Martti Koskenniemi's *From Apology to Utopia*: A Reflection

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"International Law is what international lawyers make of it".[1] Thus ends the new epilogue to the second edition of Martti Koskenniemi's *From Apology to Utopia* (hereinafter FATU), a seminal work on international law, originally published in 1989 and now republished in 2005. Shortly thereafter, he also notes the inherent situatedness of all international legal practice, citing Outi Korhonen,[2] which has a decisive influence on how international lawyers practice their trade, whether they are formalists, antiformalists, positivists, pragmatists or naturalists.[3] Finally, Koskenniemi notes that the main political point of FATU is an empirical one, that the system of international law has a structural bias, wherein it favors some outcomes or distributive choices over others, especially showing a bias against the South or the Third World.[4]

These three observations give a good sense of Koskenniemi's approach to international law, which has, I would argue, transformed significantly between 1989 when the first edition was published and 2005 when the second edition has been published. I would also suggest that these statements reveal the limits of his approach to international law in FATU but which he has since tried to address in his subsequent work. But before engaging in this task, I would like to offer some

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[1] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

[2] OUTI KORHONEN, INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAYER'S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY (2000).

[3] *See*, *supra* note 1 at 616.

[4] *Id*. 606-607.

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meditations on the encounter between FATU and my own work, which needs to be seen in the context of my cultural identity, historical experience and intellectual training. Coming from a largely Anglo-Saxon tradition of legal culture, but with a dramatically complex cultural repertoire and a strong tradition of anti-colonialism in India, FATU did not initially register on my critical compass. It was too European, too abstracted from real world politics or questions of justice and too weak in its vision of what needs to be changed in international law. Many of its central arguments, such as the critique of indeterminacy, struck me as being interesting but largely inconsequential to the subaltern condition with which I was intensely familiar. I found myself asking: so what if the legal norms are indeterminate in their application? How would that lead to a critique of an international legal system so that it ends up helping those who may need it the most? Importantly, I found its critique of the liberal theory of politics a bit perplexing. Coming from a country which had been forcibly introduced to the purest strains of liberal political theory and practice during the colonial encounter, but which had struggled with the socio-cultural implications of the transformation that liberal theory called for in Indian society, it seemed to me a bit mad to criticize liberal theory. One wanted more of it!

But this was before my own transformation from a mere student of the theory of international law and politics to a practitioner of international law as it 'hit' the ground, beginning with the United Nations. It was also before I had been able to develop a reflexive approach to my on-going legal education – including through practice – that revealed the limits and strengths of my own legal 'situatedness' within the Indian legal culture. Both of these new roles made me revisit FATU in a new light and let it influence the way I thought about international law. To give an example, FATU's claim that ultimately, it is doubtful if any meaningful distinction between morality, politics and law can be maintained at the international level – similar to claims made by Critical Legal Studies scholars about the domestic legal system – had a very distinct resonance at different stages in my career. At first, as a student of international law, FATU's claim did not register in a big way, partly because I had been well exposed to the Legal Realists' writings in the US and the initial wave of the writings by the Crits which had both led me to depart from the more British-influenced black-letter legal training imparted in India, and embrace the idea that law in action matters tremendously. But as a practitioner, I began to realize the many ways in which arguments about the distinctness of law from politics – or as Koskenniemi puts it, the distinction between 'normativity' and 'concreteness' – matters tremendously to the stakes of legal practice. The central argument of the indeterminacy critique in FATU now seemed to me to open up a new vista of progressive possibilities in the future of international law. If law is in fact so indeterminate, one could imagine political agency becoming the key issue for the future of international law rather than the 'weight of history' (always

important in an Anglo-Saxon tradition), cultural roots, economic structure in a deterministic and shallow Marxian sense, or State power. I have attempted to develop my recent work on a critical understanding of FATU in this sense.[5]

Now let me return to the three points with which I started this comment. The paradox about FATU and its new critical meaning that I was discovering was that it was not obvious, at least in its first edition. Thus, the connection between FATU and legal practice was not self-evident when it was first published in 1989. It seemed to be the most 'academic' work, in the best sense of that word. But Koskenniemi's own role as a practitioner in the Finnish ministry and at the UN since then, as reflected in his writings after FATU, gave new lenses through which one could appreciate the insights of FATU. But even here, there is a limit to his own approach to international law which is determined by his role as a governmental advisor, as opposed to being a cause lawyer with an NGO for example. The range of legal practice has expanded very significantly, especially since 1989, and international legal practice now calls for a variety of skills among which competence in international lawyering and argumentation may not occupy the most dominant place. International legal advocacy often calls for expertise in comparative legal argument as opposed to a skilled use of public international law techniques, and even then it may only be of secondary importance after such non-legal skills as negotiation or mediation. There is also the question of how one can treat the 'law-talk' of ordinary people who are not international lawyers but who nevertheless contribute to the global discourse of law. In theories of 'popular constitutionalism', for example, it has been an issue of how one can situate 'approved' law talk by judges (for example), with unapproved and even illegal law-talk by ordinary people. Their claims and arguments need to be accounted for in a fully empirical system of international law. FATU provides a fascinating coverage of international law as a rigorously formal system, but even at the time of its publication in 1989, legal practice had expanded beyond the boundaries of traditional international legal practice, from the offices of legal affairs in foreign ministries, public international law bureaucracies and international courts. But the genius of FATU and Koskenniemi's subsequent writings is that its rigorous analysis of formal structures of argument and the indeterminacy critique remain uniquely relevant to legal practice and to a theory of international law that arises from practice in a Bourdieuvian sense, far more than almost any other work in the 20th century. Thus, while I agree wholeheartedly that international law is what its practitioners make of it, I am not sure that there is a clear consensus that all practitioners need to be international lawyers, especially in the post-modern world

[5] BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).

of the early 21st century when international law-talk is occurring at the popular level.

The second point about the situatedness of international lawyers is a correlative one to the above discussion. There is no doubt that FATU reveals the situatedness of Koskenniemi himself – as a legal scholar from Finland, sharing the European tradition, but distinctly influenced by the politico-history of a small nation subjected to the hegemonic ambitions of large, powerful neighboring states. The critique of power that is immanent in FATU with its brilliant framing of apology and utopia in international legal argument, and Koskenniemi's own subsequent writings on hegemony, imperialism and the role of ethics, all reveal his situatedness. It is a line of enquiry that brings him closer to various Third World approaches to international law, with their own attention to issues of power and hegemony. But even in this, I would suggest that when originally published, FATU did not readily evince a critical self-awareness about the situatedness of its own framework. Rather, FATU was written more in the grand tradition of a 'general theory' of international law, although in a critical vein. The situatedness analyses, follows, I would argue, Koskenniemi's evolving critical writings in close encounter with multiple critical traditions. But in the light of this analysis, it is interesting to re-read FATU as a supreme work of progressive critique, situated in a specific political geography.

Finally, the argument in Koskenniemi's new epilogue that FATU's main political point was an argument of structural bias, needs to be evaluated. Here, I must express my puzzle. It is hard to see how FATU, when originally published, could be seen to express a critique of the way international law helped to sustain an unequal relationship between a powerful North and a weak South. I read it as a critique of the way western international law, especially in the liberal tradition, *fails on its own terms* – not as an 'external' critique of power relations between the North and the South. FATU's critique of power relations was subtle and immanent, but it was not yet historicized in the dominant geopolitics of North-South relations over centuries. Indeed, FATU does not discuss colonialism and its impact on international law and nor does it discuss the dominant legal issues emerging from North-South conflict in the post World War II era. Even when it does discuss North-South legal issues such as the New International Economic Order,[6] expressed in countless UN General Assembly Resolutions by numerically dominant decolonized countries of the South, FATU's focus is on the indeterminacy of the legal claims such as 'just compensation' and not on the structural bias of the rules

[6] *See*, *supra* note 1 at 484-488.

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which may favor outcomes that are adverse to the Third World, *even if legal norms remain indeterminate*. The point I make is not that FATU did not develop a critique of North-South power relations from an international legal perspective. It was indeed a powerful indictment of traditional international law as well as its supposedly reformist liberal alternatives pursued during the post World War II period, and in that sense, it contributed to a strong critique of the role of international law in sustaining unequal relations including between the North and the South. But FATU's focus was different: it was focused on the way the various tensions that are inherent within a liberal theory of international law – such as the one between community and individualism – manifest themselves in endlessly repeating and fungible arguments in international law. Koskenniemi's work between FATU's first and second editions (between 1989 and 2005) has in fact focused significantly on the central intuition that he attributes to the first edition, viz., that international law is structurally biased against the South. The causes for this transition can only be speculated upon as an exegesis in the transformation of the politics of knowledge produced by such an extraordinary craftsman. The increasing centrality of North-South relations, and the decline of East-West tensions since 1989 could form the geopolitical backdrop to this transition. The exercise of hegemonic power by the USA throughout the 1990s and since 2001 and the rise of various counter-hegemonic powers from within and beyond a statist international order, could be another factor. The intellectual ferment of the various critical traditions in international law since 1989, including the revival of Third World approaches to international law focusing on the role of history, hegemony and resistance, may be another factor. But it is clear in my mind that a critique of structural bias in international law is hard to discuss without taking on board the work of Third World international lawyers. Mohammed Bedjaoui's critique of international law remains a classic and very apt for describing the world of international law even today: international law "thus consisted of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)".[7] Koskenniemi's work is a powerful articulation of similar concerns, but I would submit that this work is more recent and not reflected in the original FATU. That does not diminish the critical thrust of FATU in any way, but that is entirely due to its focus on other worthy targets of critique.

I shall conclude with an attempt to convey my sense of profound admiration for the intellectual honesty, crisp argumentation, courage and immense erudition of Koskenniemi. In an age where government legal advisors distinguish themselves by offering the best 'apologetic' legal arguments for hegemony and abuse of power

[7] MOHAMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 50 (1979).

– as in the role played by American legal advisors in setting government policy on justifying torture – Koskenniemi belongs to a rare breed of international lawyers who dare to speak truth to power. FATU established him as the leading European international law scholar and contributed to the launch of new streams of critical scholarship in international law. Koskenniemi's subsequent work has elevated him as a global voice of innovation, sanity and fairness in the world of international lawyers.

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