

International Legal Theory *qua* Practice of International Law

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10.1 Introduction

Marti Koskenniemi once claimed that 'international law is what international lawyers do and how they think'.¹ By straddling the 'doing' and the 'thinking' of international law, this quote reminds us about how vexed the question of the relationship between 'theory' and 'practice' is for lawyers in general.² Legal theory, that is, the effort to clarify, explain and organise the nature of law and its essential properties,³ is somehow never regarded as practical enough. But nor, conversely, is legal practice, that is, the enacting and enforcing of law and legal norms, considered theoretical enough in most cases. Think of the urge for practical relevance some academics meet when teaching law, on the one hand, or of the need to

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¹ M. Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in United Nations (ed.), *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (New York: United Nations, 1999), 495, at 523.

² See e.g. the study by W. Twining, W. Farnsworth, S. Vogenauer and F. Tesón, 'The Role of Academics in the Legal System', in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 920–49.

³ On legal theory, see J. Raz, 'Can There Be a Theory of Law' in M. Golding and W. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (London: Blackwell, 2004), 324–42. On theory in general, see A. Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus' (2007) 67 *ZaöRV* 721.

systematise or justify some judges encounter when they are adjudicating in a specific case, on the other.

Interestingly, this difficulty affects all 'lawyers' equally whether they are legal practitioners or legal theorists. As a matter of fact, both our practice's and our theory's professional standards encourage us to switch roles.⁴ The route that leads from academia to the judiciary and back is an example to point to. So unlike the sociologist who is situated outside the social practice that is her object of study, the legal theorist is part of it – and this may actually explain why so many of legal theorists make a point of claiming they are not, as we discuss below. But unlike the moral philosopher whose reasoning emulates that of ordinary moral reasoning and for whom there is not much of a difference between theory and practice, the legal theorist is also a professional lawyer whose reasoning is of a special and public kind.

Other disciplines are familiar with this tension between theory and practice. Arguably, however, the relationship between the theory and the practice of law is like no other in (empirical, or even non-empirical) science. That relationship for lawyers is certainly not (only or centrally) about collecting the most accurate or complete information about the 'object' of one's theory; nor (only or centrally) about 'testing' that theory in return; nor finally (only or centrally) about a 'reality-check', either.⁵ On the contrary, I would like to argue in this chapter that the relationship between the theory and the practice of law is one of justification. It may be explained by reference to the law's self-reflectivity or, more exactly, to that of lawyers engaged in a practice that is normative and hence constantly calls for critique and justification.⁶ The theory of law helps capture what law is, and thereby facilitates legal reasoning and hence the practice of law in return. The theory and practice of law are inextricably linked, as a result, and legal theory is part of the practice of law and vice versa. In other words, their relationship is not one of distance and mutual support, but of integrity.

⁴ See e.g. the interviews of various practitioners of international law discussed in A. Peters, *Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht* (2012) 45 *BerGesVR* 105, 153–55.

⁵ See the various elements of the relationship between theory and practice in science described by A. Peters, *Realizing Utopia as a Scholarly Endeavour* (2013) 24 *EJIL* 533, 535–37. To that extent, the widespread idea that law is the 'medicine of the Arts' would not fare that well.

⁶ The adjective 'normative' is used to refer to what is based on (moral) values (e.g. equality, justice, fairness).

Assuming that theory and practice are more intimately related in law than in other disciplines, it is also clear to us that there should be a way of distinguishing them, or else theory would collapse into practice, and the distinction would be undermined. This means then that not only is it vain to try to achieve a separation of the theory of law from its practice by stressing what applies to other disciplines (e.g. by cultivating objectivity, distance or value-freeness⁷), but also that it is important to find ways of preventing the theory of law from turning into practice and vice versa (e.g. by cultivating the political or public nature of law). Interestingly, while the former differs from what applies to the social theory of a social practice, the latter sets legal theory apart from the moral theory of a moral practice.

Discussions about the nature and role of legal theory and the methodological debate about how we do and should do theory of law are of particular relevance to international law. The main reason for this is that the international legal order is still relatively young in the history of law and legal institutions. This makes a discussion of the relationship between international legal theory and the practice of international law particularly important.⁸ This is certainly why the first international lawyers saw themselves as both scholars and practitioners of international law at the same time. The role of international legal scholars was even more important as the international legal order lacked, and to a certain extent still lacks a single and centralised law-maker, a compulsory and centralised adjudication system and a single and centralised law-enforcement mechanism. Despite the importance of theorising for international law, meta-theoretical discussions remain largely undeveloped in international legal scholarship.

In response, the argument about the nature and role of international legal theory proposed in this chapter is three-pronged. I start by presenting and criticising the state of the meta-theoretical debate in international legal scholarship (Section 10.2). In a second section, I articulate a proposal about how we should conceive of international legal theory and its relationship to the practice of international law (Section 10.3). Finally, in a short third and final section, I hope to show how the proposed account constitutes a promising approach to theorising international human rights law in particular (Section 10.4).

⁷ Contra Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5.

⁸ See e.g. F. Tesón, 'International Legal Scholarship', in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 941, at 941; J. d'Aspremont, 'Wording in International Law' (2012) 25 *LJIL* 575.

Before stepping into the argument, a few terminological clarifications are in order.⁹ 'Theory' has been and will be used interchangeably in this chapter with 'scholarship', 'research' or 'thinking'. We should, however, keep legal 'theory' separate from the idea of legal 'science', and hence from the idea of law as a scientific 'discipline'. This is especially the case if one understands science as the 'advancement' and 'accumulation of knowledge' and its relationship to a set of (empirical and inert) 'data'.¹⁰ Legal science is not, I argue, the central case of legal scholarship or theory, independently of how the latter was conceived earlier in history.¹¹ Legal scholarship or theory is about legal reasoning, and not (only or centrally) about accumulating intersubjective and replicable knowledge nor about doing so on the basis of data. Of course, legal reasoning itself may be the object of science in this sense, just as moral reasoning is in the history of moral philosophy, for instance. However, the core case of legal reasoning is not science just as moral reasoning itself is not science. So, there can be a (social, political, historical or economic) science of law, but what we do as legal theorists is not (only or centrally) about that: it is part of the practice of legal reasoning itself. Holding firmly to this distinction between legal scholarship and legal science can actually prevent us from drifting away in sterile debates about value-free science versus moral activism in legal scholarship,¹² about the relationship between legal science and politics¹³ or about the responsibility of the legal scholar *qua* scientist.¹⁴

⁹ Note that other languages use different terms or the same terms with different meanings. One may think of German notions such as 'Dogmatik' (that cannot be translated, except as 'doctrine') or 'Rechtswissenschaft' (that includes a scientific dimension).

¹⁰ On science and legal scholarship (albeit from a German perspective), see e.g. U. Neumann, 'Wissenschaftstheorie der Rechtswissenschaft' in A. Kaufmann and W. Hassemer (eds.), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart*, 8th edn (Heidelberg: C. F. Müller, 2011), 385–400. See also Peters, 'Die Zukunft der Völkerrechtswissenschaft', n. 3; Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5.

¹¹ Contra Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5.

¹² See e.g. J. Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Law Methodology' in J. Crawford and S. Nouwen (eds.), *Proceedings of the European Society of International Law* (Oxford: Hart, 2011), 115; Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4, at 126–27, 140–41; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5, at 551–52.

¹³ See e.g. Koskeniemi, 'Between Commitment and Cynicism', n. 1; M. Koskeniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 *EJIL* 7; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5, at 540–52.

¹⁴ See e.g. Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4, at 138–43.

10.2 The State of the Meta-Theoretical Debate in International Law

Even though the theory of international law has now become a booming field of scholarship, discussions about the nature and methods of that theorising remain largely underdeveloped. Overall, international lawyers are very pragmatic about the way they conceive of international law.¹⁵ When they are not, they have tended, on the contrary, to be overly critical. In fact, to date, discussions on the meta-theory of international law have been pursued almost exclusively by critical legal scholars.¹⁶ Worse, their views have not only become mainstream¹⁷ for lack of contestation, but also over-theorised¹⁸ for over-concentration.

As a result, and roughly since the mid-20th century, oppositions in the field have become stark and quasi-Manichean. One may depict the debate as consisting primarily in a binary opposition between pure theoretical approaches to international law that regard legal scholarship as science,¹⁹ on the one hand, and non-theoretical approaches to international law that object to the project of a legal science and criticise any theoretical endeavour as falling either into the trap of apology (politics) or that of utopia (moralism),²⁰ on the other. Any scholarly project that falls between the two has been quickly disparaged as non-scientific and, in some cases, as morally activist by the first group, and as either utopian or apologetic by the second. Of course, one also finds a wealth of outsider-theoretical approaches to international law that frame it in another

theoretical context than law and discuss it, for instance, from the perspective of economics, political science or international relations.²¹ Neither of those theories has been particularly interested in the law as law, however, and, most importantly for our purpose, they have clearly situated themselves outside of international legal scholarship and theory as such.²²

There are many potential explanations for this regrettable state of affairs. First of all, as explained before, international law is a relatively new legal domain of law, and this accounts for the novelty not only of its theory, but also of its meta-theory. The invisibility of the college of international lawyers, to quote Oscar Schachter,²³ has not contributed to creating visibility of its meta-theory either, not to mention its claim to universality, obviously.²⁴ In fact, even when theory of international law started developing, secondly, meta-theory may actually have been seen as questioning the role of international legal theorists themselves. I have already mentioned the pragmatism and conservatism of the profession, but one should also stress many of its members' inferiority complex, to quote Jan Klabbbers.²⁵ International lawyers have long struggled with the critique that international law is not law and have compensated that disadvantage in law schools by vesting more time and energy in developing doctrinal accounts that may compete with those of their colleagues in domestic law than in working on the meta-theory of international law and its methodology.²⁶ This also explains, according to Klabbbers, why outsider-theoretical approaches have been so successful in international law: those scientific approaches external to the law appear more authoritative. And this in turn accounts for why interdisciplinarity has had so much more traction among international legal scholars than in domestic law.²⁷ Thirdly, one should stress the impact of the philosophy of sciences

²¹ See e.g. E. Posner and A. Sykes, *Economic Foundations of International Law* (Cambridge MA: Harvard University Press, 2013); A. Dunoff and M. Pollack, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012); J. Goldsmith and E. Posner, *The Limits of International Law* (Oxford University Press, 2005); A.-M. Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 AJIL 205.

²² See J. Klabbbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (2004-5) 1 JILIR 35.

²³ O. Schachter, 'The Invisible College of International Lawyers' (1977-78) 72 NULR 217.

²⁴ See Peters, 'Die Zukunft der Völkerrechtswissenschaft', n. 3, at 767-73.

²⁵ Klabbbers, 'The Relative Autonomy of International Law', n. 22, at 41.

²⁶ See Tesón, 'International Legal Scholarship', n. 8, at 942.

²⁷ See Klabbbers, 'The Relative Autonomy of International Law', n. 22.

¹⁵ See Tesón, 'International Legal Scholarship', n. 8, at 944; J. Kammerhofer, 'Law-Making by Scholars', in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (Cheltenham: Edward Elgar, 2014), 305-325.

¹⁶ See e.g. M. Koskenniemi, 'International Legal Theory and Doctrine' and 'The Methodology of International Law' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edn (Oxford University Press, 2011). See also Koskenniemi, 'Between Commitment and Cynicism', n. 1.

¹⁷ See S. Singh, 'Appendix 2: International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory' in J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2013), 236-261.

¹⁸ See e.g. A. Rasulov, 'New Approaches to International Law: Images of a Genealogy' in J. M. Beneyto and D. Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (The Hague: TMC Asser-Springer, 2012), 151, on the theory of the meta-theory of international law.

¹⁹ See e.g. H. Kelsen, *The Law of the United Nations* (London: Stevens & Sons Ltd, 1950); Kammerhofer, 'Law-Making by Scholarship?', n. 12; Kammerhofer, 'Law-Making by Scholars', n. 15.

²⁰ See e.g. Koskenniemi, 'Between Commitment and Cynicism', n. 1, at 496, 500.

at each relevant era of international law and international law scholarship.²⁸ To start with, and very schematically, there was a long period of conflation of practice and theory at the time of early international law scholars, especially in the 19th century as epitomised by the idea of 'Juristenrecht'.²⁹ This was followed by a period of purely 'scientific' approach to international legal theory and method from the beginning of the 20th century onwards.³⁰ And this has led to the gradual artificial separation of theory from the practice of international law.

Finally, and most importantly, the most interesting explanation for the neglect of meta-theory in international law lies in the underdeveloped understanding of the specific normativity of international law. This necessarily has repercussions, I would like to argue, on the understanding of the theory of international law, and especially of the normative role of its theory and meta-theory. Whereas defenders of a purely legal kind of normativity have endorsed a 'pure' theory of international law,³¹ the others who do not see or are not interested in the normativity of law, for instance because they see consent, power, rationality or ideology as the main source of motivation behind international law, have endorsed other disciplines to approach international law.³² This has forced those few theorists of international law interested in legal reasoning and normativity into the corners of meta-theoretical categories such as 'international moralism'.³³

²⁸ See A. Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25: 2 *EJIL* 369.

²⁹ See A. Peters, 'There Is Nothing More Practical than a Good Theory' (2001) *GYIL* 25; Peters, 'Die Zukunft der Völkerrechtswissenschaft', n. 3, with a historical survey of the debate between scientific and non-scientific approaches to international law. One actually finds traces of this development in Article 38(1)(d) of the ICJ Statute's reference to the work of international legal scholars among the sources of international law. On the latter, see M. Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)' in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, online edn (Oxford University Press, 2011); A. Papaux and E. Wyler, 'Le droit international public libéré de ses sources formelles: Nouveau regard sur l'article 38 du Statut de la Cour internationale de Justice' (2013) 2 *RBDI* 525.

³⁰ See e.g. Kelsen, *The Law of the United Nations*, n. 19, at viii.

³¹ See e.g. Kelsen, *The Law of the United Nations*, n. 19; Kammerhofer, 'Law-Making by Scholarship?', n. 12; Kammerhofer, 'Law-Making by Scholars', n. 15.

³² See e.g. Goldsmith and Posner, *The Limits of International Law*, n. 21.

³³ See A. Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24 *EJIL* 83, for such a critique of international moralism. And see e.g. A. Cassese, 'Introduction', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), xvii–xxii, for signs of resignation in that respect.

Interestingly, after having been the *chasse gardée* of legal realists, law and economics authors and critical legal scholars for years, some of those methodological debates have recently opened up and in a broader fashion. This revival has come mostly from international legal scholars trained in the German³⁴ or US³⁵ traditions. The former have a strong meta-theoretical education, but also a long doctrinal tradition inspired by the old 'Juristenrecht' and the Roman law notion of *jurisprudencia*.³⁶ The latter, on the contrary, are not typical US lawyers³⁷ and may be longing for a stronger and salutary involvement of scholarship in international legal practice than their domestic counterparts. Another explanation may lie in what Sahib Singh has identified as the (counter-) disciplinary 'call to arms' emitted lately by some critical legal scholars, but also by more 'mainstream' international legal scholars.³⁸ In short, realising the threat of outsider theories of international law at last, even in the guise of interdisciplinarity, but also maybe the meta-theoretical sterility of critique for the development of international law, international legal scholars have called for more methodological involvement of international lawyers.³⁹

³⁴ See e.g. Peters, 'There Is Nothing More Practical than a Good Theory', n. 29; Peters, 'Die Zukunft der Völkerrechtswissenschaft', n. 3; C. Hillgruber, 'Braucht das Völkerrecht eine Völkerrechtstheorie?' and U. Haltern, 'Die nackte Wahrheit über eine theoriefeindliche Völkerrechtswissenschaft: Ein Kommentar zu Christian Hillgruber', in M. Jestaedt and O. Lepsius (eds.), *Rechtswissenschaftstheorie* (Tübingen: Mohr Siebeck, 2008), 115, at 131, 133–49; Kammerhofer, 'Law-Making by Scholarship?', n. 15; Peters, 'Rollen von Rechtsdenkern und Praktikern', n. 4; I. Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *EJIL* 1143; Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5; Kammerhofer, 'Law-Making by Scholars', n. 15.

³⁵ See e.g. Tesón, 'International Legal Scholarship', n. 8; S. Ratner and A.-M. Slaughter (eds.), *The Methods of International Law* (Washington: American Society of International Law, 2004); G. Schaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *AJIL* 1. See already M. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313.

³⁶ See S. Vogenauer, 'Civil Law Systems' in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 935.

³⁷ See W. Farnsworth, 'The United States' in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 929.

³⁸ See S. Singh, 'Formalism and International Law', n. 17, by reference to e.g. J. Crawford, 'International Law as a Discipline and Profession' (2012) 106 *ASILP* 471; M. Koskeniemi, 'Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *IR* 3; J. Klabbbers, 'Counterdisciplinarity' (2010) 4 *IPS* 308; Klabbbers, 'The Relative Autonomy of International Law', n. 22.

³⁹ The most recent testimony being, of course, the flip side of the topic of the 2013 ESIL Research Forum: International Law as Profession.

10.3 Rethinking Practice in International Legal Theory

Regrettably, and for the time being, these debates are still trapped in the opposition between legal theory's scientific 'purists', on the one hand, and post-modern theorists, on the other. When they are not, they tell us very little about what law and its 'discipline' should be, except that it should be cultivated to save international law as a profession.⁴⁰

To escape this deadlock, I would like to argue for a meta-theoretical approach of the theory of international law that is analytical and corresponds to the normative positivist international legal theory I have defended elsewhere.⁴¹ Based on both the practical dimension of law and the specific normativity of the practice of law (Section 10.3.1), I argue that international legal theory is central to the practice of international law, and that its very centrality to the practice, once explained, tells us a lot about the kind of theory it should be (Section 10.3.2).

10.3.1 Legal Theory and the Practice of Law

Once we see law as a normative practice, legal theory appears clearly central to that practice. And that centrality to the practice tells us what a good legal theory ought to be. Accordingly, the following argument is three-pronged.

So, first of all, law should be approached as a normative practice. Law is something people do: it is a practice. It is actually something people do together (publicly), and not only on their own: it is a social and accordingly also a political practice. More specifically, law is something people do together to get each other to do other things: it is a normative social and political practice. This idea was best captured by Jürgen Habermas' approach to law as situated 'between facts and norms'.⁴² Importantly, the view defended in this chapter is not that there is some distinct form of normativity at play in the law, that is, one that is distinct from (moral)

⁴⁰ See e.g. Crawford, 'International Law as a Discipline and Profession', n. 38, at 482.

⁴¹ See S. Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 163. Note that legal positivism is still used to refer to consensualism and voluntarism in many of those exchanges, whereas there is nothing in the contemporary legal positivist claim about the validity or the legitimacy of international law that links it to state consent (contra Cassese, 'Introduction', n. 33). Nor does legal positivism as a theory of international law imply a Kelsenian take on meta-theory (contra Kammerhofer, 'Law-Making by Scholarship?', n. 12, at 115).

⁴² J. Habermas, *Between Facts and Norms* (Boston: MIT Press, 1998). See also R. Dworkin, *Law's Empire* (Cambridge MA: The Belknap Press of Harvard University Press, 1986).

normativity. On the contrary, the chapter endorses the generally accepted view in moral philosophy that legal normativity is a kind of (moral) normativity albeit a special kind due to its special social context. Legal normativity amounts, in other words, to (moral) normativity albeit applied in a socio-political context and hence specified or even generated in that context.⁴³ The normativity of law, therefore, is neither pure and distinct nor solely moral.

Secondly, legal theory plays a role in the practice of law. *Qua* normative practitioners, lawyers are enacting and applying norms in a given social-political context. Arguably, therefore, normative legal theorising is required by the normative practice of law. Indeed, it helps capture what the concept and nature of law amount to, that is, its legality⁴⁴ and hence its 'autonomy'.⁴⁵ As a normative concept, the law encapsulates one or many values of legality, and normative reasoning is thus a necessary part of its application.⁴⁶ Legal theory facilitates that normative reasoning in the practice of law and enables the law-immanent justification and critique that are characteristic of the legal practice *qua* normative practice.⁴⁷ So, the relationship between legal theory and practice is not (only or centrally) external to its object unlike what applies in social science. Legal theory is internal to the legal practice that needs it in return in order to be self-reflective and critical. Furthermore, normative legal theorising amounts to theorising about norms albeit in a contextualised fashion: it takes place in a legal context and is therefore distinct from abstract moral theorising.

Of course, there is a risk of circularity between the theory and the practice of law, as a result. That circularity is virtuous, however. Legal theory helps shape the law, but without the practice there would be nothing to theorise and shape in return. It remains distinct from practice, however, to the extent that theory does not enact and enforce legal norms for lack of (public) authority to do so. Another risk is parochialism. If legal theory is part of the practice of law, then the parochial practice of law may influence the universality of the theory. The way to make sure

⁴³ See J. Raz, 'The Normativity of Law', unpublished manuscript on file with author (2013), on the law's 'double moral life'.

⁴⁴ See e.g. M. Giudice and K. Culver, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press, 2010); L. Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge University Press, 2014), 145–82.

⁴⁵ See e.g. Klabbbers, 'The Relative Autonomy of International Law', n. 22, at 36.

⁴⁶ See Dworkin, *Law's Empire*, n. 42.

⁴⁷ See also J. Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012), 13–15.

the enquiry behind legal theory is truly universal, however, is to ensure that its reasoning and conclusions are universally valid across legal cultures (even if the concept of law itself remains parochial and the theory is part of a (parochial) practice).⁴⁸

Finally, the practical role of legal theory has two normative implications for what is a good legal theory. First of all, legal theory should take the practice of law (and hence of theory) seriously. It should situate itself in the legal practice *qua* self-reflective practice, by being a practice-situated theory that is relevant to the justification and critique that are immanent to the practice. It should also aim at non-ideal theorising, as a result, and this implies being institutional and practice-related. Secondly, legal theory should take the normativity of law (and hence of theory) seriously. It should do more than describe the law. It should both justify and criticise the law from within, so as to amount neither to apology nor to utopia, to quote Koskeniemi again.⁴⁹

Within 'legal theory' *lato sensu*, one should distinguish between law-immanent theorising and external theorising about the law. Within law-immanent or internal theorising, first of all, one may draw a line between 'legal doctrine' or specific theorising about some parts of the law, on the one hand, and 'legal theory' about the law in general, on the other. Both of them have in common that they are situated within the law and its practice, and not outside the law. As to external theorising about the law, secondly, one may classify so-called 'legal studies' (sociology, philosophy, history, economics⁵⁰ etc. of law) within that category.

It is important to stress, however, that law-immanent legal theory may at times integrate philosophical, sociological, historical and economic methods into its own. In fact, it will often have to do so to address the complex issues the law is embracing. However, when legal theorists do legal philosophy, legal history, legal sociology or law and economics, they are working as 'lawyers' and inside the legal practice, and not as philosophers, sociologists, historians or economists – unless they claim to, of course. The latter forms of legal theory should not even be described as interdisciplinary either – provided, of course, one thinks there is such a thing as interdisciplinarity and endorses it as a scientific project. As a matter of fact, legal theorists are either law-immanent theorists or

⁴⁸ See Raz, 'Can There Be a Theory of Law', n. 3.

⁴⁹ See Koskeniemi, 'Between Commitment and Cynicism', n. 1, at 523.

⁵⁰ See e.g. A. van Aaken, 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft: Eine Skizze' in M. Jestaedt and O. Lepsius (eds.), *Rechtswissenschaftstheorie* (Tübingen: Mohr Siebeck, 2008), 79.

endorse one of the research methods used in other disciplines: neither are interdisciplinary *stricto sensu*.⁵¹ Of course, the reason there seems to be so much interdisciplinarity at play in legal theory is that the identity of law as a discipline itself is in question, even among lawyers.⁵² The least we can say, based on my argument so far, is that law as a discipline, provided it is one, is certainly atypical compared to scientific disciplines such as social or moral theory.⁵³

10.3.2 *International Legal Theory and the Practice of International Law*

Turning to the implications for the theory of international law, and more generally of law in internationalised circumstances, it seems that the key issue with the nature of international legal theory pertains to the specific features of the normativity of international law.

The normativity of international law demonstrates specific features that need to be explored in more detail.⁵⁴ First of all, by reference to the subjects of its norms (individuals, states or international organisations): international law norms are norms aimed at states and international institutions, but also indirectly, and sometimes directly, at individuals. Secondly, by reference to the sources of the norms of international law. In terms of the law-making processes, international law has no central legislature, no central and ultimate judge, and no centralised law-enforcer. As to the relationship between the sources of international law, they are not organised in a hierarchical order and there is indeterminacy as to how some of them work exactly. Finally, by reference to the relativity of the norms of international law, those norms can be either *erga omnes* (i.e. general) or not, universal or not, imperative or not and even soft or hard.

⁵¹ See Klabbers, 'The Relative Autonomy of International Law', n. 22, at 37–38, 46–48.

⁵² For calls to 'counterdisciplinarity' against 'interdisciplinarity' (à la Slaughter, 'International Law and International Relations Theory', n. 21) in international law, see e.g. Crawford, 'International Law as a Discipline and Profession', n. 38; Koskeniemi, 'Teleology and International Relations', n. 38; Klabbers, 'Counterdisciplinarity', n. 38; Klabbers, 'The Relative Autonomy of International Law', n. 22.

⁵³ For a recent discussion of 'disciplinarity' in international law, see Singh, 'Formalism and International Law', n. 17; D. Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *LJIL* 9.

⁵⁴ See P. Weil, 'Towards Relative Normativity in International Law' (1983) 77 *AJIL* 413; S. Besson, 'The Authority of International Law – Lifting the State Veil' (2009) 31 *Syd LR* 343.

All those features affect the kind of normativity that international law holds. They also influence, as a result, our role as individual legal theorists when compared with domestic legal theorists. Think, for instance, of the collective nature of the normativity of international law, both in terms of sources and of subjects, or of the conflation between subjects and officials of international law norms.⁵⁵ Another example is the validating role of the international judge in that context.⁵⁶ That role goes well beyond that of ordinary judicial law-making by law-identification and law-interpretation. No wonder it holds a central position in Article 38(1) of the ICJ Statute's⁵⁷ list of (subsidiary or auxiliary) sources of determination of international law. But it is also no wonder that the legal scholar is mentioned in the same context.⁵⁸ Her role in the validation of norms stemming from the main sources of international law is what distinguishes her from a domestic legal scholar.⁵⁹ So, the international law scholar does not only have much the same role as the domestic legal scholar I presented before, such as in particular improving the quality of the normative justification and critique that are immanent to the self-reflective and self-reforming normative practice of international law. She also has a more structural and systematic role to fulfil in the identification of international law norms as legal norms in the first place.⁶⁰

⁵⁵ See Besson, 'The Authority of International Law', n. 54.

⁵⁶ See S. Besson, 'Legal Philosophical Issues of International Adjudication – Getting Over the amour impossible between International Law and Adjudication' in K. Alter, C. Romano and Y. Shany (eds.), *The Oxford Handbook on International Adjudication* (Oxford University Press, 2013), 413.

⁵⁷ Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 33 UNTS 993.

⁵⁸ On the close ties between the roles of the legal scholar and the judge, see e.g. Dworkin, *Law's Empire*, n. 42, at 91: 'jurisprudence is the general part of adjudication, silent prologue to any decision at law.' Conversely, in the international context, see Koskeniemi, 'Between Commitment and Cynicism', n. 1, at 512: 'When called upon to perform a legal service, even a non-judge (as adviser, academic, activist) must momentarily construct himself or herself as judge.'

⁵⁹ See e.g. Wood, 'Teachings of the Most Highly Qualified Publicists', n. 29; J. Stone, 'Scholars in International Law', in *Of Law and Nations: Between Power Politics and Human Hopes* (Buffalo: Hein, 1974), 253; Papaux and Wyler, 'Le droit international public libéré de ses sources formelles', n. 29.

⁶⁰ See Wood, 'Teachings of the Most Highly Qualified Publicists', n. 29, third paragraph: 'A broader and important function played by the most eminent of the writers (who were frequently also practitioners) is to give shape and order to the disparate strands that make up international law. Even more than in most areas of law, international law owes its framework and often indeed the elucidation of its rules to writers, especially but not exclusively those of the past. In that sense they are fundamental to the international legal system.'

The scope of international legal theory *qua* normative theorising of the legal practice should be carefully delineated, however, in particular so as not to collapse either into international law-making or into moral theorising of international law.

First of all, we look at international legal theory and international law-making. Most authors would agree with the distinction of degree I have just made between the respective roles of domestic and international legal scholars.⁶¹ However, many would disagree with the content of these roles, and in particular with taking the role of international law scholars (or judges, for that matter) as far as law-making. Of course, they would be right to want to keep international legal scholars outside international law-making. Indeed, the key dimension scholars are lacking is the authority to make international law. It is that authority and what justifies it, and in particular its public dimension,⁶² that need to be identified to grasp the difference between international legal theory and international law-making, including international judicial law-making.

Second, we examine international legal theory and moral philosophy of international law. International legal theory should not be equated with moral philosophies of international law that approach law as a distinct moral object.⁶³ It is situated within the law, and not outside it. Evidence for this may be found in the fact that international legal theorists are primarily lawyers, and not moral philosophers. Furthermore, international legal theory takes the special context of the normativity of law seriously. It does not regard it as another form of global social practice, and in particular as normatively inert, and attempts to assess it morally. But nor does it underestimate the law's own normative context and ability to develop new norms and its own grounds of legitimacy.⁶⁴ This also explains in turn why it would be wrong to argue that taking the (moral) normativity of international law seriously

⁶¹ See e.g. Kammerhofer, 'Law-Making by Scholars', n. 15.

⁶² See on the distinction between practical and in particular political or legal authority, on the one hand, and theoretical authority, on the other, J. Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minn LR* 1003. In the international context, see Besson, 'The Authority of International Law', n. 54.

⁶³ See e.g. A. Buchanan, *Justice, Legitimacy, and Self-Determination, Moral Foundations for International Law* (Oxford University Press, 2007); M. Walzer, *Just and Unjust Wars*, 4th edn (New York: Basic Books, 2006); J. Nickel, *Making Sense of Human Rights*, 2nd edn (Oxford: Blackwell, 2007).

⁶⁴ See Raz, 'The Normativity of Law', n. 43. On the legitimacy of international law *qua* law, see Besson, 'The Authority of International Law', n. 54.

necessarily leads to international moralism⁶⁵ or international moral activism.⁶⁶ Not only are moral philosophers of international law no moralists, but international legal theorists are not moral philosophers of international law. They may draw from the latter's research and engage with them, but their methods and approaches are distinct.⁶⁷

10.4 A Case in Point: International Human Rights Theory as Theory of a Practice

This discussion has implications in a specific area of international legal theory: international human rights theorising. Based on the reasoning presented so far, one may argue that international human rights law is a normative practice and that its theory is best developed as a legal theory of that practice, as a result.⁶⁸

First of all, then, the practice of international human rights should be approached as a normative practice. International human rights are rights that give rise to duties and hence generate normative relationships between a right-holder and a duty-bearer. More particularly, the normative practice of human rights ought to be regarded as a legal practice: human rights law holds a central position in the practice of human rights. As such, international human rights should not be conflated with the moral reality of universal moral rights. Of course, the latter may be theorised separately through moral philosophy or, even better, together with international human rights law, depending on one's take on the relationship between international human rights and universal moral rights, but certainly not as a morally constraining blueprint to be merely translated and enforced by legal practice.⁶⁹ It is crucial indeed to look at how those moral rights are specified and transformed by the legal practice in return.

Secondly, if this holds, then the theory of the normative practice of international human rights law is best developed as the normative legal theory of that practice. Human rights theory is best conceived as a legal

⁶⁵ For this critique, see e.g. Orford, 'Moral Internationalism', n. 33.
⁶⁶ For this critique, see e.g. Kammerhofer, 'Law-Making by Scholars', n. 15.

⁶⁷ See also Besson, 'Moral Philosophy and International Law', note on first page.

⁶⁸ For a full argument to that extent, see S. Besson, 'The Law in Human Rights Theory' (2013) 7 *ZfMR* 120.

⁶⁹ Contra J. Griffin, *On Human Rights* (Oxford University Press, 2008); C. Wellman, *The Moral Dimension of Human Rights* (Oxford University Press, 2010); J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *CLP* 1.

theory of legal (and moral) rights, therefore. More specifically, it should start from the hard questions in the legal practice of human rights and make the most of the moral justifications but also of the critiques articulated within that practice itself.⁷⁰ To do so, it can make use of the methodological resources of legal theory and can then fuel back directly into the human rights practice itself.⁷¹

In short, human rights theory should not be conflated with a moral philosophy of moral rights only where legal human rights are a mere translation of moral rights,⁷² nor with a political philosophy of a (non-normative) practice of rights only where the practice of legal rights is treated as morally irrelevant or inert.⁷³ The former runs the risk of utopia, whereas the latter that of apology, to quote Koskeniemi again.

Importantly, the legal practice of human rights should not only be the object of human rights theory, but also the context of human rights theory *qua* legal theory of a normative practice and hence *qua* part of that practice of immanent justification and critique. This is not only a key methodological realisation for human rights theory, but also a key meta-theoretical realisation for human rights theorists themselves, and for human rights research in general. They should understand themselves as situated in the practice, with all the (non-theoretical) responsibilities that come with it.

10.5 Conclusion

The time has come for recent developments in the theory of international law (in particular in the field of the normative philosophy of international law) to lead to the development of meta-theoretical and methodological research in international law. Curiously, the latter has remained largely undeveloped.

After mapping the state of the discussion, I have argued that the way we do theory of international law should reflect the normativity of the practice of international law and be responsive to the pivotal role of normative reasoning in that practice *qua* self-reflective practice. Realising

⁷⁰ See also S. Besson, 'Justifications of Human Rights' in D. Moeckli and S. Shah (eds.), *International Human Rights Law*, 2nd edn (Oxford University Press, 2013), 34.

⁷¹ See also Besson, 'The Law in Human Rights Theory', n. 68.

⁷² See e.g. Griffin, *On Human Rights*, n. 69; Tasioulas, 'Towards a Philosophy of Human Rights', n. 69.

⁷³ See e.g. J. Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 2001); C. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).

this should enable future international law scholarship to escape artificial divides between the theory and the practice of international law. More specifically, it would bring international lawyers to finally come to terms with their integration by focussing on the nature of their relation rather than on their separation (or their sometimes more loosely coined relationship of 'mutual support'⁷⁴). So doing, they should also be able to evade the Manichean opposition between scientific and non-scientific endeavours (legal theory is not centrally about science), on the one hand, or the opposite one between political apology/conservatism and moral utopia/activism (legal theory is both about justification and critique just like the legal practice itself), on the other.

Now that critical legal scholars' views about the nature of international legal theory have allegedly become 'mainstream' or, at least, so overly theorised that they can no longer be relevant to future theorising and to the practice of international law itself, it is time to move forward and bring some much needed diversity into our theoretical debates. Actually, the future of our practice of international law itself depends on it. Nothing less than that.

⁷⁴ See e.g. Peters, 'Realizing Utopia as a Scholarly Endeavour', n. 5, at 542–44; Peters, 'Rollen von Rechtsdenken und Praktiken', n. 4, at 143–53.

PART III

The Practice of International Law and Its Professional Capacities