International Law

Discussion Questions

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

Chapter 1, The History and Nature of International Law

Question 1. *Many legal theorists, Hart and Kelsen amongst them, have maintained that international law is not law properly so-called, but something else; a primitive order of rights and obligations, perhaps, but not a full-fledged legal system. Analyse this claim critically.*

This is a classic question for international law students, requiring knowledge as to why international law has been regarded as somehow 'lesser than' or inferior to domestic legal orders. It would be useful to trace the evolution of thinking from naturalism towards positivism, and beyond, and how that debate centred on the relationship between law and morality. Much positivist theory sought to situate international law as a distinct empirical discipline, not tainted by contested morals and ethics, during the Enlightenment. An even more well-reasoned answer might also link this to the rise of the international legal profession as an autonomous discipline within law faculties, distinct from but related to municipal legal orders. Kelsen maintained above all that international law as a 'primitive' legal order, lacking distinct legislative, adjudicative, and enforcement organs. Hart suggested that his distinction between 'primary rules' (of conduct) and 'secondary rules' (of change, enforcement, and adjudication), which to him were the essence of a legal system, were lacking.

It is true that there are some features of international law that are often criticized as problematic. Chief amongst these remain the absence of a centralised legislature or law-making authority, as well as the absence of compulsory enforcement mechanisms at the system-wide level. These are not unimportant, of course. Nevertheless, one can note the rather high degree of compliance with norms of international law as they are, and the degree to which international law was

invoked by and used by newly-independent States in order to justify their statehood and rights under international law. Finally, it also bears noting the extent to which the critical theories surveyed in Chapter 1—e.g. feminist, Marxist, Third World approaches—challenge and engage with the power of international law in embedding political preferences and the very real normative force that law has in entrenching such political preferences. Despite criticisms, international law is arguably a coherent system capable of maintaining certain fundamental values, in particular, the sovereignty and independence of States.

Question 2. *Whatever developments have taken place in recent years, international law was, is, and always will be a system rooted in the consent of States. Discuss.*

The classical view of international law is that it is a system rooted exclusively in the consent of States. Consent entails that only those obligations to which a State has agreed—has consented—can be binding upon it. In this regard, it is useful to highlight the principle of *reciprocity* on which the consent theory is based: States consent to limit their freedom of action in order to induce other States also to limit their own. Accordingly, a State, several States, or all States may create new legal norms to govern their relations between them, provided that they express their consent to be bound by such rules. Such consent is generally explicit, but at times may be tacit. Of course, consent and reciprocity are accompanied by the requirement, now reflected in Article 2(2) of the UN Charter, that obligations assumed by States be performed in good faith.

But does this tell the whole story? To give but one example, Simma and Verdross suggested that an overarching consensus could supersede the individual consent of a State in certain cases; that despite the fact they are equal and sovereign, they remain bound to an international legal order that admits of certain 'original norms' required to create further law. From this they would derive imperative law (or what are now regarded as peremptory norms of international law, or *jus cogens*). Others such as Anne Peters suggest that international law has undergone a process of 'humanisation' in which the individual is now paramount.

What's more, the processes of law-formation often do not require consent, but merely acquiescence or tacit acceptance. Silence can be enough to have new

customary norms that bind a State that has not given its express consent. *Jus cogens* and peremptory norms even go further: there is no argument that a persistent objector to a peremptory norm is exempt from it.

Question 3. *Several contemporary theories are highly critical of international law and its aspirations. Identify these, describe their main tenets, and offer your own analysis.*

Broad questions of this nature do not in any way suggest that there is a 'right' or 'wrong' answer; they are questions for reflection. In Chapter 1, a number of contemporary theories that seek to explain international law were explored. First are the regional traditions that challenge the Eurocentric (or at least, European) conception of international law, such as Chinese, Islamic or Latin American approaches to international law. One can then identify and engage with a number of schools. First, there are 'Third World Approaches to International Law', which call attention to the colonial legacy in contemporary international law and the strategic priority of Third World peoples (and emphatically not of Third World States). Feminist approaches challenge the oppressive history of international law as being rooted (at least in part) in a gendered hierarchy, and being a historically specific rather than inevitable historical development. There are also broadly Marxist perspectives, that argue that international law is a structure designed to perpetuate the capitalist economic model around the world. You also have various international relations theories (examples such as realism, 'network theories' and constructivism are given in Chapter 1) that see law more as an emanation of politics than a separate phenomenon.

What unites these various traditions is that they all challenge the purported universality or neutrality of international law. All suggest that contemporary international law is not politically neutral, that it embeds certain biases or preferences into its very structures. A student may well disagree; after all, there is at least an aspiration towards neutrality embodied in international law's global reach. Rather than focus on getting a 'right' answer, this sort of question is best addressed through reflection as to your understanding as to the nature of international law.