



## UvA-DARE (Digital Academic Repository)

### Moving Beyond Interdisciplinary Turf Wars

*Towards an Understanding of International Law as Practice*

Aalberts, T.; Venzke, I.

**DOI**

[10.1017/9781316492802.013](https://doi.org/10.1017/9781316492802.013)

**Publication date**

2017

**Document Version**

Final published version

**Published in**

International Law as a Profession

**License**

Article 25fa Dutch Copyright Act

[Link to publication](#)

**Citation for published version (APA):**

Aalberts, T., & Venzke, I. (2017). Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice. In J. d'Aspremont, T. Gazzini, A. Nollkaemper, & W. Werner (Eds.), *International Law as a Profession* (pp. 287-310). Cambridge University Press. <https://doi.org/10.1017/9781316492802.013>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

---

## Moving Beyond Interdisciplinary Turf Wars

### Towards an Understanding of International Law as Practice

TANJA AALBERTS AND INGO VENZKE\*

#### 11.1 Introduction

International lawyers have looked at the study of *their* object by international relations scholars above all with suspicion. Whereas they have warmly welcomed the increasing recognition of international law's power in political sciences, some of them have turned wary about the ways in which international law is (mis)treated in the move to interdisciplinarity. Their anxieties pertain to the fate of both international law as an object of study and, by implication, the future of the discipline of international law. We submit that these anxieties overall boil down to concerns about the autonomy of international law, both as a domain of international or world society and as an academic discipline.

This argument is in itself not unheard of and other chapters of this volume also echo such a reading.<sup>1</sup> This connection between international lawyers' anxieties and concerns for the autonomy of international law has also been made explicit by one of the most ardent critics of interdisciplinary research, Jan Klabbers, who calls lawyers to arms in order to 'jealously guard the relative autonomy of their discipline'.<sup>2</sup> International

\* The present contribution spells out the authors' idea for the panel on 'international law as practice', held at the ESIL Research Forum in Amsterdam, May 2013. It was supported by the *Leiden Journal of International Law* and was convened with Janina Dill, Frédéric Mégret, Nik Rajkovic, and Ole Jacob Sending. Anne Orford acted as commentator.

<sup>1</sup> That is, the reading that autonomy is indeed the focal point of debates, see for instance the analysis by Bohm and Collins (who see the fragile autonomy of international law – as a domain – in danger).

<sup>2</sup> J. Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (2005) 1 *JIRIL* 35.

law seems to be under threat as a sensible object of study in its own right with its own methods of inquiry. Most remarkable in this regard are the recent objections to interdisciplinarity voiced by those scholars who have been important pioneers in bringing the politics of international law to the fore and who have been so productive in providing a broader sociological analysis of the workings of international law beyond a narrow internal perspective of the law.<sup>3</sup> The lawyers' fears concentrate on the expansion of a prevailing instrumentalist understanding of international law that threatens to undermine law's autonomy, both from within the discipline and from the outside. The proposed solution is to counter these trends with progressive positivism and formalism.<sup>4</sup>

The more recent debates on interdisciplinarity are a variation of a well-known theme. They especially mirror earlier exchanges over policy-oriented jurisprudence à la New Haven School. Their present reappearance on the foreground can be traced back to some interdisciplinary research agendas that took the form of hegemonic expansion by a particular strand of international relations research since the 1990s, which advocated interdisciplinary research on the basis of a positivist social science to be adopted by lawyers (see section 11.3).

While we agree with the criticisms against this constraining agenda of interdisciplinary research, we submit that international lawyers' responses have been equally counterproductive and threaten to undo some of the insights gained into the politics of international law. That is to say, the strategies to counter the challenges of interdisciplinarity and alleged (mis)treatment of international law in mainstream variants of international relations research set up trenches in an unproductive turf war. While disciplinary knowledge and expertise is worth fighting for and indeed necessary input for any interdisciplinary project, we mourn the common first victim of any war: diversity behind the lines. One's own position, just as well as that of the supposed enemy, hardens into an implausibly homogeneous block, constituted in its antagonism with the respective other. The present push against interdisciplinarity by some contributors to the debate in fact reintroduces an image or ideal of international law as an isolated and given domain through the backdoor. Moreover, such responses to agendas for interdisciplinary research

<sup>3</sup> Here we are thinking above all of the work of Martti Koskeniemi, for instance: 'The Politics of International Law' (1990) 1 *EJIL* 4.

<sup>4</sup> Also presented as 'counterdisciplinarity'. See M. Koskeniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *IR* 3; J. Klabbers, 'Counterdisciplinarity' (2010) 4 *IPS* 308.

generalise and reify disciplinary identities in a way that goes against much of the reflexivity that international law as a discipline owes to Critical Legal Studies (CLS) in particular.

We see that an unduly narrow view of the broad field of international relations lies at the heart of many attempts at saving international law as a meaningful practice and discipline from the perceived onslaught of political science, defined in terms of realist and game theoretical approaches.<sup>5</sup> Of course international relations scholarship is broader than the instrumentalism of realist and rational-choice outlooks.<sup>6</sup> Rather than fencing international law off from international relations research, we specifically argue in this chapter that international lawyers can (and should) recognise the politics that is inherent in any legal practice, without sacrificing law to politics, or to specific political science methods, all together. In order to move past anxieties, the present contribution proposes a revamping of (inter-)disciplinary agendas along the lines of practice theory. We argue that conceptualising international law as a practice in analytical terms provides a way for understanding how law can be *both* autonomous *and* political.<sup>7</sup>

More specifically, and building on previous analyses of law as an argumentative practice in both international law and international relations scholarship, we suggest thinking about the standards of what makes for a valid legal argument (i.e. the conditions of possibility for making a legal knowledge claim) as one way of transcending bygone divides of

<sup>5</sup> Klabbers, 'Relative Autonomy', n. 2; J. Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 *IR* 119.

<sup>6</sup> As Dunoff and Pollack put it, the criticisms of Klabbers and Koskenniemi 'fall well wide off the mark' in light of the breadth and complexity of IR research. J. L. Dunoff and M. A. Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013), at 20.

<sup>7</sup> As such, it also speaks to lawyers who shied away from CLS in the first place because it would surrender the autonomy of law by highlighting its inherent politics. From the perspective discussed here, international law is autonomous as a social practice. In other words, its autonomy is not inherent or a priori, but outcome of a practice: '[I]f there remains an unavoidable need to hold on to the specificity of law as a social institution, neither is it possible to evade the complexity and specificity of politics' (A. Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society' in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), 327, at 333), and, we would add, notably the interplay between these two. See also the forum on international law and international political sociology in (2010) 4(3) *IPS*; S. Krasmann, 'Targeted Killing and Its Law: On a Mutually Constitutive Relationship' (2012) 25 *LJIL* 665.

internal and external views of the law and of putting interdisciplinarity to productive use. The focus is not on identifying some given core or universal characteristics of legal validity, as an alleged foundation for the autonomy of law, but rather on realising that the standards of what makes for a valid legal argument are produced within the social practice itself, and that this constitutes international law's autonomy as a field of practice. In the words of Dennis Patterson, 'law is an activity, and not a thing. Its "being" is in the "doing" of the participants within the practice'.<sup>8</sup>

For our argument it means that both validity and autonomy are not characteristics of this thing called law (body of rules, built on sources), but rather outcomes of law as a practice. As such, our interest lies not with legal validity per se (i.e. which legal argument is valid?), but rather with how validity is determined. In order to clarify this point, we draw a parallel to science as another social practice, whose standards for valid arguments are equally contingent, that is, produced through its practice. We thereby emphasise that the notion of validity, as we use it, is not 1:1 with a notion of legality. We are concerned with *legal* validity only in the sense that it refers to validity of an argument in a specific field of practice. This parallel to science is particularly relevant as the quest for scientific query has been the very linchpin in the (inter)disciplinary relation between international law and international relations. It has been central to their parallel struggles for disciplinary autonomy and academic credentials. And it returns with a vengeance in the interdisciplinary debate, creating current anxieties and deadlocks. But as we elaborate, these anxieties are based on rather specific and reifying conceptions of what science is and what disciplines are.<sup>9</sup>

Analysing international law as practice thus enables a discussion of its autonomy, without relapsing into the reification of boundaries between

<sup>8</sup> D. M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' in D. M. Patterson (ed.), *Wittgenstein and Legal Theory* (Boulder: Westview Press, 1992), 85, at 87.

<sup>9</sup> In addition, disciplines themselves can be understood in practice terms, as knowledge production and disciplinary boundaries are themselves the product of social practices with a history. A cross-disciplinary approach in this regard takes scholarly practices as a particular category of interpretative communities that engage in the construction of both law and politics, and international law and international relations as disciplines, which would further open up space for interdisciplinarity (N. M. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen, Introduction: Legality, Interdisciplinarity and the Study of Practices', in N. M. Rajkovic, T. E. Aalberts and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and their Politics* (Cambridge University Press, 2016). For a general discussion, see A. Abbott, *Chaos of Disciplines* (University of Chicago Press, 2001).

politics and law as separate domains, or between international law and international relations as autonomous disciplines. It thus hopes to forego the pitfalls of a continued turf war fought through the reification of disciplines and homogenous identities. It opens up space for genuine dialogue and cross-fertilisation, guided by a shared interest in similar questions and paradoxes regarding how law operates in world society.<sup>10</sup> It also avoids a relapse into the empirical/normative divide that critical thinking took pains to deconstruct over the past decades, both in international law as well as in post-positivist strands of international relations theory. It notably follows that we do not see that a simple (re)division of labour between the disciplines would do the job of moving beyond the current deadlock of interdisciplinary research. In such an approach to interdisciplinary cooperation, the respective other tends to be reduced to a junior aide, and the risk of reproducing disciplinary stereotypes or straw-men looms large. In fact, the contemporary state of the art of interdisciplinary research between international law and international relations draws attention to precisely that threat.<sup>11</sup> That is not to say that work should not be divided or boundaries should be undone entirely. Far from it. But we argue that, interestingly but unsurprisingly, the terms of any such division are part of the (inter)disciplinary struggle. Indeed, a practice approach sheds light on how boundaries are drawn. It highlights how boundaries are constitutive of the social entities and practices they allegedly demarcate.<sup>12</sup>

Our contribution first takes a step back from present day anxieties to contextualise them against the background of attempts to establish international law as a scientific discipline (Section 11.2). A quest for scientific inquiry has similarly informed international relations scholarship, yet these parallel missions paradoxically feed present anxieties about interdisciplinarity. We support this argument with a brief genealogy of the mainstream interdisciplinary agenda as it has evolved over the past two or three decades (Section 11.3). In a third and final step, we sketch our view of international law as practice. We point to the promise of asking what makes for a valid legal argument by investigating these standards as

<sup>10</sup> F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

<sup>11</sup> Cf. e.g. K. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *YJIL* 335; J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013).

<sup>12</sup> A. Abbott, 'Things of Boundaries' (1995) 62 *SR* 857.

the medium and outcome of practice itself. We finally highlight its purchase for moving past anxieties of interdisciplinarity towards a productive interdisciplinary study of the politics of international law (Section 11.4).

## 11.2 Scientific Inquiries of International Law and Politics

### 11.2.1 *Conditions for Autonomy*

The all too familiar straw-man orthodoxy presents international law as a body of rules that are applied to a specific case in a way that, too, follows rules. The twin pillars are those of *positivist* sources doctrine that confines the making of law to a specific category of acts and *formalist* doctrines of interpretation that, in some imagination at least, tell how one ought to go about uncovering the meaning of those acts in a specific case. By and large, legal positivism understands legal sources as setting out the criteria under which actors can create law. It is flanked by formalism, which suggests that interpretation is a rule-bound activity that establishes the meaning of legal sources.<sup>13</sup> At their core, both positivism and formalism seek to ensure that law is something different from – more objective than – politics. Law and politics meet at the moment in which actors make law in the form of recognised sources, for instance by concluding a treaty. From this perspective, interpretation could concretise the law, maybe, but surely does not make it. Were this otherwise, law's autonomy would arguably be under siege. That is why 'law wishes to have a formal existence', in Stanley Fish's famed words with which he describes the self-reinforcing persistence of positivism and formalism in legal practice.<sup>14</sup>

It is possible to make good sense of positivism and of international law in its formal existence without subscribing to the reductionist view of interpreting international law as an act of concretisation that exclusively follows a legal programme and is removed from the realm of the political.<sup>15</sup> The programme of positivism is best understood in the

<sup>13</sup> See, for instance, J. Sorel and V. B. Eveno, 'Article 31' in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011), 804, at 806.

<sup>14</sup> See S. Fish, 'The Law Wishes to Have a Formal Existence' in S. Fish (ed.), *There's no Such Thing as Free Speech and it is a Good Thing Too* (Oxford University Press, 1991), 141, at 142.

<sup>15</sup> For a collection of approaches that discuss attempts at relocating positivism in this sense, see J. d'Aspremont and J. Kammerhofer (eds.), *International Legal Positivism in a Postmodern World* (Cambridge University Press, 2014).

context of a quest for scientific inquiry at its late 19th century outset, in a move away from natural law theories. The aim was the safeguarding of (international) law as a scientific discipline.<sup>16</sup> Hans Kelsen's project of a positivist pure theory of law was probably one of the most powerful in this regard, even if it was sidelined by the mainstream.<sup>17</sup> The point that drove Kelsen was that, in his view, morality or politics could not be scrutinised objectively. They may thus not form part of legal justifications, at least not explicitly, if legal practice wishes to be scientific. We hasten to add that Kelsen was an outspoken critic of the orthodoxy for its wish to make belief that interpretation is but an act of deduction or even cognition rather than of political will. Applying the law to a concrete case was not an act of cognition, already for Kelsen, but one of political will (within limits). But for one, Kelsen still suggested that the capable legal scientist could cognise the law in the abstract. His conception of the legal system was geared precisely towards providing the conditions for that possibility. For another, Kelsen left the interpreter charged with applying the law in a concrete case to herself. If one wants to know how best to interpret in a concrete case, one finds next to nothing in Kelsen's oeuvre. That is a matter of politics. Kelsen's has been one of the most powerful articulations of the positivist programme, also for international law. It might not have been the most influential, however. More influential approaches, we submit, have by and large given politics a yet more limited role, belittling even the politics of interpretation in concrete cases. In short, the quest for scientific inquiry – for Kelsen as for others at his time and thereafter – has come with a turn away from politics.

Scientific ambitions and a quest for objective knowledge and autonomy also informed the establishment of the discipline of international relations in the United States. It resulted in a decisive turn away from international law. The key figure of this development is of course that of Hans Morgenthau, who had worked under the supervision of Hans Kelsen in Geneva and then, like Kelsen, emigrated to the United States. Unlike Kelsen, he would turn his back on international law to instead

<sup>16</sup> For a discussion of the historical emergence of law as science, see M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 122ff; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); F. Zarbiyev, *A Genealogy of Textualism in Treaty Interpretation*, in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015), 251.

<sup>17</sup> H. Kelsen, *Pure Theory of Law*, Max Knight (trans.) (Berkeley: University of California Press, 1967).



shape international relations scholarship. The US story of IR is hooked on Morgenthau's specific stance as the Realist and proto-scientist, who clearly demarcated international relations and international law: '... the political realist maintains the autonomy of the political sphere [and] thinks in terms of interest defined as power ... the lawyer, of conformity of action with legal rules'.<sup>18</sup> It is this distinction that underlies the development of international law and international relations as related but 'carefully quarantined fields of inquiry'.<sup>19</sup>

Indeed, as Friedrich Kratochwil has argued, the very identification of Carr and Morgenthau as the realist founding fathers of the discipline of international relations is 'charged with establishing the autonomy of the discipline'.<sup>20</sup> What is more, the separation of the two disciplines, coupled with a division of labour in terms of studying international affairs, created their mutual conditions of possibility. Thus, we have two parallel quests for science moving in opposite directions: a project to cleanse international relations scholarship from normative and idealistic

<sup>18</sup> H. J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 3rd edn (New York: Knopf, 1966), 13. He can be identified as a proto-scientist insofar as he identified the research agenda of the emerging discipline in terms of the objective and eternal laws of human nature driven by the pursuit for power, as opposed to the idealism of Wilsonian legalism. This was at the same time combined with an ethics of responsibility to overrule simplistic power political determinism and behavioural scientistism. On this basis, Koskenniemi alternatively characterises him as an anti-formalist (by relating law's validity not to its internal qualities, but to the likelihood of its effectiveness). M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press, 2002), 467. There is some ambivalence about Morgenthau's conception of science which stands out most clearly in the contrast between *Scientific Man and Power Politics* (1947) and his first principle of political realism in the *Politics of Nations*. According to this principle, '[p]olitical realism believes that politics, like society in general, is governed by objective laws that have their roots in human nature ... Realism, believing as it does in the objectivity of the laws of politics, must also believe in the possibility of developing a rational theory that reflects, however imperfectly and one-sidedly, these objective laws. It believes also, then, in the possibility of distinguishing in politics between truth and opinion – between what is true objectively and rationally, supported by evidence and illuminated by reason, and what is only a subjective judgment, divorced from the facts as they are and informed by prejudice and wishful thinking'. This hence signifies a clear preference for objective reason over subjective judgment. This seems to be at odds with his forceful and book-length critique against rationalism and scienticism of the liberal internationalist agenda in *Scientific Man and Power Politics*.

<sup>19</sup> C. Reus-Smit, 'Introduction' in C. Reus-Smit (ed.), *The Politics of International Law* (Cambridge University Press, 2004), 1, at 1.

<sup>20</sup> F. Kratochwil, 'How Do Norms Matter?' in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000), 35, at 38.

daydreaming as the very justification for its emergence as a separate discipline, on the one hand, and a turn to formalism by which international law sought to free itself as a field of study from morals, interests, or social conventions to establish its neutrality, objectivity (i.e. 'scientific-ness'), and autonomy, on the other. These quests have led to remarkably similar and similarly implausible conceptions of politics and law within both international law and international relations scholarship. The view, Kratochwil notes and deplores, is that '[l]aw and politics are not one continuum in the realm of praxis but radically different domains that must be kept separate'.<sup>21</sup> And they must do so not only for the sake of their autonomy, but also for their scientific identity. Illustrative is Kelsen's recognition of the politics of legal practice, but which he at once casts aside as a matter not possibly subject to scientific inquiry. In other words, the quests for scientific rigour have resulted in rather stylised projections of autonomous domains of what are in fact intermeshed social practices. These projections produce significant blindspots with regard to studying the dynamics of law and politics in the international realm.

### 11.2.1 *Bringing Politics Back in: Policy-Oriented Jurisprudence and Critical Legal Studies*

Unsatisfied with the formalist and positivist ideal-types, it was the heirs of legal realism in New Haven who placed the politics of international legal practice centre-stage in their policy-oriented jurisprudence. Scholarship of the New Haven School offers a telling example of the causes and consequences of unease, that mirror present debates – an unease, namely, that arises when disciplines are seen as overreaching and as projecting their logic onto phenomena that other disciplines believe to be their own. The New Haven School's policy oriented jurisprudence comes with a legendary critique of positivism and formalism. It was outspoken in its disdain for thinking of international law-making in terms sources.<sup>22</sup> International law, Myres McDougal found, should be 'regarded not as

<sup>21</sup> Kratochwil, 'How Do Norms Matter?', n. 19, at 39. Carr, like other Realists, shows some ambivalence in claiming on the one hand that politics and law are distinct, and on the other that law is nothing but the handmaiden of power politics, and cannot 'be understood independently of the political foundation on which it rests and of the political interests which it serves' (E. H. Carr, *The Twenty Years' Crisis, 1919–1939* (London: Macmillan, 1939), 176, 179). Note the striking parallels with CLS depiction of the politics of international law (although epistemologically a different project all together).

<sup>22</sup> See generally G. J. H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983), 39–44; Koskenniemi, *Gentle Civilizer*, n. 17.

mere rules but as a whole *process* of authoritative decisions in the world arena'.<sup>23</sup> Law-making neither ended nor started with sources. International Law had developed a myth, in their opinion, the myth that the law could be found by looking at what Art. 38 claims to be the sources of all law.<sup>24</sup> The model of positivism, Michael Reisman contends, is distorting precisely because it holds that law is made by the legislator.<sup>25</sup> He argued that international law rather emerges from the myriad of legal communications that a plethora of actors utter every day. The space of politics is thus much wider. The New Haven approach also came with its own scientific agenda and propositions about what counts as proper science. It could not be the subjective claims as to what legal sources mean; *that* is in the eye of the beholder. Legal formalism does not come with the necessary conditions for scientific inquiry. It is but hollow words that should not distract from the underlying politics of the matter. One should rather be sure about what is the purpose of it all. Then one can meaningfully argue about what the law is and what it should be.<sup>26</sup> The unnerving push was for instrumentalism to replace empty formalism.

The views from New Haven find roots in legal realism and its sobering suggestions about the incapacity of rules to guide and constrain decisions. This has prompted McDougal and Reisman to look for other bases to explain and guide international legal practices. Whereas they find an anchor in politics, and a morality anchored in human dignity and humanitarianism, Critical Legal Studies charts a second, quite different route from legal realism. While it shares the rule-scepticism, it is equally sceptical of any other foundation for explanation or guidance. In the end,

<sup>23</sup> M. S. McDougal, *Studies in World Public Order* (New Haven: Yale University Press, 1960), 169. Also see R. Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 ICLQ 58, 58 ('international law is a continuing process of authoritative decisions'); B. Cheng, 'Epilogue: On the Nature and Sources of International Law' in *International Law: Teaching and Practice* (London: Stevens, 1982), 203.

<sup>24</sup> M. Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *ASILP* 101.

<sup>25</sup> Reisman, 'International Lawmaking', n. 23, at 107.

<sup>26</sup> M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven: Yale University Press, 1967), 13–21; See M. S. McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1954) 82 *RCADI* 137; W. M. Reisman (ed.), *Toward World Order and Human Dignity. Essays in Honor of Myres S. McDougal* (New York: Free Press, 1976). It is interesting to note that this comes close to idealist positions in a natural law tradition, see Van Hoof, *Rethinking the Sources of International Law*, n. 21, at 41; J. von Bernstorff and I. Venzke, 'Ethos, Ethics and Morality in International Relations' in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, online edn (Oxford University Press, 2010).

the actor is left alone with the responsibility for her decisions. At best, she can openly ascribe to a political project, or highlight redistributive consequences of one choice rather than another, appealing to moral sentiment.<sup>27</sup>

The more specific critique that David Kennedy and Martti Koskenniemi have implanted as a well-rehearsed topos of international law is the indeterminate structure of legal argumentation. Legal argumentation, they posit, inescapably oscillates between apology (connecting to state consent) and utopia (connecting to a basis beyond state consent).<sup>28</sup> Indeterminacy gives a prominent place to political choices that drive legal practice without – in stark contrast to approaches from New Haven – allowing politics or morality to offer a new foundation. As such, CLS also provides a more fundamental and epistemological critique of the scientific project. Moreover, Koskenniemi's twist against interdisciplinarity is directed against a specific political scientific study of international law that allegedly leaves no room for a domain of international law proper – proper in the sense that is not reduced to the working of politics. Instead, he proposes to address law in terms of a 'culture of formalism'.<sup>29</sup> Such a perspective defends the domain of law as a culture and a project. It exposes and acknowledges the politics of international law,<sup>30</sup> but seeks to counter this with formalism as a progressive choice because its argumentative standards are still higher when compared to discourses of morality or politics. Its argumentative standards arguably still allow for more scrutiny and for a certain levelling of the playing field.<sup>31</sup>

What this last twist suggests, not unlike Kelsen's work, is that the autonomy of international law is best located in its argumentative practice.<sup>32</sup> At the same time, it transpires clearly that this practice is

<sup>27</sup> A masterful study in this vein is certainly D. Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, MA: Harvard University Press, 1997).

<sup>28</sup> D. Kennedy, 'Theses about International Law Discourse' (1980) 23 *GYIL* 353; Koskenniemi, *From Apology to Utopia*, n. 15; Koskenniemi, 'The Politics of International Law', n. 3.

<sup>29</sup> Koskenniemi, *Gentle Civilizer*, n. 17.

<sup>30</sup> As Koskenniemi himself claimed: 'the critique of rules and principles cannot be undone' (Koskenniemi, *Gentle Civilizer*, n. 17, at 495).

<sup>31</sup> Koskenniemi, *Gentle Civilizer*, n. 17, at 495.

<sup>32</sup> P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *HLJ* 814; D. Busse, 'Semantic strategies as a means of politics: Linguistic approaches to the analysis of 'semantic struggles'' in P. Ahonen (ed.), *Tracing the Semiotic Boundaries of Politics* (Berlin: Mouton de Gruyter, 1993), 121; I. Venzke, *How Interpretation Makes*

political in the sense that it may amount to an exercise of power.<sup>33</sup> The picture of legal interpretation that arises from this perspective is certainly not one of uncovering the law in an apolitical exercise of archaeology, but one of a political struggle in which actors attempt to find acceptance for their interpretative claims that are aligned with their interests or convictions. Success in interpretation translates into winning a semantic struggle in a particular instance.<sup>34</sup> Participants in legal discourse craft claims about (il)legality, seek to bend the payoffs distributed by international law, and try to tap law's symbolic power. In Koskenniemi's pithy words, 'international law is an argumentative practice'.<sup>35</sup> And as an argumentative practice international law is inescapably connected with politics.

Given this unmistakable message about the politics of international law over the past decades, Koskenniemi's more recent rejection of interdisciplinarity might come as a surprise. Moreover, his work indeed is very rich in drawing on insights from other disciplines. It is evidently a quite specific interdisciplinary agenda, or a particular conception of interdisciplinarity, that is under attack. As elaborated in the next section, the bone of contention is the supposedly interdisciplinary agenda as it has emerged, with some turns and twists, from US-styled international relations scholarship.

### 11.3 The (Hi)Story of Interdisciplinarity and Present Anxieties

Telling the story of interdisciplinarity is not an innocent exercise. Neither is identifying its starting point. It partakes in a practice that we wish to critique; namely the suggestion that there is just one such agenda or one such story. Our endeavour at present is to retrace the agenda that has become dominant. The specific tradition of what commonly comes under the heading of 'IL/IR research'<sup>36</sup> notably sidelines other origins and disciplinary developments as they, for instance, started off within the

*International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012), 57–64.

<sup>33</sup> M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *CRIA* 197.

<sup>34</sup> I. Venzke, 'Is Interpretation in International Law a Game?' in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015), 352.

<sup>35</sup> M. Koskenniemi, 'Methodology of International Law' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edn (Oxford University Press, 2007).

<sup>36</sup> Dunoff and Pollack, *Interdisciplinary Perspectives*, n. 10.

United Kingdom. The first chair for international relations in Aberystwyth led to a quite different tradition of the so-called English School, which has been more inspired by historiography, that advocates classical methods over social science, and that has for a longer time been prone to taking international law seriously.<sup>37</sup> In recent recollections, however, two articles in the North American tradition figure most prominently as the pioneers of interdisciplinary research: Kenneth Abbott's article on modern international relations scholarship as a 'prospectus' for international lawyers, and Anne-Marie Slaughter's article(s) on a dual agenda for international law and international relations research based on a 'shared conceptual space'.<sup>38</sup> Both Abbott and Slaughter see a lot of potential for the development of shared research agendas, or even a joint discipline, to establish a further scientific sophistication of causal analytical models to study international law. They are based on the insights and techniques of modern international relations theory, as (narrowly) defined by rationalism (including regime theory and liberal institutionalism) and game theory.

These agendas coincide with the end of the Cold War, which – in its portrayal as the end of history – enabled a move beyond international relations defined in terms of power politics towards soft politics and normative power, or muscular humanitarianism as a hybrid form.<sup>39</sup> For the discipline of international relations, it also entailed an identity crisis because its scientific methods had failed to predict this most defining moment of world politics after the Second World War. The end of the Cold War and the agenda of a New World Order thus provided the conditions of possibility for the emergence of interdisciplinarity. Liberal institutionalist and constructivist approaches in international relations theory provided room for dialogue, dual agendas and even, in Abbott's

<sup>37</sup> The debate about methods counts as the Second Great Debate in the disciplinary historiography of international relations. See H. Bull, 'International Theory: The Case for a Classical Approach' (1966) 18 *WP* 361. Classic English School discussions of international law are H. Bull, *The Anarchical Society. A Study of Order in World Politics*, 2nd edn (London: Macmillan, 1995) and C. A. W. Manning, *The Nature of International Society* (London: Bell and Sons, 1962).

<sup>38</sup> Abbott, 'Prospectus', n. 10; A-M. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL* 205; A-M. Slaughter, A. S. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 *AJIL* 367.

<sup>39</sup> The term 'muscular humanitarianism' comes from A. Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Intervention' (1999) 10 *EJIL* 679–711.

view, an opportunity to integrate international law and international relations as disciplines.<sup>40</sup> The language is telling. This was not a reunion or re-integration. The tables had turned. With a gendered metaphor, international law is conceived no longer as international relations' mother discipline or *alma mater*, but international relations has become international law's father, to provide analytical approaches, insights and techniques to analyse the raw material that international legal scholarship collects. In turn, lawyers have to transform from 'formalists' into 'functionalists' and learn to generate hypotheses.<sup>41</sup>

The contours or parameters of the debate are set out clearly in this way. The division of labour notably reinforces the very same stereotypical differences and implicit hierarchies between the two disciplines that justified their autonomous existence at the time of their divorce when Hans Morgenthau turned against his onetime teacher Hans Kelsen. Illustrative in this regard is also Robert Keohane's proposal for a synthesis between instrumentalist (predominantly international relations) and normative (predominantly international law) optics in order to articulate causal mechanisms that allow for empirical testing as the hallmark of scientific inquiry. In other words, there is room for a normative optic (which he identifies in terms of reputation and legitimacy) if only it could make sure to define empirically testable propositions and indicators.<sup>42</sup> Hence in this version of interdisciplinarity, dialogue and integration thus would (have to) proceed on international relations' speaking terms: 'The price that international law pays to be taken "seriously" by IR theorists is greater empiricism, [scientific] positivism, and skepticism'.<sup>43</sup>

<sup>40</sup> See e.g. V. Raffo, et al., 'Introduction: International Law and International Politics – Old Divides, New Developments' in T. J. Biersteker, et al. (eds.), *International Law and International Relations: Bridging Theory and Practice* (Abingdon: Routledge, 2007), 1.

<sup>41</sup> Abbott, 'Prospectus', n. 10, at 334, 339–40. Illustrative of the paternalistic and gendered portrayal is his discussion of scientism: Where 'modern IR theory' has followed the positivistic precepts of natural sciences, 'in spite of obstacles such as the difficulty of empirical testing, [m]ost international lawyers will not wish to follow such an austere and treacherous path. Fortunately, even a more relaxed approach can yield valuable dividends' (Abbott, 'Prospectus', n. 10, at 353).

<sup>42</sup> R. O. Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harv ILJ* 487. This runs parallel to the dialogue Keohane proposed between positivist and reflectivist approaches within International Relations on the basis of the very 'scientific' parameters that the reflectivist or post-positivist approaches criticised. R. O. Keohane, 'International Institutions: Two Approaches' (1988) 32 *ISQ* 379. T. E. Aalberts and R. Van Munster, 'From Wendt to Kuhn: Reviving the "Third Debate" in International Relations' (2008) 45 *IP* 720.

<sup>43</sup> D. J. Bederman, 'Review Essay: Constructivism, Positivism, and Empiricism in International Law' (2000) 89 *Geo LJ* 469, 471.



The so-called 'legalisation debate' is particularly telling in this regard. It takes up the gauntlet to develop a research programme as basis for the (re)union of the two disciplines.<sup>44</sup> It came with a move beyond the strenuous debate on whether international law is law properly so called towards an emphasis on its effectiveness. Research on compliance has since been the focus for a specific interdisciplinary agenda inspired by behaviouralism. In this variant of research, interdisciplinarity is reduced to the use of legal material to back up the abstract social science models that international relations scholarship had imported from general political science. This turned international relations scholars into consumers of law who had little knowledge of either law or the legal process through which their empirical examples and data were produced.<sup>45</sup> As we continue to show, this has significant implications for the potential of interdisciplinary collaboration.

Against this background, in any event, it is hardly surprising that there has been fierce criticism against the interdisciplinary agenda, most prominently by Martti Koskenniemi and Jan Klabbers. The latter has criticised such research as follows:

Interdisciplinary scholarship is, more often than not, about imposing the vocabulary, methods, theories and idiosyncrasies of discipline a on discipline b. Interdisciplinarity, in a word, is about power, and when it comes to links between international legal scholarship and international relations scholarship the balance tilts strongly in favour of the latter.<sup>46</sup>

Koskenniemi in his turn identified international relations scholarship and its exercises in interdisciplinarity as an American crusade and a hegemonic project.<sup>47</sup> What transpires from these combined critiques is in fact a double hegemonic move. Interdisciplinarity as a project reproduces or strengthens existing power configurations, both in politics and in academia, across the boundaries of both disciplines *and* within

<sup>44</sup> J. Goldstein, M. Kahler, R. O. Keohane and A-M. Slaughter, 'Introduction: Legalization and World Politics' (2000) 54 *IO* 385–99, as well as the other contributions to this special issue.

<sup>45</sup> L. M. Ashworth, 'Interdisciplinarity and International Relations' (2009) 8 *EPS* 16.

<sup>46</sup> Klabbers, 'The Bridge Crack'd', n. 5, at 120. See also Klabbers, 'Relative Autonomy', n. 2. While this tendency to export IR concepts characterises many interdisciplinary projects with International Law, in its relation to other disciplines IR is actually more often accused of merely importing theories and concepts (D. Long, 'Interdisciplinarity and International Relations' in P. Aalto, V. Harle and S. Moisiso (eds.), *International Studies: Interdisciplinary Approaches* (London: Palgrave Macmillan, 2011), 61.

<sup>47</sup> Koskenniemi, *Gentle Civilizer*, n. 17, at 483–84, 489–94; M. Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *EJIR* 395.



international relations scholarship itself. While Koskenniemi was one of the pioneers of the Critical Legal Studies movement – arguing that international law cannot be conceived as a given and isolated domain, but should be understood as a practice that is constantly (re)constituted in relation to other fields of practices – in recent years he has become one of the most outspoken critics of interdisciplinarity. The supposedly shared conceptual space has transformed into a clearly demarcated *champs de bataille*. International lawyers now see the autonomy of international law under siege because it is used only instrumentally and, sometimes at least, in a rather dilatory fashion. James Crawford thus chimes in with others and sees a danger in the delegalisation of the legal discourse that comes with the search for reasons and consequences that is nested in so many interdisciplinary projects.<sup>48</sup>

In sum, the history of interdisciplinarity and the relationship between the disciplines looks like a drama in three acts: both disciplines at first gained their identity in opposition to each other, driven by the quest for scientific rigour. New opportunities for interdisciplinarity opened up in the 1990s but did not lead to fruitful results precisely because disciplinary outlooks only produced images of international relations and international law almost beyond recognition for the respective other. Debates, to the extent that contributions from all sides merit such a label, turned into a turf war. However, this drama with its not so happy ending is at least in part a consequence of the particular story of (inter)disciplinarity that is told.<sup>49</sup> The fact that the story could well be – but hardly ever is – told otherwise, is part of the problem. As Robert Beck notes, the scholarly

<sup>48</sup> J. Crawford, 'International Law as Discipline and Profession' (2012) ASILP 1.

<sup>49</sup> For an insightful critique of Koskenniemi's intellectual history of International Relations as selective, anachronistic and teleological, see M. A. Pollack, 'Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi' (2013) 27 *TICLJ* 339. While correcting Koskenniemi's 'hopelessly outdated' picture of contemporary International Relations, Pollack similarly reconfirms disciplinary identities by identifying IR as an American Social Science (cf. S. Smith, 'The Discipline of International Relations: Still and American Social Science?' (2000) 2 *BJPIR* 374). This not only is a selective picture itself (which he seeks to justify in footnote 3) that ignores the more pluralist landscape that emerges once you move out of American mainstream IR; it unfortunately also reconfirms the anxieties about IR's hegemonic conquest, even if Pollack calls for a more equal exchange and division of labour. See also J. L. Dunoff and M. A. Pollack, 'What Can International Relations Learn from International Law' (2012) Temple University Legal Studies Research Paper no. 2012-14, available from <http://ssrn.com/abstract=2037299> and T. E. Aalberts 'Interdisciplinary Perspectives on International Law and International Relations' (2015) 11 *Journal of International Law and International Relations* 85.

division between the two disciplines was hardly as explicit and stark as it is portrayed by many of the early protagonists of interdisciplinarity.<sup>50</sup> In a sense, the juxtaposition and subsequent deadlock of the interdisciplinary dialogue can be traced back to the specific set-up of the division by the very people that sought to develop an agenda to fill up the space they carved out in the first place, according to their own specific parameters.

Those international law scholars who caution against interdisciplinarity could tell a different story as well. Instead, they build their argument on a criticism of realism and game theory as if these were the only approaches in the camp of international relations and the only sparring partners for interdisciplinarity. They object to the 'flat, one dimensional vision of the discipline-to-relate-with' in many international relations accounts of international law.<sup>51</sup> But when they look towards international relations, they seem to be just as guilty as they charge others. They gloss over, for instance, that such positivist social science agenda has been fiercely criticised from within the discipline of international relations itself.<sup>52</sup> They also tend to belittle the many richer approaches to international law as they have been developed by the so-called English School, or within German circles of political science that have placed much emphasis on international norms and argumentative practices.<sup>53</sup> The diversity does not only come with the Atlantic division. Within the United States, the view clouded by anxiety largely overlooks the early and sophisticated voices of Nicolas Onuf, Friedrich Kratochwil and others who share a critical constructivist approach that is adamant to recognise the proprium of international law as an argumentative practice.<sup>54</sup> While usually

<sup>50</sup> R. J. Beck, 'International Law and International Relations Scholarship' in D. Armstrong (ed.), *Routledge Handbook of International Law* (Abingdon: Routledge, 2009), 14.

<sup>51</sup> Klabbers, 'Relative Autonomy', n. 2, at 37.

<sup>52</sup> This was the crux of the so-called Third Debate. One of the classical texts is Y. Lapid, 'The Third Debate: On the Prospects of International Theory in a Post-Positivist Era' (1989) 33 *ISQ* 235. For a recent discussion in relation to the study of international law, see Kratochwil, *Status of Law*, n. 9, although Kratochwil, too, is identifying interdisciplinarity with only one specific strand. See T. Aalberts 'Interdisciplinarity on the move: Reading Kratochwil as counterdisciplinarity proper' (2016), 43 *Millennium* 242.

<sup>53</sup> T. Risse, 'Let's Argue!': Communicative Action in World Politics' (2000) 54 *IO* 1; H. Müller, 'Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations' (2004) 10 *EJIR* 395.

<sup>54</sup> N. G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989); F. V. Kratochwil, *Rules, Norms and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1991). See also Kratochwil's

credited with little more than a perfunctory reference, Onuf and Kratochwil were doing interdisciplinary research before its launch as an 'official' agenda, *and* they were pioneers in unsettling the parameters of international relations as an American social science at the same time. This is one alternative story of interdisciplinary research that is hardly ever told.

Instead, in their response to counter what they conceive as the imperialist crusade by international relations scholarship, Koskenniemi and Klabbers reproduce the same parameters and stereotypes of the two disciplines that they criticise. Rather than countering hegemonic moves that close down the space for dialogue, both within and between disciplines, they seem to reify disciplinary boundaries, and disciplines as homogenous and unitary bodies of knowledge.<sup>55</sup> They were among the first who discarded the temptation of reaching out to other disciplines – be it politics, philosophy or economics – in search for a foundation in times of indeterminacy and uncertainty. Whenever you approach another discipline, Koskenniemi notes, you learn about ever-greater internal divisions and contestation the closer you get.<sup>56</sup> Why then such a monolithic view of what international relations is about?

While we certainly agree with much of the critique of the interdisciplinary agenda as formulated by Abbott, Slaughter et al., we see no reason why this particular exercise of interdisciplinarity would discredit interdisciplinarity as a practice all-together. We should be wary of considering international law or international relations as given, unified and essentially mutually antagonistic disciplines. The next section ploughs a way towards a different perspective, which takes the criticisms of the mainstream interdisciplinary agenda seriously, yet does not throw the baby out with the bathwater. More specifically, we argue that analysing international law as a practice opens up room for interdisciplinary dialogue to better understand the interplay between politics and law, or the politics of international law, without losing sight of the autonomy of law.

recent argument on how instrumentalist approaches to international law as an example of interdisciplinary research impoverishes our understanding of international law (Kratochwil, *Status of Law*, n. 9).

<sup>55</sup> This also makes their label of 'counterdisciplinarity' (Koskenniemi, 'Counterdisciplinarity', n. 4; Klabbers, 'Counterdisciplinarity', n. 4) a misnomer. See also Aalberts, 'Interdisciplinarity on the Move', n.52

<sup>56</sup> M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *MLR* 1.

### 11.4 International Law as Practice

What then do we prescribe against present anxieties and how do we propose to move interdisciplinarity forward? As a starting point, we are reaching back to one of Critical Legal Studies' other important contributions to legal scholarship – its understanding of international law as an argumentative practice. We suggest that this understanding opens up a different avenue for interdisciplinarity, which builds on critical constructivist research in international relations scholarship and its more recent turn to international political sociology.<sup>57</sup> That avenue does not leave interdisciplinarity behind, but takes it towards productive use to analyse the dynamic relation between politics and law.

Our ambition in this final section is to offer some preliminary steps towards further developing an understanding of legal practice as a meeting place, precisely, between law and politics. Typically it is neither entirely one nor the other.<sup>58</sup> Generating knowledge about the law and about politics in the practice of law must take that into account. It also means that in order to make sense of how law operates within the international realm or world society, we need to combine an internal perspective (focussing on the application and interpretation of rules) and external perspective (focussing on underlying forces reflected in legal rules and decisions).<sup>59</sup> Like others, we see international law then as a separate field established through its professional practices and modes of reasoning, rather than through law as a body of rules as its defining object itself. These practices constitute both the professionals and international law as a particular field of (argumentative) practice.<sup>60</sup>

We now suggest approaching the task of developing a more specific understanding of such argumentative practice in light of a guiding question: What makes for a valid legal argument? The choice for validity as the focal concept is deliberate. Asking about *validity*, rather than success or truth, shifts the inquiry away from the pitfalls of policy-oriented jurisprudence and instrumental understandings of international law in its wake, on one side, and of a formalism that blends out the creativity and the politics of the legal practice, on the other. As suggested in the

<sup>57</sup> See forum on International Law in International Political Sociology (2010) 4 *IPS* 303.

<sup>58</sup> We say typically because to the contrary we can imagine, and in fact see, practices where there is indeed little autonomy to the law and it can thus plausibly be reduced to politics.

<sup>59</sup> W. G. Werner, 'The Use of Law in International Political Sociology' (2010) 4 *IPS* 304.

<sup>60</sup> I. Venzke, 'Multi-disciplinary Reflections on the Relationship Between Professionals and the(ir) International Law' (2013) ESIL Conference Paper Series, Conference Paper No. 4/2013. See already Bourdieu, 'Force of Law', n. 33.

introduction, with this question we intend to shift the focus beyond a quest for a firm foundation or universal characteristics of legal validity as the ultimate source of law's autonomy, to a realisation that the means of identifying valid arguments – the standards of judgment – are produced within the social practice itself. It is precisely in its particular mode of reasoning that the autonomy of law is produced.<sup>61</sup> It is in this modus, too, that politics can be traced inter alia in the rhetoric of legal claims, in the appeal to universality and neutrality, in the attempt to find acceptance, in the mobilisation of one legal regime rather than another and in the formation of standards for judgment. The guiding question might thus push us further into thinking of international law as an argumentative practice that is both political *and* distinctively legal at the same time.

In contrast to the reductionist, abstract and flat understandings of international law espoused by particular variants of international relations scholarship, placing emphasis on an argument's validity suggests that any inquiry into the politics of international law needs to take into account that the assessment of an argument will hinge on standards that are produced within the particular field of practice.<sup>62</sup> When it comes to the argumentative practice of law, those standards (as conditions of possibility of the very practice) are not well captured if sheer acceptance or the unqualified success of an argument, let alone compliance, was the sole focus of inquiry. Such an external focus would not only miss out on the rules and conventions that define what counts as an instance of a practice (what qualifies as an argument in the first place), but also have no sense for the reasons, motives, and understandings that actors hold and which impact on how they partake in the practice of law.

This means that inquiries into international law as an argumentative practice have to recognise it as an autonomous practice that is informed by workings of power. After all, rules do not speak for themselves, as both Koskeniemi and Kratochwil have taught us since long in parallel reference to Wittgenstein: as an argumentative practice the meaning of law is produced in its use. It follows that (legal) arguments do not come from nowhere, but are always produced from particular subject positions. In other words, rules and strategy are not two separate optics on the workings of international affairs through

<sup>61</sup> Patterson, 'Law's Pragmatism', n. 8, at 87.

<sup>62</sup> Such an argument can also inform attempts at giving sources doctrine a new theoretical basis. See J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011).

law and politics,<sup>63</sup> but intertwined aspects of international law as an argumentative practice as it operates in world society. Law is an autonomous, but not isolated practice. And crucially, the politics of law works both ways. The recent discussion on lawfare is only the most outspoken illustration of how law has become an integrated part of world politics, as a *sine qua non* for doing and justifying politics in present times.<sup>64</sup> To understand the power of law, academics are well advised to reorient their attention from a dominant focus on the courtroom to the 'situation room' or cabinet war rooms, where strategy and legality are part of the same discursive struggle to justify politics through playing with the rules by the rules.<sup>65</sup>

It is on this level of argumentation that we should look for international law's autonomy. The practice of international law retains its distinctiveness and its autonomy through the particular standards of the discourse – the yardstick of what counts as a valid legal argument. Pierre Bourdieu saw this point clearly when he wrote that

Far from being a simple ideological mask, such a rhetoric of autonomy, neutrality, and universality, which may be the basis of a real autonomy of thought and practice, is the expression of the whole operation of the juridical field and, in particular, of the work of rationalization to which the system of juridical norms is continually subordinated.<sup>66</sup>

That autonomy needs to be taken into account in the study of international law because it is constitutive of its reality, and produced through its very practice.<sup>67</sup> International relations scholarship has done that in notable parts, providing a fruitful alternative to the interdisciplinary agenda formulated by Abbott, Slaughter et al.<sup>68</sup>

We suggest thinking of international law as a practice that contains within itself the yardstick of what counts as a valid argument or, put differently, 'competent performance'.<sup>69</sup> Those latter terms are in fact

<sup>63</sup> as Keohane suggests in his research agenda for interdisciplinary cooperation, 'Two Optics', n. 41.

<sup>64</sup> D. Kennedy, *Of War and Law* (Princeton University Press, 2006)]; C. Dunlap, 'Lawfare Today: A Perspective' (2008) 3 *YJIA* 146; W. G. Werner, 'The Curious Career of Lawfare' (2010) 43 *CWRJIL* 61.

<sup>65</sup> Kennedy, *Of War and Law*, n. 63; Rajkovic, Aalberts and Gammeltoft-Hansen, 'Legality, Interdisciplinarity and the Study of Practices', n. 9

<sup>66</sup> Bourdieu, 'Force of Law', n. 33, at 820.

<sup>67</sup> P. Bourdieu and L. J. D. Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992), 7–8.

<sup>68</sup> Onuf, *World of Our Making*, n. 55; Kratochwil, *Rules, Norms and Decisions*, n. 55

<sup>69</sup> E. Adler and V. Pouliot, 'Introduction and Framework', in E. Adler and V. Pouliot (eds.), *International Practices* (Cambridge University Press, 2011), 3.

those of international relations scholarship that not only shows the existing theoretical and methodological heterogeneity of international relations scholarship, but also meets our argument halfway. A practice-oriented approach analyses social practice as an actual, contingent, evolving and productive set of activities.<sup>70</sup> As such, it also draws attention to the fact that the standards of competence or validity, which define and are constituted by fields of practice, are historically contingent. This counts for both law and science as social practices whose authority hinges on their claim to objectivity and neutrality. Both law and science are based on standards that define the practice, and that define what counts as a valid argument. Hence Vitoria could – or had to – refer to the Gospel of Matthew to ground his legal claims in *Des Indes*, and in the Middle Ages texts would only count as scientific and accepted as ‘true’ when ‘marked with the name of their author’.<sup>71</sup>

This is something which can also interestingly be studied from a more political-sociological perspective that is attuned to the workings of politics and cultural predispositions. Second-order observations, for instance into the forces that shift the standards for assessment, not only work towards a better interdisciplinary agenda but indeed lead to a better understanding of the workings of law. All of that while continuing to account for the participants’ internal perspective. It is here where critics of the interdisciplinary agenda might find their greatest cause for concern: interdisciplinarity, they suggest, impacts precisely on those standards and tends to deformatise, if not instrumentalise, the legal argument. James Crawford sees the discipline of international law and its professionals in the service of maintaining the formality of the practice, in other words, of maintaining the standards of the argumentative practice.<sup>72</sup> It is a matter of fact, however, that those standards have always been shifting. They even differ between areas of law and institutions at

<sup>70</sup> See also Kratochwil’s discussion of David Hume’s work that informed a view of law as an artifice of historical genesis shaped by evolving customs, conventions and bounds of sense (Kratochwil, *Status of Law*, n. 9).

<sup>71</sup> As Foucault asserts with regard to scientific discourse in the Middle Ages: ‘Hippocrates said, “Pliny recounts”, were not really formulas of an argument based on authority; they were the markers inserted in discourses that were supported to be received as statements of demonstrated truth’ (M. Foucault, ‘What Is an Author’, in J. D. Faubion, *Aesthetics, Method and Epistemology: Essential Works of Foucault 1954–1984 volume II* (New York: New Press, 1998), at 212. This practice changed in the 17th or 18th century, when the scientific authority of a text did no longer depend on the author function (who wrote the text, when, under what circumstances).

<sup>72</sup> Crawford, ‘International Law as Discipline and Profession’, n. 47.



any single moment in time. To suggest that they now allow for a more managerial vocabulary or for more arguments of effectiveness and efficiency needs to be qualified as a matter of description.<sup>73</sup> Whether it is something to be avoided or countered is also something that might be the case, but that, too, needs further nuance.

### 11.5 Conclusion

In this chapter we have taken issue with both the dominant interdisciplinary agenda in IL/IR research, and with the alleged counter-hegemonic moves by other critics of this agenda. We have argued that both protagonists and antagonists of the current interdisciplinary debate unduly and unproductively reify boundaries between politics and law as domains and between international law and international relations as academic disciplines. We proposed that a conceptualisation of international law as a practice in analytical terms provides a way for understanding how law can be *both* autonomous *and* political. Hence in the final section we reintroduced the understanding of law as an argumentative practice. Many of the points addressed here will ring a bell and indeed are reminiscent of arguments raised in different contexts by critical legal scholars, and are not new insights as such. But what is new is to use these insights to reformulate this as an alternative avenue for interdisciplinarity beyond the current deadlock or turf wars based on a juxtaposition of internal and external perspectives on law.

How then, finally, does our suggested path not only move beyond transitions of policy-oriented jurisprudence but also avoid relapsing into orthodox formalism? It transcends trenches, we suggest, by shifting emphasis from the law to the practice of arguing about it. Here we certainly follow closely on both Koskenniemi's and Kratochwil's heels, and bring their arguments together. Whereas formalism has no sense for interpretation as a creative act, our understanding of international law as an argumentative practice emphasises it. The law does not give away the answer of what is a valid legal argument, but the argumentative practice does. And, crucially, it does so on the basis of standards that are produced within its own field of practice. This is why we suggest investigating the conditions of validity as part of an alternative avenue for interdisciplinarity. We not only believe that this is the theoretically and practically most solid view of international law.

<sup>73</sup> Koskenniemi, 'The Fate of Public International Law', n. 55.



We also think that it has the merit of interdisciplinary research that moves beyond present anxieties. Not so much because it leads to a division of labour. Indeed, we challenge any separation of the disciplines along the received boundaries of internal and external perspectives.<sup>74</sup> Such a division is in most cases questionable because it tends to blend out a constitutive part of law as practice – either that it depends on concrete choices, which brings in considerations of politics, or that it is the practice of law that we are talking about. Thinking of international law as a practice that carries within itself the standards of an argument's validity recognises that one is incomplete without the other: to think of international law without politics is just as inadequate as thinking about international politics without law.

<sup>74</sup> See also K. Günther, 'Legal Pluralism or Uniform Concept of Law?' (2008) 5 *NoFo JELP* 5.