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## International Organisations

January 10<sup>th</sup>, 2017 4-6 p.m.

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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 six pages and four questions.

### Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1            20%

Question 2            20%

Question 3            30%

Question 4            30%

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Total                    100 %

**We wish you a lot of success!**

### Question 1 (20%)

- a) (10%) What are the main differences between traditional and supranational organisations?
- b) (10%) What is the role of international courts as part (as organs) of and with respect to international organisations? Give concrete examples.

### Question 2 (20%)

Compare the law-making powers of the UN General Assembly and of the UN Security Council.

### Question 3 (30%)

Art. 4 (Membership in the Organisation) of the International Cocoa Agreement 2010 which also establishes an international organisation contains the following provision:

*5. Any reference in this Agreement to "a Government" or "Governments" shall be construed as including the European Union and any intergovernmental organization having comparable responsibilities in respect of the negotiation, conclusion and implementation of international agreements, in particular commodity agreements. Accordingly, any reference in this Agreement to signature, ratification, acceptance or approval, or to notification of provisional application or to accession shall, in the case of such intergovernmental organizations, be construed as including a reference to signature, ratification, acceptance or approval, or to notification of provisional application, or to accession, by such intergovernmental organizations.*

*6. In the case of voting on matters within their competence, such intergovernmental organizations shall vote with a number of votes equal to the total number of votes attributable to their member States in accordance with article 10. In such cases, the member States of such intergovernmental organizations shall not exercise their individual voting rights.*

The European Union is not listed as a member of the organisation, but only the EU member states.

Article IX (Decision-Making) (1) of the WTO-Agreements reads as follows:

*1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO....*

The European Communities (nowadays the European Union) are WTO member as well as all its member states.

In both organisations, the Council as the main executive organ is about to decide with binding effect for the member states on several draft resolutions. During a debate on the 10th of January 2017 on one of the resolutions, a controversy arises between the representative of the EU and of the UK as to whether the resolution pertains to a subject matter within the competence of the Union or of the member states. The UK delegate argues that the subject matter refers not or only partly to the Union's competence and that the UK is, because of the Brexit vote, anyway entitled to vote even if the resolution's subject matter is covered by the competence of the EU.

The Chair persons of these organisations ask you to prepare memos on the legal issues connected with the conduct of the representative of the UK. Please assume that there are no

official procedures available within these organisations to decide the dispute and that is up to the Chair and/or the Council to resolve the complicated situation.

**Question 4 (30%)**

Please find on the next pages excerpts from the very long SC Res 2253, adopted 2015, on threats to international peace and security caused by terrorist acts. The resolution consists in its entirety of measures against the Islamic State. The whole resolution was adopted under Chapter VII of the UN Charter (see at the top of the resolution's operative part).

Do all the paragraphs have the same legal force, or do you see differences? Please give reasons for your answers.

Sample Answers  
Exam of January 10<sup>th</sup>, 2017

Die Punkte verstehen sich als Maximalpunkte. Sie werden erreicht, wenn sinngemäss die Antwort wie hier dargestellt ausfällt. Über die Notenskala wird erst entschieden, wenn alle Arbeiten korrigiert sind.

Möglicherweise ist die Prüfung zu lang. Die nachfolgenden Lösungen sind angesichts der relativ kurzen Zeit unrealistisch differenziert. Dies ist bei der Korrektur zu berücksichtigen.

**Question 1 (20% = 6 points)**

**a) (10% = 3 points)**

1 point:

- The basic principle of and at the same time the main difference between supranational organisations to traditional organizations is *a permanent transfer of powers (political, law-making etc.) / sovereign rights* in certain policy areas by states to a common institution whose organs exercise and administrate these powers.

½ additional points each. Up to a maximum of 2 points (in the case of at least 4 well-explained issues raised from the following). 4 further correct answers leads to an additional point (1/4 each):

- Supranational organizations create close legal and political ties between member states, leading to an increasing integration among them and giving them a legal nature *between a federation and a confederation* of states. This marks a difference to traditional IOs, which do not lead to such a high degree of integration.
- *Member-State dependency* is higher in traditional IOs (formulated differently: the organs of supranational organisations are independent of member states and don't follow instructions)
- While traditional IOs are mainly institutions for coordination, supranational organisations are *not only used for coordination but can also impose decisions*
- Accordingly, the *rules for decision-making differ*: while consensus is more common in traditional organisations, majority vote (and thus overruling sovereign states) is more frequent in supranational organizations
- While traditional IOs don't have their *own* (i.e. state-independent) *policies*, supranational organisations do.
- Supranational organizations establish their own *legal system*.
- Supranational organizations have the power to adopt *binding law*, having supremacy over national law (even without their consent), which is not the case in traditional organisations
- Decisions of supranational organisations have a *direct effect*, which is not the case in traditional organisations (where ratification is needed)

- Supranational organizations have *independent courts* with mandatory jurisdiction/powers, which is not the case in traditional organizations
- The *funding* in supranational organizations is independent of member states, which is not the case in traditional IOs
- Supranational organizations are themselves *a subject of IL*
- Direct participation of citizens, i.e. *democratic legitimacy* in parliament of supranational organization

b) **(10% = 3 points)** What is the role of international courts as part (as organs) of and with respect to international organisations? Give concrete examples.

Points are awarded either if there is a separation between the general points and the example(s) or if this is not the case, that is if the general part is explained with the aid of examples or vice-versa.

1 point:

- The main role of international courts in IOs is to resolve disputes arising from the constitutive instrument of the organisation or on the basis of the court's statute.

1 point:

- Certain courts are also competent to clarify a legal matter at the request of the IO without the existence of a dispute (e.g. the ICJ can give advisory opinions)

$\frac{1}{4}$  point is awarded for mentioning D (the role). Another  $\frac{1}{4}$  is awarded if this is meaningfully explained while mentioning either A, B, or C.  $\frac{1}{2}$  is the maximum that is awarded per example.

- ICJ:
  - o A) Affiliation: UN (principal judicial organ)
  - o B) Applicable law: Applies the whole of international law (Art. 38 ICJ Statute), not only the UN Charter.
  - o C) Ratione personae: Between States
  - o D) Role: to assist in the resolution of disputes between states, and to provide advisory opinions to specified IOs on certain legal questions.
- ECtHR's role:
  - o A) Affiliation: Council of Europe
  - o B) Applicable law: Applies the ECHR in contentious cases or interprets it in advisory opinions
  - o C) Ratione personae: Individuals against State parties; or between State parties
  - o D) Role: ensure that the human rights obligations of the ECHR are respected in the member states of the Council of Europe
- EJC
  - o A) Affiliation: EU
  - o B) Applicable law: The EU's body of law
  - o C) Ratione personae: Between states and the EU, between organs of the EU; occasionally private parties

- D) Role: by contentious and advisory jurisdiction it is ensuring the uniform application of the law; is a forum for enforcement; settling disputes between Union members
- Dispute settlement system of the WTO
  - A) Affiliation: WTO
  - B) Applicable law: WTO agreements and related instruments
  - C) Ratione personae: all member States of the WTO and the EU
  - D) Role: resolve disputes by rendering legally binding decisions; trade sanctions ensure the uniform application of WTO law
- Human Rights Committee (HRC) as de facto court
  - A) Affiliation: monitoring body of the ICCPR, located at the UN
  - B) Applicable law: ICCPR
  - C) Ratione personae: individuals and states can bring communications against state parties who have accepted the jurisdiction of the Committee
  - D) Role: Receive reports by state parties on compliance with the ICCPR; issues observations and general comments on the covenant; receives communications from individuals and states alleging violation of HR by parties of the covenant
- ICTY/ICTR
  - A) Affiliation: Set up by the UNSC under Chapter VII
  - B) Applicable law: ICTY/R Statutes
  - C) Ratione personae: Criminal trial of individuals only
  - D) Role: prosecute persons for war crimes, crimes against humanity and genocide in former Yugoslavia / Rwanda and thereby contributing (in its role as a tribunal set up under Chapter VII of the UN Charter) to international peace and security.
- Other international courts/tribunals may also be mentioned. The same point system as above applies.

## Question 2 (20% = 6 points)

The amount of points awarded is stated at the beginning of the sentence.

- ½ point: For external decisions, the GA can only make recommendations, whereas the SC can pass binding resolutions
  - ¼ pursuant to Art. 25
- ½ point: However, the GA resolutions can be (or form the basis of) binding law
  - ½ In the case of UN internal regulations and
    - ¼ Example: Art. 4: admission of new members or Art. 17: the budget
  - ½ Can crystallize into customary international law (soft law documents are often treated as state practice but also as evidence of *opinio juris*)
    - ¼ This is especially the case if the GA resolution is unanimous
- ½ point: The SC can pass legally binding resolutions, but not all its resolutions are binding:
  - ½ Chapter VI resolutions are usually not binding
  - ½ Chapter VII resolutions are usually binding
    - ¼ with the exception of Art. 39 recommendations

- ½ provisional measures are binding
- ½ Procedural resolutions and those pertaining to UN-internal matters are legally binding (e.g. establishment of a PKO)
- Overlap of competencies between the GA and SC:
  - ½ Art. 11(2) “Any such question on which action is necessary shall be referred to the SC by the GA either before or after discussion.”
    - ¼ ICJ Advisory Opinion *Certain Expenses of the UN*: “action” only refers to “enforcement action” (i.e. coercive action) and the GA is thus entitled to make recommendations in cases not amounting to an enforcement action
  - ½ Art 12(1): the GA cannot make recommendations if the SC “is exercising... the functions assigned to it in the present Charter” → the GA thus has a subsidiary role in law-making
- ½ The powers of the SC are stated in Arts. 24-26 UNCh and the specific powers are found in Chapters VI, VII, VIII and XII
  - ½ But other implied powers exist as well
    - ¼ see ICTY Tadic: e.g. the power to set up an international criminal tribunal
- ½ point: Art. 24: the SC has the primary responsibility for maintaining international peace and security
  - ½ The SC’s powers are, however, limited by the purpose and principles of the UNCh
  - ½ ICJ Advisory Opinion *Certain Expenses of the UN*: the SC has the primary responsibility but not “exclusive” authority with regard to maintaining international peace and security
  - ½ ICTY Tadic 95: “The Charter thus speaks the language of specific powers, not of absolute fiat.”
- ½ point: Uniting for peace is a GA resolution that attempted to circumvent blockage in the SC:
  - ½ in case of a deadlock in the SC, the GA has the power to *recommend* (not decide) collective measures
  - ¼ Examples: Suez crisis 1956 or Congo conflict 1960/61
  - ¼ De facto amendment to the UNCh
- ½ PKOs are usually decided by the SC, but are exceptionally decided by the GA
  - ¼ ICJ Advisory Opinion *Construction of a wall in the Occupied Palestinian Territory*: the GA can recommend a “peace-keeping” operation but not an “enforcement action”, on the basis of the purposes and principles of the UN.
- ½ Art. 13 UNCh: GA can initiate studies and make recommendations for the progressive development of IL and its codification → however, nothing bars the SC from doing the same
- ½ Therefore, the SC has vast powers and can make binding decisions on the most important international matters, while the GA cannot do so.
  - ½ However, in practice, the SC is often blocked (due to a veto of a P5 member) and its vast powers are thus only rarely used. The GA’s decision-making procedures (without a veto, majority vote) does not as often lead to blockage. There is thus a gap between theory and practice when it comes to the powers of the SC and the GA.
- How procedure influences the decision-making process:

- ½ UNSC is not representative, the GA is: thus the GA has a higher legitimacy in passing decisions

### Question 3 (30% = 9 points)

The below is a list of possible answers that is not exhaustive. Question 3 is the only question in which points can be awarded for innovative, well argued, and well formulated answers that are not listed below.

*The UK delegate raises two alternative points:*

- A) *UK's claim: The subject matter is not, or only partly, in the competence of the EU and that thus the UK can vote*
- In the case of the International Cocoa Agreement (ICA) 2010:
    - The EU is authorized to vote “on matters within their competence” → The question is whether the resolution is within the competence of the EU? It does not clearly fall outside of the EU’s competence → arguments why it does (not) fall within the EU’s competence are awarded points
    - “In such cases, the member States of such intergovernmental organizations shall not exercise their individual voting rights.” → it is thus clear that the UK delegate cannot vote *if* the EU votes
    - Membership: EU not a member, but it is mentioned in the ICA that the EU can vote if it is in its competence (see above). Whether the EU can vote or not thus depends on the conclusion regarding its competence.
  - In the case of the WTO:
    - “Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO.” → it is not explicitly stated that in such cases the EU-Member States cannot vote. However, it is clear that no state can have a double vote for the following reasons:
      - Sovereign states are legally equal (Art. 2(1) UNCh)
      - The constitutive instrument of the WTO is a treaty and is thus subject to the rules of interpretation of the Vienna Convention on the law of treaties (any meaningful argument regarding interpretation, e.g. textual approach, purposive interpretation, will be awarded points)
  - Internal EU-rules will determine whether the EU or its Member States are competent to take the floor/vote in an IO. To what extent are the ICA and the WTO obliged to follow such rules?
    - In both organizations, the EU is entitled to take the floor on certain matters and so is the UK.
    - However, it is equally clear in both organizations that there is only one vote per state.
    - The question whether the EU or the UK can vote is essentially a matter to be discussed and decided at an EU-coordination meeting, not in the plenary organ of an IO.



- An argument that can be made on the basis of Art. 46 VCLT (provision of internal law regarding competence to make treaties): “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” → thus international law is what counts not (EU-) internal law. Based on this argument, one would not even have to start arguing whether the EU is competent or not.

B) *UK's claim: The UK is, because of the Brexit vote, anyway entitled to vote even if the resolution's subject matter is covered by the competence of the EU*

- The Brexit has not been implemented yet and therefore this is a legally irrelevant argument
- The UK has not even invoked Art. 50 TFEU yet.
- After invoking Art. 50, there will be a negotiation period
- Politically, the UK delegate might indeed be perceived as an EU-independent actor, but this does not change the fact that the UK is legally still part of the EU and thus bound by its law

#### **Question 4 (30% = 9 points)**

The general rules as to the legal nature of SC resolutions are the following (each ½ points):

- Procedural resolutions and those pertaining to UN-internal matters are legally binding (e.g. establishment of a PKO)
- Resolutions based on Chapter VI are usually non-binding recommendations
- Resolutions based on Chapter VII are usually binding (not, however, recommendations based on Art. 39 UNCh)
- Provisional measures based on Art. 40 UNCh are binding
- Binding decisions are directly based on Arts. 24 and 25

Different legal effects within Chapter VII (each ½ point):

- In practice, SC resolutions adopted under Chapter VII often contain paragraphs with different legal effect.
- The application of Chapter VII simply means that there is, as determined by the SC, a threat to peace, a breach of peace or an act of aggression (see Art. 39 UNCh).
- This does not say anything about the legal force of a paragraph as part of a resolution adopted under Chapter VII. Art. 39 UNCh provides also for recommendations, not only for decisions.

Analysis of the resolutions and its paragraphs:

- The starting points of an analysis are the wording (1/2) and the legal basis (1/2) mentioned in a resolution in order to find out what legal force / effect a paragraph has.

- 1 point: Circumscriptions such as “welcomes”, “looks forward”, “reiterates”, “encourages”, “expresses concern”, “calls upon” stand for non-binding statements of the SC
- 1 point: “Demands”, “urges”, “decides” and “requests” usually refer to binding decisions.
- ½ preambular paragraphs can be used for interpretation
- A maximum of 4 points can be awarded for a paragraph-by-paragraph analysis:
  - ½ Non-binding language is used in the preambular paragraphs
  - ½ The only preambular paragraph that has a binding effect is the one starting with “urging” – it is a UN-internal regulation
  - ½ §1 is internal and binding
  - ½ §2 regarding asset freeze and travel bans is clearly binding pursuant to Art. 25 UNCh
  - ½ §5 internal and binding
  - ½ §6 internal and binding
  - §10 must be split:
    - ½ “Encourages”: non-binding
    - ½ Second sentence: “confirms... must” the language here is strong (“must”) and it is thus binding.
    - ½ “notes” this sentence is not binding
  - §24: must be split
    - ½ “highlights”: not binding
    - 1 point: “calls upon”: here it depends on the argument as it is somewhat indeterminate. One can either argue that it is not binding because of the rather weak language. Or, alternatively, one can argue that not sharing information on terrorist financing etc. could constitute a threat to the peace.
  - §25 must be split
    - ½ “Recognizes”: not binding
    - 1 point: “Calls upon”: here again it depends on the argument. It can either be qualified as not binding because of the weak language. Or it can be qualified as binding because of the potential relevance for international peace (same argument as in §24)
  - ½ §29: non-binding
  - ½ §37 strongly worded, internal and binding
  - ½ §38: strongly worded, internal and binding
  - ½ §39: strongly worded, internal and binding
  - ½ §54: strongly worded, internal and binding