

Born Again Lawyer: FATU as An Antidote to the 'Positivist Blues'

By Mario Prost*

For some time, there has been something paradoxical about Martti Koskenniemi's *From Apology to Utopia* (hereinafter FATU). FATU might very well have been the single most influential book of the last 15 years in the field of international legal theory. Virtually all of my colleagues have, at one point or another, engaged with it and used it to sustain their arguments in diverse areas of the law (including, amusingly enough, even in commercial arbitration). Yet, as is well known to most law library users, FATU has long been out of print, making it extremely difficult to find a copy, even more so when, as is periodically the case at my home university, the available copy goes missing. FATU, in other words, seemed to be everywhere, but nowhere to be found. The prophet had believers. His tables of the Law, however, seemed to have disappeared. The splendid republication of FATU comes as great news to all of us who have struggled to access, let alone to possess, this seminal book.

The editors of this symposium have asked that the contributors engage with FATU on an intellectual level or more personal level. I will do a bit of both. I should like, however, to begin with a preliminary disclaimer. FATU is a multi-layered, multi-dimensional book. It works in mysterious ways. Soon after I was invited to participate in this symposium, I asked some of my colleagues to share their views on FATU. It quickly became clear that none had had exactly the same interpretation of the text, and that each one of them had a different idea as to what exactly FATU means for the discipline of international law. All were familiar with such ideas as the "politics of international law," "legal indeterminacy" or "ascending/descending arguments." Yet, these ideas meant different things to different people. Accordingly, I anticipate that many – Koskenniemi included – will

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disagree with what I say. This, however, is but further evidence of the importance, complexity and richness of this work.

A.

That being said, I would like to use this short contribution to consider the role of FATU in legal education. Is it suitable reading for law students? And, if so, when is it most useful to introduce would-be lawyers to FATU? Spontaneously, I am inclined to answer: the sooner, the better.

Legal education is training for hierarchy (the extent to which that remains the case is, of course, open to debate).¹ Legal education is also practical training for practical jobs. Yet, the ideological dimension is key to the legal curriculum. Part of what law schools do is turn students into lawyers who will participate in the reproduction of a system which, they are told, they do not make. Law schools do this, *inter alia*, by way of legal mystification, i.e., by teaching the discipline as a set of legal truths (rules) and the profession as a set of behavioral dogmas (attitudes). The outcome frequently creates alienated students passive to the legal world of which they are becoming a part. This is not to say that students have no political ideals or views about the world they live in (they certainly do), but rather that they are not trained to question the role that law and they, as lawyers, play in it.² In such an intellectual environment, there is little room for improvisation and alternative progressive sympathies (alternative because, at the heart of the mainstream legal orthodoxy is the idea that law in itself is a progressive force). There is, in other words, little space for resistance.

Of all legal disciplines, international law might be the one area where this uncritical embrace of the law holds most true. Indeed, almost consubstantial to international law is the idea that the 'international' is good. International law tends to be seen as intrinsically virtuous, as opposed to, say, contract law, whose virtue depends rather on its outcomes, i.e. on what particular project the parties pursue through their contractual arrangements. Ring the bell of international law, and most people (in particular first year students) hear the sound of humanitarianism, environmentalism, and prosecution of war criminals. International law has a certain *étiquette* attached to it, made up of Kantian cosmopolitanism, cooperation and diplomacy (rather than Machiavellian Realpolitik, unilateralism or war).

¹ See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW : A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982).

² Some will go so far as to say that students are specifically trained *not to* ask such questions.

L'ésprit d'internationalité (the internationalist sensibility³) is colored and flavored with an inherent sense of justice and of the common good.⁴ This, as noted by David Kennedy, results in a peculiar intellectual universe, in which quasi-blind commitment to the *level* of government (international) often displaces concern about its outcome (peace, justice, equity, emancipation, and so forth).⁵

Accordingly, international law students – and international lawyers in general – have the tendency to believe that it is those outside the discipline (the politicians, the market etc.) who are responsible for the 'evils' of this world, while international law is part of the solution, not the problem. This is where FATU comes into play. Indeed, part of what FATU does is illustrate how there is no such thing as an 'objective' system of international law, i.e. an autonomous law which judges can 'find' and use as a non political device for settling disputes,⁶ and which students can learn 'as it is'. Instead, international law consists of a series of arguments based on disputable assumptions (the now notorious ascending and descending arguments). International law is undeterminable, inconsistent, contingent, paradoxical and polemical. It is, in sum, political. As such, it is neither neutral nor innocuous. And to speak the language of international law is to espouse, more or less willingly, a particular political agenda which, too, can be *part of the problem*.

By exposing regimes of truth as systems of power and by revealing the politics of international law, FATU demystifies the discipline where legal education, by and large, mystifies it. FATU teaches the student of international law that international law, taken by itself, is not an absolute good; that what matters is how we use it and what we make of it, and that, as a consequence, she has to make value choices and take responsibility for them. This ethic of authentic commitment, which Koskenniemi sees as key to our professional integrity, leaves law students not only with the burden of new responsibilities; it also provides them with a feeling of intellectual liberation. Indeed, if, in spite of ready-made rules and principles, international law consists of an open argumentative practice (Koskenniemi even

³ The history of which Koskenniemi has studied in great detail in another seminal book; see Martti Koskenniemi, *THE GENTLE CIVILIZER OF NATIONS – THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

⁴ This, certainly, explains why international lawyers have dedicated so much time and energy defending the existence, relevance, and efficacy of 'their' law.

⁵ David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS* 329, 337 (1994).

⁶ See *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, 1966 I.C.J. 49 (July 18): "The Court is not a legislative body. Its duty is to apply the law *as it finds it*" (emphasis added).

speaks of a 'conversation'⁷), it becomes clear that international law is, at least minimally, what international lawyers think and make of it.⁸ FATU thus provides an intoxicating sense that, whilst the international legal system makes us who we are (international lawyers), it is also we, as lawyers, that make the system. In sum, we, too, rule.⁹ FATU, in many such ways, opens intellectual avenues for a more responsible and a freer international legal discipline.

However, reading FATU early on in one's legal education is more easily said than done. This is so for two reasons.

Firstly, FATU uses a methodology - deconstruction or 'regressive analysis' (Koskenniemi also speaks of 'disentanglement') - which is largely alien to legal methodology. What deconstruction entails in the legal field is the investigation of structures of power and hidden codes resting behind the surface of explicit legal norms. This goes against what most law students are taught in their initial introduction to the discipline of law, i.e. that law is an objective/autonomous normative order and that they shall focus primarily, and rigorously, on the *lex lata* (the law as it is), not the *lex feranda* (the law as it should be). This is particularly true of continental Europe, where Kelsen's theory of pure normativity, and its postulate that the world of law can be - and must be - apprehended in clinical isolation from the world of politics, is still very much alive.

Secondly, and most importantly, FATU uses a distinct rhetoric, as well as specific forms and metaphors. There is a certain aesthetic to it (by aesthetic, I mean a certain symbolism and imagery), to which most law students are not accustomed until they themselves become proficient international lawyers. The book was not aimed at students and contains an amount of case law and uses a language which expect a certain knowledge of, or a certain experience in, the field. The fact that Koskenniemi has developed his critical view of the traditional doctrine of international law from inside the discipline is undoubtedly a strength. The influence that FATU has had on the discipline is due, in part, to the fact that it does not stand outside the body of beliefs the structure of which it exposes. It does not

⁷ See FATU, at 544.

⁸ Something which Koskenniemi explicitly acknowledges; see FATU, at 569 and 615.

⁹ Conceding that 'we, too, rule' sees us emancipate ourselves from the ascending/descending dilemma. To conceive of international law as a platform on which to articulate political claims is to renounce its depiction as a neutral, objective and autonomous system. For if 'objectivity' no longer stands as the *ultima ratio* of legal theory, the ascending/descending dilemma simply disappears (and we are no longer caught in it).

judge it from premises that owe nothing to it.¹⁰ Yet, being to a large extent a sociological study of the discipline of international law, FATU requires some acquaintance with the discipline's own culture.

Accordingly, it might be better to read FATU only once equipped to deal with its intellectual sophistication, i.e. once one has become a fully trained international lawyer. But here, again, this might turn out to be problematic. Indeed, FATU exhibits international law's indeterminacy. It does so by illustrating how each one of its principles has a history made of a constant oscillation between contradictory argumentative poles, i.e. a permanent shift from apology to utopia (and vice versa). Most importantly, FATU contends that apology and utopia cannot be reconciled, as they express opposite facets of the same liberal ideal: that of the Rule of Law in international relations. *To the international lawyer, FATU thus suggests that what she knows is, at best, partially right and, at worst, totally wrong.* This, needless to say, is something that many will not easily admit. The more lawyers know about 'their' law, the less they are willing to accept being told that what they know is but a reversible part of a contingent legal truth. Hence, the somewhat panic-stricken reaction of some scholars who have called FATU 'nihilistic', leading to critiques of a theory which, they feel, might eventually lead to the 'elimination of international law.'¹¹

B.

Sooner might be too soon. Later might be too late. Reading FATU is never an easy thing to do, either because of *what* it says (we, too, are part of the problem, and what we think we know about international law is just one facet of an open legal-argumentative practice) or because of *how* it says it (by means of an aesthetic, a language and a grammar which require intellectual domestication).

¹⁰ This has led some commentators to call Koskenniemi's work 'internal skepticism'; see Oliver Gerstenberg, *What International Law Should (Not) Become. A Comment on Koskenniemi*, 1 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, 126-7 (2005). Whilst I agree on the 'internal' part of it, I am personally reluctant to call FATU 'skeptical'. Anybody who has had the chance to meet Koskenniemi knows that he is an enthusiast, a passionate and optimistic scholar. Surely, his critic of the discipline is uncompromising. But 'qui aime bien châtie bien', as the French saying goes. Koskenniemi's love of international law may be hard love, but it is, I believe, love nonetheless.

¹¹ See Iain Scobbie, "Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism", 61 BRITISH YEARBOOK OF INTERNATIONAL LAW 340 (1991). To a lesser extent, see Andreas Paulus, "International Law After Postmodernism: Towards Renewal or Decline of International Law?" 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 727 (2001) and Nigel Purvis, "Critical Legal Studies in Public International Law", 32 HARVARD INTERNATIONAL LAW JOURNAL 81, 120-124 (1991).

Yet, whilst reading FATU might not be easy, it certainly is worth the effort, especially for those who, at one point or another, experience the infamous 'positivist blues.' Positivist blues is a feeling induced by the sense that law has, to a certain extent, become a pure science, a world of objective truths where, in the name of pure normativity, emancipatory purposes are set aside and eventually collapse into mere regulation.¹² This intellectual environment is the empire of the straight line segregating the world of politics from that of law and ensuring that ethical, political or moral standards do not permeate legal norms. Such empire is not only blatantly unsatisfactory for anybody who is interested in what law, and international law in particular, *does* rather than what, in itself, it simply *is*; it is also unbearably dreary, narrowing the function of the lawyer to a mere technical job with little influence, if any at all, on the system of which she is a component.

A particular student of international law was hit by the positivist blues upon realizing that I was being trained to become a good soldier of the law, not a legal – let alone a social – engineer. I was fortunate enough, however, to come across Koskenniemi's work as he gave a speech to a graduate seminar at the Sorbonne. Challenged at first by his unorthodox style, methodology, and ideas, I quickly found that FATU had the remarkable potential to transfigure everything which I thought was settled and conservative about our legal discipline. With FATU I found out that international law becomes contradictory, ambiguous and fuzzy. Far from being static, it is in constant motion. It moves up (Westphalian arguments) and down (Grotian or Kantian arguments). It moves left (human rights, environment, development) and right (free trade). International law is not a straight line but, rather, a living serpentine, much like the one painted by Paul Klee and reproduced on FATU's new cover.

If international law is a serpentine, it no longer possesses the aesthetic purity of a straight line. It loses the certainty, predictability and regularity of a normative pyramid. In sum, it loses the formal 'beauty' of a well-structured hierarchical legal order, of a law 'properly so-called'. Again, this is something which many, above all law professors,¹³ will not easily concede. Indeed, by displaying international law's internal contradictions, FATU brings doubt into the discipline.

Is doubt, however, a bad thing after all? Of course, doubts can lead to the de(con)struction of our legal knowledge. But the de(con)struction of our

¹² On the collapse of emancipation into regulation, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON LEGAL SENSE 7-10 (2nd ed., 2002).

¹³ To a certain extent, teaching international law always involves synthesizing it and portraying it as a somewhat stable and coherent normative order.

international legal discourse and of its contradictions need not be the negation, elimination, or death of international law as a whole. After all, as Deleuze and Guattari once observed: 'personne n'est jamais mort de contradiction!'¹⁴ Moreover, after de(con)struction comes re-construction or, as Rorty puts it, 'therapeutic re-description' of the discipline (the adoption of new scientific equipment).¹⁵ What is lost in terms of certainty and intellectual comfort is regained in terms of professional freedom and empowerment. FATU does not leave international lawyers with a legal abyss or a legal black hole. It leaves them - it leaves us - with raw materials that we can use and transform into successful legal arguments.

As such, the international legal discipline becomes much like a sport, with professional players (lawyers), supporters (clients, students, the public), rules of the game (the discipline's own language and grammar), friendly exhibitions (conferences), competitions (trials), training facilities (law faculties), and referees (arbitrators, judges). In the international law game, arguments respond to one another on a given problematic, much like two teams play a match on the same field. Some teams opt for defensive strategies (ascending arguments), while others prefer offense (descending arguments). A team's popularity (an argument's momentary success) depends on a series of factors. Some are quite evident and universal: whether the team plays a spectacular game (whether the argument meets established standards of merit; whether lawyers show outstanding skills); whether the team wins competitions (whether the argument is held valid by an arbitrator or a judge). Some are more intuitive and personal: whether the team is that of my country or my hometown (whether the legal argument is championed by my government); whether the team is that which my family has long supported (whether a particular argument or theory is that of my professor or supervisor).

Comparing our discipline to a sport does not render it as trivial and devoid of influence, but rather reflects its place as a *social* practice, a collective game in which we, lawyers, have a role to play on the field, not in the stands. All this is good news. I once dreamt of becoming a professional football player. While I am forced (reluctantly) to concede that this is unlikely to come true (anybody who has seen me play knows why), FATU suggests a new game. And a new playing field. Long gone are the positivist blues: I'm now an enthusiastic player, a born again lawyer.

¹⁴ GILLES DELEUZE & FELIX GUATTARI, *L'ANTI-ŒDIPE - CAPITALISME ET SCHIZOPHRENIE* 158 (1972).

¹⁵ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 9 (1989).