td>Hoffa v. United States 179</td>
</tr>
<tr>
<td>203</td>
<td>Holder v. Humanitarian Law Project 76, 269–70, 272</td>
</tr>
<tr>
<td>250</td>
<td>Hussain v. Obama 250</td>
</tr>
<tr>
<td>275</td>
<td>Insular Cases 262–6, 275</td>
</tr>
<tr>
<td>113</td>
<td>Jewel v. National Security Agency 113</td>
</tr>
<tr>
<td>205, 257</td>
<td>Ker v. Illinois 205, 257</td>
</tr>
<tr>
<td>193</td>
<td>Kinsella v. Kreuger 193</td>
</tr>
<tr>
<td>263</td>
<td>Kinsella v. United States 263</td>
</tr>
<tr>
<td>268–9, 272</td>
<td>Kleindienst v. Mandel 268–9, 272</td>
</tr>
<tr>
<td>108–9</td>
<td>Kylo v. United States 108–9</td>
</tr>
<tr>
<td>105</td>
<td>Lee v. United States 105</td>
</tr>
<tr>
<td>106</td>
<td>Lopez v. United States 106</td>
</tr>
<tr>
<td>316</td>
<td>Ludecke v. Watkins 316</td>
</tr>
<tr>
<td>288</td>
<td>McCall v. McDowell 288</td>
</tr>
<tr>
<td>194, 201</td>
<td>McElroy v. United States 194, 201</td>
</tr>
<tr>
<td>256</td>
<td>McNabb v. United States 256</td>
</tr>
<tr>
<td>256</td>
<td>Mallory v. United States 256</td>
</tr>
<tr>
<td>33</td>
<td>Marbury v. Madison 33</td>
</tr>
<tr>
<td>119</td>
<td>Minnesota v. Carter 119</td>
</tr>
<tr>
<td>164</td>
<td>Miranda 164</td>
</tr>
<tr>
<td>278</td>
<td>Morse v. Frederick 278</td>
</tr>
<tr>
<td>105, 106, 109</td>
<td>Olmstead v. United States 105, 106</td>
</tr>
<tr>
<td>253</td>
<td>Padilla v. Hanft 253</td>
</tr>
<tr>
<td>269</td>
<td>Palestine Information Office v. Shultz 269</td>
</tr>
<tr>
<td>104</td>
<td>Perez v. Brownell 104</td>
</tr>
<tr>
<td>102</td>
<td>In re Production of Tangible Things 102</td>
</tr>
<tr>
<td>236</td>
<td>Rasul v. Bush 236</td>
</tr>
<tr>
<td>197</td>
<td>Rasul v. Myers 197</td>
</tr>
<tr>
<td>263–4, 265, 274, 276, 279</td>
<td>Reid v. Covert 193–6, 201, 263–4, 265, 274, 276, 279</td>
</tr>
<tr>
<td>198–9</td>
<td>Rodriguez v. Swartz 198–9</td>
</tr>
<tr>
<td>201</td>
<td>Roper v. Simmons 201</td>
</tr>
<tr>
<td>262, 263</td>
<td>In re Ross 193, 262, 263</td>
</tr>
<tr>
<td>203</td>
<td>Schooner Exchange v. McFaddon 203</td>
</tr>
<tr>
<td>106</td>
<td>Silverman v. United States 106</td>
</tr>
<tr>
<td>200</td>
<td>Smith v. Doe 200</td>
</tr>
<tr>
<td>201</td>
<td>Tennessee v. Garner 201</td>
</tr>
<tr>
<td>206, 211, 265, 272</td>
<td>In re Terrorist Bombings of US Embassies in East Africa 206, 211, 265, 272</td>
</tr>
<tr>
<td>201</td>
<td>Terry v. Ohio 201</td>
</tr>
<tr>
<td>203</td>
<td>United States v. Ahmed 203</td>
</tr>
<tr>
<td>274–5</td>
<td>United States v. Al-Bahlul 274–5</td>
</tr>
</tbody>
</table>
Constitutionalism across borders in the struggle against terrorism

United States v. Ali 197
United States v. Alvarez-Machain 257
United States v. Carpio-Leon 197
United States v. Demanett 273
United States v. Emmanuel 197
United States v. Ghailani 255–6
United States v. Miller 103, 179
United States v. Molin 113
United States v. Mohamud 113, 114
United States v. Peterson 122, 123
United States v. Place 109
United States v. Purvis 239
United States v. Quarles 240
United States v. Salvucci 119
United States v. Syokes 265
United States v. Toscanino 257, 273
United States v. United States District Court for the Eastern District of Michigan 104
United States v. United States District Court (‘Keith’) 112, 113–14, 119
United States v. Warsame 203
United States v. White 179
United States v. Yunis 239
United States v. Zakharov 211
USAID v. Alliance for Open Society 223, 260–61, 268, 269, 270, 272
Wabol v. Villacrusis 277
Warsame 237–40, 242, 245, 251, 255, 256
Wong Sun v. United States 106
Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme 261
Youngberg v. Romeo 201
US Constitution Eighth Amendment, unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314
US Constitution Fifth Amendment due process rights 191, 192–3, 197, 198, 199–200, 206
seizures of persons 199–207
targeted killing and detention operations abroad 207–12
US Constitution First Amendment, extra-territorial 260–80
US Constitution Fourth Amendment data disclosed to third parties 103, 119–20
limited extra-territorial scope 103–4, 119–20
national security and foreign intelligence investigations, call for distinction between 104
reference to ‘the people’ as term of art 194–5, 202–3
and right to privacy 105–15, 119–20
seizures of persons 199–207
sharing information with third party 179, 180–82
targeted killing and detention operations abroad 207–12
US officials’ searches of foreign nationals abroad 179–80
warrantless searches and Fourth Amendment, transnational seizures 194–6, 202–4, 211
US Constitution Suspension Clause 192, 196, 197, 236–7, 266, 272, 278, 314, 317
US Constitution Uniformity Clause 262–3
US constitutional protection against unreasonable searches and seizures 101–24
Canada and ‘reasonable’ searches and accountability 116–19
comparison with other constitutional democracies 115–23
data collection/surveillance and rights-protection challenges 103

US constitution and ship-based detention see ship-based detention and extra-territorial application of US constitutional rights

US Constitution due process rights see under due process rights
<table>
<thead>
<tr>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>data disclosed to third parties 103, 119–20</td>
</tr>
<tr>
<td>dog sniffing searches 109</td>
</tr>
<tr>
<td>electronic surveillance 105–15, 119–20</td>
</tr>
<tr>
<td>extra-territorial application of constitutional constraints 119–23, 179–80, 194, 202, 235</td>
</tr>
<tr>
<td>Foreign Intelligence Surveillance Act and PRISM program (Section 702) 102–3, 112–14</td>
</tr>
<tr>
<td>FREEDOM Act 119</td>
</tr>
<tr>
<td>global positioning (GPS) device use 109–10</td>
</tr>
<tr>
<td>habeas corpus rights see habeas corpus</td>
</tr>
<tr>
<td>‘incident to arrest’ doctrine 110–11</td>
</tr>
<tr>
<td>limited extra-territorial scope 103–4, 119–20</td>
</tr>
<tr>
<td>multi-vocal constitutional judgments 112–15</td>
</tr>
<tr>
<td>national security and foreign intelligence investigations, call for distinction between 104</td>
</tr>
<tr>
<td>PATRIOT Act and telephonic metadata program 101–2, 103, 113, 114–15</td>
</tr>
<tr>
<td>privacy and dissent in Supreme Court 105–11</td>
</tr>
<tr>
<td>proportionality principles in privacy intrusions 118–19</td>
</tr>
<tr>
<td>right to privacy 105–15, 119–20</td>
</tr>
<tr>
<td>telephone data collection 107–8, 182, 183</td>
</tr>
<tr>
<td>thermal imaging 108–9</td>
</tr>
<tr>
<td>USA FREEDOM Act 119</td>
</tr>
<tr>
<td>Valeec, M. 156</td>
</tr>
<tr>
<td>Valverde, M. 96</td>
</tr>
<tr>
<td>Van den Herik, L. 71</td>
</tr>
<tr>
<td>Van Schaack, B. 154, 244–5</td>
</tr>
<tr>
<td>Vazquez, C. 205</td>
</tr>
<tr>
<td>Versteeg, M. 105</td>
</tr>
<tr>
<td>Vidmar, J. 35, 36, 37</td>
</tr>
<tr>
<td>Vladeck, S. 191, 193, 205, 211, 238, 242, 250, 251, 254, 257, 270</td>
</tr>
<tr>
<td>Voete, E. 329</td>
</tr>
<tr>
<td>Walker, C. 52–77, 94, 229, 324</td>
</tr>
<tr>
<td>Walker, N. 96</td>
</tr>
<tr>
<td>Walsh, D. 92</td>
</tr>
<tr>
<td>Walzer, M. 292, 293</td>
</tr>
<tr>
<td>war</td>
</tr>
<tr>
<td>law of see law of war, unraveling</td>
</tr>
<tr>
<td>POW status 243, 254, 307, 316</td>
</tr>
<tr>
<td>War Crimes Act, US 258–9</td>
</tr>
<tr>
<td>war-model, intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4</td>
</tr>
<tr>
<td>warrantless searches 194–6, 202–4, 211</td>
</tr>
<tr>
<td>see also US constitutional protection against unreasonable searches and seizures</td>
</tr>
<tr>
<td>Waxman, M. 306, 318</td>
</tr>
<tr>
<td>Webber, D. 230</td>
</tr>
<tr>
<td>Weiler, J. 83</td>
</tr>
<tr>
<td>Weiser, B. 240</td>
</tr>
<tr>
<td>Weisman, J. 183</td>
</tr>
<tr>
<td>Whitehead, T. 178</td>
</tr>
<tr>
<td>Whitman, J. 170</td>
</tr>
<tr>
<td>Wildhaber, L. 330</td>
</tr>
<tr>
<td>Wills, A. 167</td>
</tr>
<tr>
<td>Wing, N. 156</td>
</tr>
<tr>
<td>Wittes, B. 309–10</td>
</tr>
<tr>
<td>World-Check 88–9</td>
</tr>
<tr>
<td>Yehezkeli, Z. 294, 301</td>
</tr>
<tr>
<td>Yoaz, Y. 296, 302</td>
</tr>
<tr>
<td>Yoo, J. 235</td>
</tr>
<tr>
<td>Zimardo, P. 301</td>
</tr>
<tr>
<td>Zimmermann, A. 285, 286</td>
</tr>
<tr>
<td>Zumbansen, P. 81, 83, 330</td>
</tr>
</tbody>
</table>