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**Selected Topics in International Law:  
Transnational Public Security Law  
22 Juni 2016**

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**Duration: 120 minutes**

Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains seven pages and 16 questions.

**Grading:**

Part 1:	24 points	33.33 % of the total
Part 2:	24 points	33.33 % of the total
Part 3:	24 points	33.33 % of the total

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Total	72 points	100 %
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**Notes on multiple-choice questions**

You get two points for each multiple-choice question if your answer is correct on all four possible choices (A–D). For three correct answers within a multiple-choice question you are given 1.0 point. For two correct answers or less you get 0 points.

**Notes on completing the answer-sheet**

We strongly recommend that you transfer the solutions to the answer sheet shortly before the end of the exam (see below). This is advisable, because possibly an answer to a question gives you reason to return to a previously answered question and to answer that question differently.

**Notes concerning multiple-choice solution sheet**

Answers to the multiple-choice questions **must be made on the multiple choice solution sheet according to the guidelines**. Only this solution sheet will be revised.

**Good luck!**

## PART I

1. Art. 31(1) of the Vienna Convention on Diplomatic Relations of 18 April 1961 (VCDR) reads: “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.”

Mark the correct answer(s).

Based on the definition of transnational law used in this class, Art. 31(1) VCDR

- A) is a classical example of transnational law as it regulates the conduct of individuals (i.e. members of a diplomatic mission) of one State on the territory of another State.
- B) concerns inter-state relations. Therefore, it regulates a “transnational legal problem”.
- C) belongs to the body of international law. As international law and transnational law are mutually exclusive, it cannot be a transnational legal norm.
- D) does not fulfil all conditions of transnational law.

2. Mark the correct answer(s).

Transnational public security law

- A) uses “imposition” as one of its law-making techniques which involves the unilateral transfer of a norm through a legally binding act with cross-border application.
- B) is often characterized by a multi-actor approach, which e.g. comprises the collaboration of two or more States, or a State with private actors, or States with an international organization.
- C) is triggered, i.a., by States’ expectation of efficiency gains through cooperative action in response to cross-border risks and threats.
- D) must originate from an international law source (e.g. an international treaty). Domestic law cannot constitute transnational public security law.

3. Mark the correct answer(s).

The concept of “public security”

- A) refers to a state of safety in the public sphere.
- B) implies the obligation of the constitutional State to guarantee a certain level of security to its inhabitants.
- C) justifies interferences by the State with individual rights in the interest of its capacity to guarantee collective security interests.
- D) is an essentially contested concept since there exists no definition of public security.

**4. Mark the correct answer(s).**

**The idea of “civilizing security”**

- A) means that civil society, not the State, is the primary guarantor of security.
- B) refers (in one of its meanings) to the “security paradox”: the State is at the same time a “guarantor of” and a “threat to” the security of individuals.
- C) means that security can be fabricated by the State (security as *techné*).
- D) refers – in one of the meanings attributed to it by Ian Loader and Neil Walker – to the idea that security fosters solidarity among the people of a political community.

**5. Mark the correct answer(s).**

**In the Yahoo! Inc. v. La Ligue Contre Le Racisme et L’antisemitisme (LICRA); L’union Des Etudiants Juifs De France (UEJF) Case,**

- A) the U.S. 9<sup>th</sup> Circuit Court denied the applicable French criminal law provision transnational effect that extended to U.S. territory.
- B) the U.S. 9<sup>th</sup> Circuit Court applied the Calder test and held that it had personal jurisdiction because of the interim orders obtained from the French Court and served in the US.
- C) at the outset, the problem was that Yahoo! had made accessible to all French Internet users via the Yahoo! France website the auction of Nazi artifacts.
- D) the U.S. 9<sup>th</sup> Circuit Court ruled that any legal act which is harmful to US interests triggers the personal jurisdiction of U.S. courts.

**6. Mark the correct answer(s).**

**The Swiss-German Police Treaty of April 1999 (Treaty)**

- A) regulates international legal assistance between Switzerland and Germany.
- B) regulates the exercise of public authority of one Member State on the territory of the other Member State.
- C) states that, as a general rule, police officers of one Member State are authorized to act within the territory of the other Member State without the latter’s prior consent.
- D) attributes the conduct of a police official of one Member State, acting in conformity with the Treaty, to the State on whose territory the police official acts.

**7. Mark the correct answer(s).**

**“Targeted sanctions” by the UN Security Council**

- A) are targeted at individual States instead of creating obligations for all UN Member States.
- B) are provisions of a repressive nature with the aim of punishing individuals involved in global terrorism.
- C) were developed in response to the detrimental humanitarian effects upon civilians of Security Council economic sanctions, e.g., against Iraq.
- D) have prompted national and regional courts to decide on the relationship of obligations flowing from Security Council resolutions with national and regional human rights guarantees.

**8. Mark the correct answer(s).**

- A) The United Nations Convention on the Law of the Sea subsumes piracy under the definition of “armed robbery”.
- B) In resolution 1816 (2008), the UN Security Council suspended the application of the United Nations Convention on the Law of the Sea with regard to the territorial waters of Somalia.
- C) In its anti-piracy resolutions, the UN Security Council authorized States cooperating with the Transitional Federal Government of Somalia to use force in the territory of Somalia.
- D) The measures envisaged in the anti-piracy resolutions of the UN Security Council required the consent of the Transitional Federal Government of Somalia since otherwise they would have been contrary to the prohibition of intervention according to Art. 2 § 7 UN Charter.

**9. Mark the correct answer(s).**

**Cross-border surveillance by states**

- A) violates the international law principle of non-intervention since it interferes with the internal affairs of a foreign State.
- B) usually does not violate the territorial integrity of the targeted State since measures of transnational surveillance using signals intelligence do not create a sufficient link to the foreign territory.
- C) may interfere with the human right to privacy in Art 17 of the Covenant on Civil and Political Rights (ICCPR) of the individuals monitored.
- D) cannot be attributed to the State if the personal data, handed over to law enforcement agencies, is collected by private actors such as Google or Facebook.

**10. Mark the correct answer(s).**

- A) The Palermo Convention fully harmonizes the contracting States' national criminal laws with regard to transnational organized crime (TOC).
- B) The Palermo Convention is only concerned with the repression, not the prevention of TOC.
- C) The Contracting States to the Palermo Convention partially define what constitutes TOC in their domestic laws.
- D) In comparison to international legal instruments on counter-terrorism, the Palermo Convention relies on more traditional ways of international cooperation (e.g., international legal assistance).

**11. Mark the correct answer(s).**

- A) Art. 32 of the Council of Europe Cybercrime Convention (CCC) allows contracting States to access or receive stored computer data located in another contracting State without the authorisation of the latter.
- B) Cybercrime comprises offences which can only be committed by using a computer or via an information system.
- C) Non-European States may become parties to the CCC.
- D) The German Federal Constitutional Court developed the guarantee of the integrity and confidentiality of information technology systems based on Art. 10 of the German Basic Law on the privacy of correspondence, posts and telecommunications.

**12. Mark the correct answer(s).**

- A) UN Peacekeeping Operations are usually subsidiary organs of the UN Security Council.
- B) MONUSCO's Intervention Brigade was controversial since it raised issues with regard to the UN Peacekeeping Principle of "consent of the parties".
- C) UN Peacekeeping Operations are only allowed to use force in self-defense.
- D) UN Peacekeepers that become parties to an armed conflict are legitimate military targets according to international humanitarian law.

## PART II. Short Essay Questions

13. In response to the 9/11 terrorist attacks, the UN Security Council adopted resolution 1373. Briefly describe the legal basis in the UN Charter for the adoption of the resolution and explain why it is applicable. When discussing the legality of the resolution, which UN Charter articles and Charter terms are at issue? Give one reason that speaks against the adoption of this type of resolution by the UNSC and one that speaks in its favour. (8 points in total)

*- Chapter VII: UNSC Res 1373 was adopted based on Chapter VII. UNSC Res 1373 contains measures that are binding upon UN Member States. Chapter VII is applicable because it is the Charter chapter based on which the UNSC can enact binding measures as opposed to mere recommendations. Res. 1373 further qualifies acts of international terrorism as constituting threats to international peace and security. Chapter VII contains the measures available to the UNSC to maintain or restore international peace and security once it has qualified a situation as constituting a threat thereto.*

*- Art. 39 and 41 UN Charter: According to Art. 39 UN Charter, the UNSC “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”. Even though originally the UNSC qualified only specific situations as “threats to the peace”, the Charter does not exclude an expansive interpretation of the term, including abstract threats such as terrorism. Art. 41 authorizes the UNSC to take “measures not involving the use of armed force”. The term “measures not involving the use of armed force” is broad enough in principle, to include legislative measures.*

*- State sovereignty & consent principle: The Security Council uses its enforcement powers to replace the conventional law-making process among sovereign States which is based on state-consent. States have not agreed to create an international legislature which is authorized to enact obligations of a general-abstract character. The UN General Assembly is the international body coming closest to a world legislature but its resolutions are non-binding and constitute soft law. Until today States are the main legislators of the international legal system. The Security Council was not envisaged as a body regulating matters of an abstract character but rather as an executive-type organ reacting to specific situations (i.e. threats). The power of the UNSC to take binding decisions when acting under Chapter VII was originally considered more limited.*

*- Efficiency Gain: International treaty-making is a time-consuming process which is often too slow to respond swiftly to rapidly developing threats. The consent principle may compromise the effectiveness of a treaty since only those measures can be adopted which all State parties could agree upon. Furthermore, since States may decide not to become parties to a contract or may make reservations to a treaty, its application is often limited. UNSC legislative resolutions are a way to address these efficiency problems.*

14. a) 18 U.S. Code § 2339A and § 2339B prohibit material support to terrorism: Determine if and why these norms constitute (or do not constitute) transnational law and describe, from a constitutional law perspective, the problems arising from the U.S. criminal law norms. (4 points in total)

- *The material support norms in U.S. criminal law are transnational law since they regulate actions and events that transcend national frontiers according to Philip Jessup's definition of transnational law. They are transnational since they have cross-border effects to the extent that they apply to the support of terrorist organizations residing abroad and regulate the conduct of private individuals.*

- *Subjective Element: § 2339B does not require an intention to further an FTO's illegal activities. Knowledge that the material support goes to a designated FTO or of its commission of terrorist acts is sufficient to establish criminality.*

- *The U.S. material support norms interfere with the freedom of association and freedom of speech of non-members under the 1<sup>st</sup> Amend. of the U.S. Constitution. Restrictions of these constitutional guarantees are admissible if they are not overbroad, i.e. they are compatible with the 1<sup>st</sup> Amend. if there are no less restrictive means available to accomplish the same objective. To the extent that the U.S. material support norms prohibit generally socially acceptable conduct such as the provision of humanitarian aid (if offered to a designated FTO), one could argue that the restriction is overbroad since any activity could run the risk of being material support to terrorism.*

- b) In *Holder v. Humanitarian Law Project*, the U.S. Supreme Court found that 18 U.S. Code § 2339B was constitutional. In particular, the court rejected the vagueness-challenge and denied that the right to freedom of speech was violated. Briefly sketch the main parts of the court's reasoning on both counts. (4 points in total)

QUOTE from judgment (important aspects bold; of course, students are not expected to know all relevant details of the reasoning): “(c) As applied to plaintiffs, the material-support statute is **not unconstitutionally vague**. The Ninth Circuit improperly merged plaintiffs' vagueness challenge with their First Amendment claims, holding that “training,” “service,” and a portion of “expert advice or assistance” were impermissibly vague because they applied to protected speech—regardless of whether those applications were clear. The Court of Appeals also contravened the rule that “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495.

*The material-support statute, in its application to plaintiffs, “provide[s] a person of ordinary intelligence fair notice of what is prohibited.” [TEST] United States v.*

*Williams*, 553 U. S. 285, 304. The statutory terms at issue here—“training,” “expert advice or assistance,” “service,” and “personnel”—are quite different from the sorts of terms, like “ ‘annoying’ ” and “ ‘indecent,’ ” that the Court has struck down for requiring “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” *Id.*, at 306. Congress has increased the clarity of §2339B’s terms by adding narrowing definitions, and §2339B’s knowledge requirement further reduces any potential for vagueness, see *Hill v. Colorado*, 530 U. S. 703, 732.

Although the statute may not be clear in every application, the **dispositive point is that its terms are clear in their application to plaintiffs’ proposed conduct.** Most of the activities in which plaintiffs seek to engage readily fall within the scope of “training” and “expert advice or assistance.” In fact, plaintiffs themselves have repeatedly used those terms to describe their own proposed activities. Plaintiffs’ resort to hypothetical situations testing the limits of “training” and “expert advice or assistance” is beside the point because this litigation does not concern such situations. See *Scales v. United States*, 367 U. S. 203, 223. *Gentile v. State Bar of Nev.*, 501 U. S. 1030, 1049–1051, distinguished. **Plaintiffs’ further contention, that the statute is vague in its application to the political advocacy they wish to undertake, runs afoul of §2339B(h), which makes clear that “personnel” does not cover advocacy by those acting entirely independently of a foreign terrorist organization, and the ordinary meaning of “service,” which refers to concerted activity, not independent advocacy. Context confirms that meaning: Independently advocating for a cause is different from the prohibited act of providing a service “to a foreign terrorist organization.” §2339B(a)(1).**

**Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by §2339B.** On the other hand, a person of ordinary intelligence would understand the term “service” to cover advocacy **performed in coordination with, or at the direction of, a foreign terrorist organization.** Plaintiffs argue that this construction of the statute poses difficult questions of exactly how much direction or co-ordination is necessary for an activity to constitute a “service.” Because plaintiffs have not provided any specific articulation of the degree to which they seek to coordinate their advocacy with the PKK and the LTTE, however, they cannot prevail in their pre-enforcement challenge. See *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 454. Pp. 13–20.

(d) As applied to plaintiffs, the material-support statute does **not violate the freedom of speech guaranteed by the First Amendment.** Pp. 20–34.

(1) Both plaintiffs and the Government take extreme positions on this question. Plaintiffs claim that Congress has banned their pure political speech. That claim is unfounded because, under the material-support statute, they may say anything they wish on any topic. Section 2339B does not prohibit independent advocacy or membership in the PKK and LTTE. Rather, Congress has prohibited “material support,” which most often does

*not take the form of speech. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. On the other hand, the Government errs in arguing that the only thing actually at issue here is conduct, not speech, and that the correct standard of review is intermediate scrutiny, as set out in United States v. O'Brien, 391 U. S. 367, 377. That standard is not used to review a content-based regulation of speech, and §2339B regulates plaintiffs' speech to the PKK and the LTTE on the basis of its content. Even if the material-support statute generally functions as a regulation of conduct, as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. Thus, the Court "must [apply] a more demanding standard" than the one described in O'Brien. Texas v. Johnson, 491 U. S. 397, 403. Pp.20–23.*

*(2) The parties agree that the Government's interest in combating terrorism is an urgent objective of the highest order, but plaintiffs argue that this objective does not justify prohibiting their speech, which they say will advance only the legitimate activities of the PKK and LTTE. Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. Congress rejected plaintiffs' position on that question when it enacted §2339B, finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." §301(a), 110 Stat. 1247, note following §2339B. The record confirms that Congress was justified in rejecting plaintiffs' view. **The PKK and the LTTE are deadly groups. It is not difficult to conclude, as Congress did, that the taint of their violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means. Moreover, material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways.** The record shows that designated foreign terrorist organizations **do not maintain organizational firewalls** between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks. Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups. Pp. 23–28.*

*(3) The Court does not rely exclusively on its own factual inferences drawn from the record evidence, but considers the Executive Branch's stated view that the **experience and analysis of Government agencies charged with combating terrorism strongly support Congress's finding that all contributions to foreign terrorist organizations—even those for seemingly benign purposes—further those groups' terrorist activities.** That evaluation of the facts, like Congress's assessment, is entitled to deference, given the sensitive national security and foreign relations interests at stake. The Court does not*

*defer to the Government's reading of the First Amendment. But respect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on informed judgment rather than concrete evidence. The Court also finds it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. Most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that prohibiting material support in the form of training, expert advice, personnel, and services to foreign terrorist groups serves the Government's interest in preventing terrorism, even if those providing the support mean to promote only the groups' nonviolent ends.*

*As to the particular speech plaintiffs propose to undertake, it is wholly foreseeable that directly training the PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt. Teaching the PKK to petition international bodies for relief also could help the PKK obtain funding it would redirect to its violent activities. Plaintiffs' proposals to engage in political advocacy on behalf of Kurds and Tamils, in turn, are phrased so generally that they cannot prevail in this pre-enforcement challenge. The Court does not decide whether any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It simply holds that §2339B does not violate the freedom of speech as applied to the particular types of support these plaintiffs seek to provide. Pp.28–34.”*

15. In the case *A. and Others v. UK* (2009), the European Court of Human Rights held that preventive detention of suspected terrorists for public security purposes was prohibited under the European Convention on Human Rights. Briefly describe the court's reasoning with regard to Art. 5 and Art. 15 ECHR. In your answer, discuss whether preventive detention of a suspected terrorist could be permissible under Art. 5(1)(c) ECHR, stating that a person may be deprived of his liberty “when it is reasonably considered necessary to prevent his committing an offence”. (8 points in total)

*1) In the case A. and Others v. UK, the ECtHR had to decide whether preventive detention of suspected terrorists by UK authorities pursuant to legislation passed by the UK parliament and a derogation from Article 5 ECHR made by the UK after the 9/11 attacks under Article 15 ECHR was compatible with the Convention. Article 5 ECHR enshrines the fundamental human right of*

*the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless one of these grounds is applicable.*

*The ECtHR had to determine whether Art. 5 (f) ECHR applied in the present case as the UK Government contended that the applicants' detention was justified under that sub-paragraph and that the applicants were lawfully detained as persons "against whom action is being taken with a view to deportation or extradition". Sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context for the purpose and for as long as deportation or extradition proceedings are ongoing. The ECtHR came to the conclusion that the detention of the applicants did not fall within the exception to the right to liberty set out in Article 5 § 1 (f) ECHR since the applicants could not be deported without this giving rise to a real risk of ill-treatment contrary to Article 3 ECHR.*

*2) The Court did also not find any other exception of Art. 5 ECHR to be applicable in the present case. It determined that the derogation notice and the applicable part of the 2001 Act made it clear that the applicants were detained because they were suspected of being international terrorists and because it was believed that their presence in the UK gave rise to a threat to national security. The Court held that it does not accept the Government's argument that Article 5 § 1 ECHR permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from a terrorist threat. It qualified this argument as inconsistent with its jurisprudence under sub-paragraph (f) and the exhaustive nature of the exceptions in Art. 5 ECHR as well as with the requirement of their narrow interpretation.*

*3) The Court then inquired whether the UK had validly derogated from Art. 5 ECHR according to Art. 15 ECHR.*

*a) Public emergency threatening the life of the nation: The UK contended the existence of a threat of serious terrorist attacks planned against the United Kingdom. National authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency in the jurisprudence of the ECtHR. The ECtHR thus accepted the judgment of the UK executive, parliament and national courts on the existence of an Art. 15 ECHR type of emergency.*

*b) The derogation did not apply to a non-derogable right (Article 2, except in respect of deaths resulting from lawful acts of war; Articles 3, 4 (paragraph 1) and 7) as it pertained to Art. 5 ECHR.*

*c) The Court then inquired whether the measures derogating from UK's Art. 5 ECHR obligations were strictly required by the exigencies of the situation. The ECtHR, held that the concerned measures were not immigration measures, where a distinction between nationals and non-nationals would be legitimate, but measures concerned with national security directed at averting*

*a real and imminent threat of terrorist attack which was posed by both nationals and non-nationals. It concluded that government's and parliament's choice of an immigration measure to address what was essentially a security issue failed to adequately address the problem and imposed a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. The ECtHR thus found the derogating measures disproportionate in that they discriminated unjustifiably between nationals and non-nationals.*

*4) Art. 5 § 1 (c) ECHR authorizes the lawful arrest or detention of a person if it is "reasonably considered necessary to prevent his committing an offence".*

*a) A wide interpretation of the term "reasonably" and the admission of a not pre-defined or an only very abstractly defined "offence" in Art. 5 § 1 (c) ECHR would allow for preventive detention for suspected terrorists based on this provision.*

*b) The ECtHR considers only a narrow interpretation of the exceptions compatible with the aims of Art. 5 and the scope of the exceptions is determined in the jurisprudence of the Court. This suggests a narrow interpretation of Art. 5 § 1 (c) ECHR and the requirement of a "concrete and specific offence" since the ECtHR held that lit. c was "not adapted to a policy of general prevention directed against an individual or a category of individuals who, like Mafiosi, present a danger on account of their continuing propensity to crime" and that it did "no more than afford Contracting States a means of preventing a concrete and specific offence".*

### **PART III. Hypothetical**

16. The UN Security Council (UNSC) enacted a binding resolution which requires UN Member States to freeze the assets and issue travel bans against certain blacklisted individuals who are members of the government of State B. X, a member of the government of State B, was blacklisted by the UNSC Sanctions Committee which administers the listing on behalf of the UNSC.

Implementing the UNSC resolution, State A froze the assets of X and enacted a travel ban against him. X lodged a complaint against the national measures implementing the UNSC resolution and unsuccessfully challenged the national measures before the domestic courts in State A. His complaint was eventually rejected by the national court of last resort of State A based on procedural reasons and the court refused to scrutinize the merits of the case. State A is a member of the European Convention on Human Rights (ECHR). X thus eventually decides to file a complaint against the decision by the national court of last resort with the European Court of Human Rights (ECtHR).

a) Describe the legal basis and the preconditions that need to be fulfilled for the issuance of Security Council resolutions obliging States to freeze assets of and issue travel bans against selected individuals.

*Chapter VII is the appropriate legal basis in the UN Charter for UN Security Council resolutions requiring States to freeze assets and issue travel bans against individuals if the UNSC wants these measures to be binding upon UN Member States in order to address a threat to international peace and security according to Art. 39 UN Charter.*

*Measures are mandatory on UN Member States under Art. 25 UN Charter if the Security Council resolution designates them as mandatory, as opposed to only recommendatory. The text of a resolution usually reveals the intention of the UNSC regarding the mandatory or recommendatory nature of the provisions in its resolutions. The use of the word “decide” is a clear indicator that the UNSC intends a provision to be binding upon States.*

*In order to enact binding measures based on Chapter VII of the UN Charter, the UNSC first needs to determine the existence of a threat or breach to the peace or an act of aggression according to Art. 39 UN Charter. The UNSC can then decide what measures need to be taken in order to maintain or restore international peace and security. Art. 41 UN Charter authorizes the UNSC to decide what measures not involving the use of armed force States shall take to give effect to its decisions. Asset freezes and travel bans against individuals are measures not involving the resort to force and can thus be subsumed under the term “measures” according to Art. 41 UN Charter. The measures are qualified as targeted sanctions to the extent that they require States to enact measures against singled out (i.e. listed) groups or individuals or individuals associated with selected groups.*

b) Which legal argument could the national court of last resort mount to justify its rejection of X’s claim and its refusal to scrutinize the merits of X’s complaint?

*If the UNSC intends the asset freezes and travel bans to be mandatory, they would establish binding obligations for UN Member States in the sense of Art. 103 UN Charter which prevail over obligations under any other international agreement.*

*The national court could thus argue that the courts of a UN Member State are not authorized to examine the substance of complaints by individuals affected by targeted sanctions since according to Art. 103 UN Charter, binding Security Council resolutions enjoy priority over potentially conflicting treaties of Member States such as the ECHR.*

*Since the UNSC is bound to respect jus cogens, the national court of a UN Member State could review binding UNSC resolutions for jus cogens violations.*

c) Which human rights guarantees of the European Convention on Human Rights (ECHR) could X claim to allegedly have been violated by State X in implementing the Security Council resolution and rejecting his complaint?

*Alleged violation of the right to a fair trial as guaranteed by Article 6 § 1 ECHR: X could complain that the asset freeze and travel ban had been ordered in the absence of a procedure complying with Article 6 of the Convention. Art. 6 § 1 ECHR guarantees the right to have any claim relating to civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 embodies the “right to a court”, of which the right of access to a court, i.e. the right to institute proceedings before courts in civil matters, constitutes one aspect.*

*Alleged violation of the right to respect for private life and family life as guaranteed by Article 8 ECHR: If X was residing in a different country from the one where his family and friends are residing at the time the travel ban was enacted, he could complain that the ban which prohibits him from leaving the country where he is residing, prevents him from seeing his friends and family.*

*Alleged violation of the right to an effective remedy as guaranteed in Art. 13 ECHR: X could complain that he did not have an effective remedy by which to complain the breaches of his Convention rights since the national courts did not examine the merits of his complaint concerning alleged violations of Convention rights.*

*Alleged violation of the right to liberty and security as guaranteed in Art. 5 ECHR: X could argue that the travel ban, preventing him from leaving the country where he resided at the time the travel ban was enacted, deprives him of his liberty contrary to Art. 5 § 1 ECHR and that the absence of a review on the merits was contrary to Art. 5 § 4 ECHR which guarantees the right of everyone who is deprived of his liberty by arrest or detention to take proceedings by which the lawfulness of his detention shall be decided.*

d) What solutions did national and regional courts come up with in response to the conflict between obligations flowing from UNSC resolutions in conflict with national or regional human rights law?

*- Conflicting obligations arising from the UN Charter and the ECHR must be harmonized and reconciled by States members to the UN and the ECHR as far as possible. If UN Member States which are also members of the ECHR enjoy some latitude, even if only limited, in implementing binding resolutions of the UNSC, they need to implement them in a way respectful of their ECHR obligations. If there was no room for discretion power on behalf of Member States, the Court could check whether the United Nations or the UNSC resolution at issue provided fundamental rights protection equivalent to the protection guaranteed by the ECHR. If yes, the measures implementing the UNSC resolution would be presumed to be compatible with the ECHR as long as this presumption is not rebutted due to a manifest deficiency in the human rights protection in the actual case. If the fundamental rights protection was not equivalent to the ECHR protection, full review would apply to the implementing measures of the ECHR Member State. (ECtHR: Nada, Al-Dulimi)*

- A Court could take the position that it does not have jurisdiction to review the lawfulness of national or regional measures implementing a binding UNSC resolution if that resolution left no leeway to States regarding its implementation. If the only purpose of an implementing measure is to put into effect a resolution of the UNSC, to review the lawfulness of the implementing measure would result in the indirect review of the lawfulness of the UNSC resolutions. Such jurisdiction would be incompatible with Articles 25, 48, and 103 UN Charter. To the extent that the UNSC is also bound by jus cogens, Courts could, however, still be authorized to review the lawfulness of the UNSC resolutions with regard to jus cogens. (GC: Kadi)

- A Court may hold that it does not have the jurisdiction to review binding UNSC resolutions. It could, however, make the argument that its review of lawfulness did not apply to the UNSC resolution but merely to the implementing act intended to give effect to the resolution and that it must ensure the review (maybe even full review) of the lawfulness of the national or regional implementing measures in light of the applicable fundamental rights guarantees. (CJEU: Kadi I & II)