International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 6, International Organisations

Question 1. *How is the international legal personality of an international organisation different from that of a State?*

In order to respond properly to such a question, it would be useful for students to reflect on what is meant by 'legal personality' in international law ('ILP'). In essence, the concept refers to the entitlement of a legal person to subjecthood; to hold rights and obligations under international law.

There are significant differences between the ILP of an international organisation (an IO) and that of a State. Foremost, a State's legal personality is 'inherent'; it was not bestowed upon it or delegated by another State. Conversely, an international organisation is invariably created via constituent instrument (a treaty creating the organisation). The bestowal of legal personality need not be inherent, but can be derived from the constituent instrument and the functions of the IO (see e.g. *Reparations for Injuries* advisory opinion).

It would therefore be useful for students also to consider the consequences of such legal personality through the three dominant theories described in the chapter: the 'functionalist' theory that ascribes great weight to the competences of the IO; the 'will theory' that looks carefully at the intention of the drafters of the constituent instrument; and an 'objective' approach that suggests that IOs acquire legal personality automatically, if they meet certain factual criteria such as the creation of organs that have separate decision-making powers from their members.

Like States, IOs may hold rights and obligations, enter into treaties, and raise international claims. IOs are distinct from States in several respects. They must

capable of possessing rights and obligations separately from those of their members. However, their legal personality in domestic law operates somewhat differently. Above all, their rights and obligations are highly dependent on their constituent instrument, unlike States that are all, formally at least, juridically equal.

Question 2. *How can the non-members of international organisations deal with that organisation? Can they even do so at all?*

The ICJ, in the *Reparations* advisory opinion, boldly suggested that the founding States of the UN could create an 'objective' international legal person, one that required no recognition from non-member entities. The ICJ relied to a degree on a 'functionalist' approach, looking at the structure of the UN Charter and the powers attributed to the UN as indicating a necessary, if implied legal personality. It also looked at the number of States involved (the majority of States existing at the time, representing all regions, and all major powers save the defeated Axis States from World War II), but has had consequences for other international organisations.

Further examples include the European Union, also claims objective legal personality vis-à-vis non-members (Art 282 of the Lisbon Treaty) and regularly engages with non-member States on the basis that they will accept this separate international personality. In domestic jurisdictions, non-member engagement with an IO as a separate international person also exists. In *Arab Monetary Fund v Hashim*, the English High Court looked at the practice of member States to the AMF: seeing that they regarded the AMF as having international legal personality, they were prepared to recognise that legal personality in the UK, a non-member.

Question 3. '*Since the ICJ does not have powers of judicial review, there is no mechanism of review if the almighty Security Council acts beyond the scope of its powers* (ultra vires)*'. Discuss and analyse critically.*

It is true that the ICJ has repeatedly, across several judgments and advisory opinions (*Namibia, Lockerbie (Provisional Measures), Kosovo)* affirmed that it does not possess the power of judicial review over decisions of the Security Council. As the

Security Council is the only UN organ with the power to bind all member States, this would suggest that any powers of review are indeed weak. However, it bears noting that in *Lockerbie* and *Kosovo*, the Court found it necessary to interpret and apply the Council's decisions, and one would wonder what would happen were the ICJ to find, in the process of interpretation, that the Council had acted *ultra vires*.

However, one can look further than the ICJ's powers of judicial review when considering the possible responses to a claim that an organ is acting *ultra vires*. For example, the Court has engaged in quasi-review activity in *South West Africa* and *Certain Expenses*, examining the legal consequences of conduct by United Nations organs following questions regarding the competence of the said organs. Moreover, national courts and those of regional organisations have also called into question the legality of Security Council resolutions. The most prominent is the *Kadi (II)* judgment of the ECJ, in which it examined the imposition of targeted sanctions by the Council and the legality of their implementation in relation to Mr Kadi's fundamental rights (see also *Nada v Switzerland* at the ECtHR).

Perhaps there is no 'judicial review', but there certainly seems to be a degree of oversight or external engagement in relation to the legality of decisions taken by the Security Council.