Dr. Tilmann Altwicker, LL.M. Spring Semester 2015

Selected Topics in International Law:

Transnational Public Security Law

17 June 2015

SAMPLE SOLUTIONS

Duration: 120 minutes
Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains six pages and 16 questions.

Grading:

Part 1:	12 points	33.3% of the total
Part 2:	12 points	33.3% of the total
Part 3:	12 points	33.3% of the total
Total	36 points	100 %

Notes on multiple-choice questions
Each multiple-choice question that is answered correctly gives you a maximum of two points, i.e. each individual correct answer gives you 0.5 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. In a recent case, Belgium threatened to make unavailable all services offered by Yahoo (a U.S.-based internet service) to users located in Belgium. The reason was that Yahoo was unwilling to provide personal data on one of its users who had posted racist content on websites operated by Yahoo, accessible in Belgium.

Mark the correct answers(s).

A) Transnational legal problems often arise in the context of cyberspace regulation. This case, too, involves a "transnational legal problem".
B) Transnational legal problems only arise in inter-state relations. Therefore, this case does not concern a "transnational legal problem".
C) The transnational legal problem involved in this case could be solved by harmonizing Belgium and U.S. criminal law.
D) One transnational problem implied by this case is "dual criminality".

2. 18 U.S. Code § 2339B states: "Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life."

Mark the correct answer(s).

A) 18 U.S. Code § 2339B cannot count as an example for a transnational legal norm because it is part of the domestic law of a State.
B) As a criminal law provision, 18 U.S. Code § 2339B cannot be part of transnational law.
C) 18 U.S. Code § 2339B can be considered as "transnational law" if one adopts the famous definition given by Philip Jessup.
D) 18 U.S. Code § 2339B can be regarded as transnational law, but not as public international law.

3. Mark the correct answer(s).

A) "Public security" is a legal concept devoid of meaning.
B) The idea of "public security" was first developed during the Enlightenment by the British philosopher John Locke.
C) In comparison to "human security", "public security" relates to a broader understanding of security.

D) The "collectivist approach" to the legal concept of "public security" puts particular emphasis on the aspect of "publicness", i.e. the view that "public security" essentially relates to public (and not primarily individual) interests.

4. Mark the correct answer(s).

The idea of "civilizing security"

A) is outdated given that most States have ratified international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR).
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) is founded, at its core, on the Hobbesian idea 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 general constitutional principle that government must be limited, especially when relying on public security-powers.

5. Mark the correct answer(s).

The definition of "terrorism" used in International Counter-Terrorism Conventions

A) usually excludes the applicability of the convention to a situation of armed conflict.
B) requires the presence of a special terrorist motivation, e.g. "compulsion of the government", in order for an act to count as "terrorism".
C) excludes the possibility that acts of damage against property satisfy the violence-element of terrorism.
D) excludes acts of violence that merely serve the purpose of financial gain.

6. Mark the correct answer(s).

"Targeted sanctions" by the UN Security Council against individuals

A) always violate the UN Charter.
B) are a criminal sanction against global terrorists.
C) usually have States as their formal addressees, not the individuals themselves.
D) may, when implemented by a State Party to the European Convention on Human Rights (ECHR), come into conflict with obligations under that Convention.

7. Mark the correct answer(s).

In the *Kadi I* case, the Court of Justice of the EU (CJEU) had to rule upon the implementing measures with which the EU gave effect to individual targeted sanctions by the Security Council.

A) The CJEU considered the 'focal point'-procedure (by which any person or entity may approach the Sanctions Committee directly and submit a request to be removed from the list) to be deficient and not to provide a satisfactory form of judicial review.
B) The CJEU held that the Security Council resolution, insofar as it affected Mr. Kadi, violated his fundamental rights and was thus without effect.
C) The CJEU held that it did not have jurisdiction because a Community court may not review an implementing measure that is based on a Security Council resolution.
D) The CJEU held that its power to review the impugned measures against Mr. Kadi is not barred due to the fact that it is based on a Security Council resolution adopted under Chapter VII of the UN Charter.

8. Mark the correct answer(s).

A) Preventive detention of suspected terrorists for public security purposes is never admissible under the European Convention on Human Rights (ECHR).
B) According to the European Court of Human Rights (ECtHR), Art. 5(1) ECHR prohibits preventive detention for public security purposes of suspected terrorists.
C) States may, in situations of terrorism, modify their obligations under the ECHR by a unilateral notice to the Secretary-General of the Council of Europe.
D) There are some rights in the ECHR, e.g. the prohibition of torture, that States cannot derogate from even when facing a severe terrorist threat.

9. Mark the correct answer(s).

The Palermo Convention

A) aims at the repression of transnational crime only (e.g. by providing for rules on prosecution, adjudication and sanctions).
B) does not define "organized crime".
C) enumerates only a limited set of crimes associated with organized crime (such as "laundering of proceeds of crime" and "corruption"). In general, the Palermo Convention leaves it to the State Parties to specify which crimes are covered (provided that the conditions of Art. 2 of the Palermo Convention are fulfilled).
D) does not contain "transnational law" if this is defined as "law on the conduct of individuals with cross-border application or effect".

10. Mark the correct answer(s).

The Swiss-German Police Treaty of April 1999

A) allows police officers – under certain conditions – to act in the territory of the other State Party.
B) is a treaty by which both State Parties restrict the application of the international law principle of territorial integrity.
C) is a treaty concluded under European Union law.
D) is a treaty by which both State Parties restrict the application of the international law principle of the use of force, Art. 2(4) of the UN Charter.

11. Mark the correct answer(s).

In *Holder v. Humanitarian Law Project* of June 2010,

A) the US Supreme Court dealt with the problem of material support to a foreign terrorist organization (FTO).
B) the US Supreme Court reached the conclusion that it had no jurisdiction, given that the case concerned terrorist organizations residing in foreign countries.
C) the US Supreme Court held that even the provision of generally socially acceptable humanitarian aid (e.g. training how to write petitions), if offered to a designated FTO, is punishable under US criminal law.
D) the US Supreme Court considered advocacy independently of any cooperation with a FTO (e.g. postings on a private website, writing a newspaper article about the FTO) punishable as "material support to a foreign terrorist organization".

12. Mark the correct answer(s).

Under the European Convention on Human Rights (ECHR), the jurisdictional competence of State Parties is primarily territorial.

A) This means that one cannot claim that a State Party has violated one's Convention rights outside the territory of that State Party.
B) This means that State Parties must guarantee to everyone in their territory the rights and freedoms contained in the ECHR.
C) It is accepted that the ECHR applies to acts of diplomatic and consular agents of a State Party present in a foreign territory.
D) The individual X is a sought-after terrorist. After locating him in State A (not a member of the Council of Europe), X is handed over to agents of State B (member of the Council

of Europe) *while still on the territory of State A*. In this situation, State B does not have jurisdictional competence over X.

PART II. Short Essay Questions

13. a) Why has "public security" become an issue of transnational law? Briefly provide three reasons. (2 points in total; 2/3 points per answer)

- efficiency: by cooperation, states can act more efficiently (save resources)

- mobility of risks: today, dangerous persons (e.g. foreign terrorist fighters) and dangerous goods (e.g. weapons, drugs) are highly mobile across national borders; in other words: some modern security risks have transnationalized, requiring a transnational solution

- harm: new risks have emerged that are highly destructive and may cause substantial harm to people, the economy and state institutions (e.g. terrorism, organized crime, cybercrime)

- externalities: spill-over effects; if state A does not sufficiently patrol its border with state B (due to the lack of resources, lack of a proper legal framework, lack of political will etc.), the security of neighboring state B is adversely affected; the (insufficient) provision of public security by state A, thus, is a (negative) security externality for state B; state B has an incentive to cooperate with state A to jointly improve security situation; in situations of negative externalities, states want to eliminate "weakest link" problems (e.g. pandemics, where the effort of all depends on the effort of the weakest link in the chain, often the country with the "poorest" health service system), a security-related weakest link problem is financing of terrorism (if there is one state that does not comply with the international legal rules, the efforts of all others will be diminished/less effective)

- public good: parts of public security are a "transnational public good", i.e. they are non-rivalrous (the good may be consumed by one actor without diminishing its availability to others) and they are non-excludable (no actor may be excluded from consumption regardless whether she contributed to its production or not); example: information about a cybersecurity threat is non-rivalrous (if state A has the information, state B may as well benefit from it) and it is non-excludable (if state A gained the information through one of its informants, state B may as well act upon this information, no matter if it contributed to its production or not)

b) How have States reacted to the transnationalization of risks and threats to public security? Briefly identify (at least four) transnational legal solutions used for problems of "public security", and provide examples. (2 points in total: ½ point per answer; as of ¼ for the identification and ¼ for providing an example)

- harmonization of criminal laws (examples: International Convention for the Suppression of the Financing of Terrorism; UN Convention against Transnational Organized Crime and the Protocols thereto)

- "imposition" of norms through quasi-legislative Security Council resolutions (examples: UN SC Res. 1373, dealing with counter-financing of terrorism; UN SC Res. 1540, dealing with non-proliferation of weapons of mass destruction; UN SC Res. 2178, dealing with foreign terrorist fighters)

- informal networks (examples: Art. 35 of the Council of Europe Convention on Cybercrime setting up a 24/7 network; liaison officers; Financial Action Task Force, FATF)

- extraterritorial acts, i.e. states sometimes carry out acts of policing/law enforcement on the territory of other states (examples: Al-Skeini case by the European Court of Human Rights; Öcalan case; UN SC Res. 1851 allowing states and regional organizations fighting against piracy and armed robbery at the sea off the coast of Somalia to "undertake all necessary measures that are appropriate in Somalia"); bilateral police treaties, restricting state sovereignty, allowing for the exercise of extraterritorial public authority (example: Swiss-German police treaty)

- establishing new international/regional organizations/giving them more competences in the field of public security (examples: strengthening of Interpol; Europol)

- peace keeping (MONUSCO Congo; UNMIK Kosovo; UN Standing Police Capacity)

14. Some claim that the UN Security Council has started to act as a "world legislator". Explain (2) and make reference to (at least) two resolutions (1) by the Security Council. In your answer, also address the problem of legitimacy (1) of UN Security Council "legislation". (4 points in total)

The SC adopted Res. 1373 in the aftermath of the 9/11 attacks on the U.S. The resolution primarily deals with counter-financing of terrorism. It contains a number of abstract-general rules on counter-financing. These rules are "abstract" in the sense that they do not deal with a concrete problem of international peace and security (e.g. the situation in Afghanistan), but instead tackle an "abstract" problem (¼) (here: counter-financing of terrorism). The rules are "general" (¼) in the sense that they pertain to "all states" (not even limited to the member

states!). The special legislative character is fortified by the fact that the SC has installed a "supervisory organ" (¼) (subsidiary organ to SC, Art. 29 UNCh) monitoring the implementation of SC Res. 1373 by the states (SC Res. 1373, para. 6). Furthermore, the fact that the Resolution does not provide for a time-limit (¼) is indicative of its quasi-legislative (¼)character. Finally, the resolution is binding (¼) as it is adopted under Ch. VII of the UNCh (legal basis: Art. 39, 41, binding in connection with Art. 25 UNCh). This too emphasizes its quasi-legislative nature.

On the one hand, thus, one could say that some rules contained in Res. 1373 are of a legislative nature and that the SC has started to act as a "world legislator". On the other hand, however, it must be noted that it is only (at the most!) "quasi"-legislative action by the SC (at least, if one compares it with domestic legislation): A major difference between domestic legislation and quasi-legislative acts by the SC is that the former directly affects the rights and obligations of individuals (¼) (e.g. through norms of criminal law), while the latter only indirectly shapes the normative situations of individuals. All quasi-legislative resolutions are not formally addressed to non-state actors, but to the states (¼). They are generally regarded as not directly applicable, i.e. the states need to establish implementation legislation in order to give effect to these norms.

Discussion of (at least) one specific rule contained in one of the quasi-legislative resolutions. (½ for naming a Resolution, ½ for explaining)

Example: SC Res. 1373, para. 1(b): States shall "criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts". This is an abstract-general norm. It is quite precise, it requires states to introduce a (new) criminal provision.

- other examples for quasi-legislative resolutions: Res. 1540 deals with non-proliferation of weapons of mass destruction, Res. 2178 deals with foreign terrorist fighters

[Note: It would be incorrect to cite SC Res. 1816 or SC Res. 1851 as quasi-legislation. Both concern the situation of piracy off the Somali coast. The SC explicitly made clear that it intended to adapt the rules of UNCLOS only for that particular situation, not with general effect MONUSCO DRC. Targeted Sanctions]

The legitimacy of quasi-legislative acts by the SC is controversial. <u>CONTRA</u>: 1. The traditional method to make new abstract-general norms is by international treaties (consensual paradigm). Quasi-legislation by the SC thus bypasses the accepted method of lawmaking in international law. 2. The SC has a mandate to intervene in immediate fighting/hostilities and to stop them. The UNCh provides for the function of the SC as a "policeman", not as a lawmaker. 3. The institutional legitimacy of the SC is already weak (under-representation of some regions in the world, only historically powerful states have a veto, no thorough deliberations at the SC etc.). 4. The substantive legitimacy is put to doubt as SC Res. 1373 does not mention human rights (though it deals with rights-sensitive issues). This is especially problematic if the SC starts

legislating globally. PRO: 1. With regard to SC Res. 1373, the SC only acted after the ordinary, treaty-based process had practically failed. The 1999 International Counter-Financing of Terrorism Convention had been very unsuccessful, not many states had joined the Convention. In situations of urgency, where uniform rules are required (see "weakest link"-problem above), the SC should be empowered to act and to accelerate the process of lawmaking. 2. The UNCh does not provide for a fixed role/function of the SC. Instead, the SC is largely at liberty to "invent" new methods to carry out its mandate under Art. 24 UNCh. Quasi-legislation is not excluded by the UNCh. 3. The legitimacy of UN Res. 1373 was only called into question by a handful of states, the majority is very complicit with the resolution.

15. In the case of *Rantseva*, the European Court of Human Rights (ECtHR) has held that "human trafficking" falls within the ambit of Art. 4 of the European Convention on Human Rights (ECHR). Briefly outline (3) and discuss (1) the Court's reasoning. (4 points in total)

In the case of Rantseva, the ECtHR had to decide on the issue whether "human trafficking" falls within the ambit/scope ("Schutzbereich") of Art. 4 of the ECHR. Art. 4 deals with the prohibition of slavery and inhuman/degrading treatment or punishment. It thus does not explicitly mention "human trafficking". However, the ECtHR opted for an extensive interpretation (½) of Art. 4 and included "human trafficking" in its protective scope. The ECtHR based its reasoning on the following principles:

1) It interpreted Art. 4 ECHR by recourse to Art. 31 (¼) of the 1969 Vienna Convention on the Law of Treaties (VCLT), i.e. the Court inquired into the ordinary meaning of the terms used in Art. 4 ECHR, it looked into the context, and the object and purpose (½) of Art. 4.

2) The ECtHR interprets the ECHR in the light of "present-day circumstances", as a "living instrument", in a dynamic interpretation. It interprets the Convention "as a whole", and stresses internal consistency and harmony between the provisions. It is guided by the principle of effectiveness (effet utile), the Convention rights must be interpreted as practical and effective safeguards. (½)

3) The ECtHR – in interpreting the Convention – takes into account also all relevant rules and principles of international law applicable in relations between the Parties (see Art 31(3)(c) VCLT).

In interpreting the concept of "slavery" (¼), the Court took note of the following international legal documents and developments:

1) Already in the 1926 Slavery Convention, it meant the "exercise of a genuine right of ownership and reduction of the status of the individual concerned to an 'object'".

2) Human trafficking is a global phenomenon; in Europe, especially after the fall of Communism.

3) 2000 Palermo Protocol and 2005 Anti-Trafficking Convention show the increasing international awareness of the problem.

4) ICTY: slavery concept has evolved. There are contemporary forms of "slavery" under four conditions: (1) control of a person's movement/physical environment, (2) element of psychological control, (3) measures taken to prevent escape, (4) control of sexuality/forced labor. (½)

Applied to the present case of Rantseva, this means:

1) ECtHR examines if and how human trafficking "runs counter the spirit and purpose of Art. 4 of the Convention".

2) human trafficking fulfills the conditions of contemporary forms of slavery as set up by the ICTY

3) human trafficking violates human dignity (½), a core value protected by the ECHR

Result: Human trafficking falls under Art. 4 ECHR.

Discussion: (1) CONTRA: The Court practically "invented" a new right, i.e. the right not to be trafficked. The Court has no legitimacy to do that. PRO: 1. "Slavery" does not have a fixed meaning, carved in stone. Rather, the concept needs to be interpreted in present-day conditions. If it shall have any meaning at all, human trafficking must be encompassed. 2. Human trafficking is a particularly severe violation of the fundamental value of human dignity. A human rights' court cannot turn a blind eye to that. 3. Art. 19 ECHR empowers the Court with the final say on the interpretation of the Convention. As it is not an interpretation contra legem and there are valid legal reasons why human trafficking is contained under the scope of Art. 4 ECHR, the Court did not act ultra vires.

PART III. Hypothetical

16. There are indications that a huge cyber attack on bank accounts in State A is about to be launched by Z, an individual residing in State B. The police of State A would like to obtain information both on the latest contacts of Z as well as on the planned attack, presumably saved on Z's email account that is maintained by a (private) internet service provider Y located in State C. State A sends a request for mutual legal assistance to State C which State C refuses. State A then sends a request directly to Y. It threatens to shut down all services offered by Y to customers in State A in case Y declined cooperation with State A. Assume that States A, B and C have ratified the Council of Europe Convention on Cybercrime (Budapest Convention).

a) Are the acts taken by State A legal under the Budapest Convention?

Question a): 2/3 , question b): 1/3 of the total of Part III. (8 points question a); 4 points question b))

[Note: It is important that the students show familiarity and make efficient and correct use of the Budapest Convention, i.e. that they cite and apply the correct norms.]

The acts taken by State A would be illegal, if they violated the Budapest Convention.

1. Applicability: The Budapest Convention is applicable, as States A and C have ratified it. [Note: It does not matter that State B has also ratified the Convention, even though the individual Z is affected by the acts. This case only concerns the legal relationship between A–C and A–Y.]

2. Relevant Norm:

a) Art. 31 Budapest Convention: This is not the relevant norm in this case. Art. 31 may be invoked between state parties, where one state party requests the other, e.g., to disclose data stored by means of a computer system located within the territory of the requested party. In the present case, state C has explicitly refused to cooperate with state A. [Note: Art. 31 of the Budapest Convention must be mentioned in the solution as the hypothetical explicitly refers to the refusal by state C.] (1)

b) Art. 32 lit. a of the Budapest Convention: This is not the relevant norm in this case. The police of state A are interested both in "traffic data" and "content data", in connection with the account of Z. "Traffic data" is defined in Art. 1 lit. d of the Budapest Convention as "any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service." In this case, the police want information about the "latest contacts" of Z, i.e. the partners/destinations of his communication. "Content-data" is not defined by the Budapest Convention. It refers to anything intelligible data conveyed in the communication. Here, the police want information about the planned attack, which relates to content-data. [Note: The students should be familiar with the distinction between "traffic data" and "content data". It does not matter at which point they discuss that, though.] Art. 32 lit. a Budapest Convention only relates to "publicly available data", i.e. those data that can be accessed by the general public without first having to use a password etc. This is not the case here, the contacts and any content information is not publicly available. (1½)

c) Art. 32 lit. b Budapest Convention: This is the relevant norm in this case, according to which a "Party may, without authorization of another Party access or receive, through a computer system in its territory, stored data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system."

"without authorization of another Party": (+), state C's refusal

"receive stored data located in another Party through a computer system in its territory": state A seeks information/data located on a server in another Party, because the server maintained by Y is located on the territory of state C.

"person with the lawful authority to disclose the data": (+/-). The central question is whether Y has this authority. At the time of the drafting of the Budapest Convention, the state parties could not agree on the level of "transnationality", i.e. if such direct requests should be legal or not. They effectively left open this question. It now largely depends on the law of the member states. The U.S., e.g., allows for the disclosure of traffic data, if it is otherwise legal. Content data is not disclosed (this requires formal mutual assistance between the states). Certainly, the "owner" of the information, i.e. Z, could voluntarily disclose the data to the law enforcement. This is, however, not the case here.

It is controversial whether Art. 32 lit. b of the Budapest Convention should be interpreted to allow transnational direct requests (of a state party vis-à-vis an internet service provider). CONTRA: 1. It would be a violation of state sovereignty if the refusal of authorization could be bypassed by the procedure of Art. 32 lit b. 2. The internet service providers are not well-placed to perform the necessary legal checks if they are served with a transnational direct request. For example, they cannot check whether the request violates (international) human rights law. PRO: 1. Otherwise, Art. 32 lit. b would have a very limited scope. 2. One could point to the preamble of the Budapest Convention stating that "cooperation with the private industry" is necessary. 3. Additionally, Art. 20(1)(b) and Art. 21(1)(b) of the Convention may be mentioned here which seem to assume the possibility of a close cooperation between state authorities and the internet industry. 4. Art 15 of the Budapest Convention envisages the situation that states create the necessary legal framework so that even ISPs (internet service providers) are enabled to check the human rights' conformity of such requests.

Accordingly, Y has the lawful authority to disclose data (most likely, depending on the domestic law, restricted to traffic data). [Note: Of course, students are not expected to analyze the Budapest Convention in this detailed way. However, they should discuss the problem of "authority" in relation to Y.]

"lawful and voluntary consent": The "lawfulness" is determined with regard to the domestic law. [Note: The facts are silent on this issue.] The problem here is the voluntariness of consent. State A has threatened to close down all services in case Y refuses cooperation. In this situation, consent is not "voluntary".

Result: The acts taken by state A vis-à-vis Y are not legal under the Budapest Convention.

[Note: It is important that the students come up with a well-reasoned solution. It does not matter whether they conclude that the acts were legal/illegal. They should demonstrate some skills in interpreting and applying an international convention.] (5½)

b) There is no implementing legislation concerning the Budapest Convention in State A. State A follows a monist understanding of international law. Imaging you were a public prosecutor in State A. What legal considerations would you make?

The problem is whether Art. 32 lit b of the Budapest Convention is directly applicable. (½)Direct applicability means that the international legal norm (that is binding upon a state) can be applied by domestic courts and administration without implementation legislation (½). The standard criterion for direct applicability of an international legal norm is sufficient precision (½) (i.e. stating with sufficient clarity which is the required, prohibited or permitted conduct) and unconditionality (½) (i.e. not exclusively addressed to the legislator). Art. 32 lit. b of the Budapest Convention can be considered as sufficiently precise, and it is not addressed exclusively to the legislator. [Note: The Explanatory Report confirms this. However, students can perfectly well deny sufficient precision.] Art. 32 lit. b of the Budapest Convention is directly applicable. (2; max. 1 point in case of abstract discussion)