

An Epilogue on an Epilogue

By Florian Hoffman*

As the last straw,¹ a question: where does it (*From Apology to Utopia*) lead us to, what are we to make of and with it (international law)? The author himself hints at an answer in the very last sentence of the *Epilogue*, which marks the difference between the original and this new edition of *From Apology to Utopia* (FATU), by pointing to his second *Hauptwerk*, the seminal *Gentle Civilizer of Nations*² and the story about international lawyers it tells. Indeed, the last paragraph of FATU thereby becomes a sort of epi-epilogue, an interpretive afterthought on *Gentle Civilizer*, written after the original FATU, within the afterthought of FATU's new edition, written after *Gentle Civilizer*. The latter is taken to illustrate the consequences of FATU for both individual practitioner and academic lawyers, notably the continuous double bind between law and politics inherent in the structure of international law.³ That double bind demands, according to Koskenniemi, at once coolness and passion, that is, as he concludes, "a full mastery of the grammar and a sensitivity to the uses to which it is put."⁴ This, of course, alludes once again to the twofold intent that inspires FATU: to disinter with

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¹ The New Dictionary of Cultural Literacy usefully informs that the idiomatic expression 'the last straw' refers, amongst others, to "the last in a series of grievances or burdens that finally exceeds the limits of endurance"; [see E. D. Hirsch, Jr., Joseph F. Kett, *New Dictionary of Cultural Literacy*, Boston: Houghton Mifflin Company, 2002; see also online at <http://www.bartleby.com/br/59.html>]; after the preceding assemblage of splendid texts, this 'epilogue' may, indeed, have that effect, apology for which is, in anticipation, already humbly offered.

² MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2004).

³ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, 617 (2006).

⁴ *Id.*, 617.

archeological precision the grammatical structure of international law *and* to thereby enable its critique, or, as the author puts it in the *Epilogue*, to join a descriptive with a normative project. The double-edged argument that has resulted from this combination has uniquely captured the letter and spirit of international legal practice and has mesmerized the international legal profession ever since it first appeared in 1989. Together with *Gentle Civilizer*, it has justly made its author into one of the iconic figures of international legal theory of the intellectual fin-de-siècle of the outgoing twentieth and the incoming twenty-first century. Yet, for all the echoes FATU has been occasioning in virtually all corners of the legal theoretical spectrum, the consequences that flow from it for legal theory and practice have remained somewhat under-explored.

Although Koskenniemi himself has consistently attempted to outline his vision of these consequences from the concluding chapter of the original FATU (*Beyond Objectivism*), via the last chapter of *Gentle Civilizer* (*A Culture of Formalism*), and to the *Epilogue* of the re-edition of FATU, his own thought has been shifting over time. His reception has been mixed on this point. Indeed, whereas *A Culture of Formalism* (GC) clearly develops the points made earlier in *Beyond Objectivism*, thereby situating *Gentle Civilizer* on the same argumentative line as FATU, the latter has sometimes been (mis-)interpreted as a retraction or, at least, qualification of the stance adopted in FATU. Hence, in *Gentle Civilizer*, the former legal advisor of the Finish government is said to have come down from his excursion into critical legal thought to the supposedly less controversial and more ingratiating field of international legal history,⁵ as if the shift from an analytical to a historical key had purged the critical inconvenience from the story he has been telling.⁶

Yet, even apart from (mis-)readings of this sort, a genuine question as to the position his theoretical stance entails has remained. After all, is he not simply apologetic of 'pure' power when he deconstructs the foundations of international normativity? Is he not also utopian when he insists that formal legal discourse has no better alternative? The most intellectually intriguing way in which Koskenniemi has tried to conceive of this paradox has, of course, been what he himself has

⁵ See, for example, Marius Emberland's review in the INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, VOL. 51(1) (2003): 272-273; Robert Cryer, *Deja Vu in International Law*, 65 MODERN LAW REVIEW 931-949 (2002) is more nuanced, but still muses about Koskenniemi's turn; even Brian Simpson's masterful review in the 96 AM J INT'L L 99-1000 (OCTOBER 2002), shows some puzzlement about Koskenniemi's critical-historical stance.

⁶ In fact, in a legal field so dominated by formalism, historization has been bound to play a critical role, which, in part, explains why so many critical legal works are but histories of a particular subject matter within 'mainstream' law; on this, see George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR J INT'L L 539-559 (2005).

termed the 'culture of formalism'. It essentially frames international law as a professional language game 'playable' by all those expressing themselves with the correct syntax and grammar. As such, (neo-)formalism eliminates what, from its own view, is a metaphysical anachronism, namely the need for shared faith in the law's foundation, re-conceiving it, instead, as a form of faithless practice. In addition since such neo-formalism combines the first-person perspective of the practitioner with the third-person perspective of the (academic) observer, it is capable of beholding that international legal game-playing is actually part of that wider scheme through which the exercise of power is organized. The fact that the role played by the law in this great game of power is variable and unpredictable is, from this perspective, not a weakness but a strength since it is precisely the inherent openness of the game's outcome that enables law to be used to both stabilizing and transgressive ends. Consequently, a culture of formalism would appear to be an ideal synthesis: at worst, it provides a (groundless) ground from which to go on practicing international law without intellectual remorse. At best, it is nothing less than the squaring of the circle, a (re-)foundation of (international) law beyond morality, beyond power, and without violence. At any rate, it may have become the only intellectually honest perspective from which to presently observe and work the law of nations.

Yet for all its elegance, the culture of formalism is a complex construct beyond the surface of which lie many of the paradoxes puzzlement over which has, by his own admission⁷, provided the author's inspiration for FATU in the first place. Their (all too brief) reconstruction may help to raise some (critical-constructive) questions on the nature of (neo-)formalism and the attractiveness of its culturalised practice. The starting point for this must, of course, be the author's choice to intertwine his descriptive with his normative project. *Prima facie*, this follows the plot of critical theory, with the revelation of the deep structure of the grammar of international law entailing an emancipatory potential which empowers the legal subject to 'liberate' herself from its grammatical confines and transcend it towards better justified ideals. In FATU's case, as Koskenniemi clarifies in the *Epilogue*, these ideals are progressively revisionist. They aim to re-instill international law with the political commitment that characterized the original international legal project which sprung from an authentic and existential concern with the big questions of international justice, peace and war⁸. To Koskenniemi, the politically progressive ends that the rationalized international legal discourse (that has developed as of the late nineteenth century) was to produce have been superimposed by the professionally entrenched end of recursively re-producing

⁷ KOSKENNIEMI, *supra* note 3, 562.

⁸ *Id.*

that discourse despite and apart from politics. Yet as he himself has argued in the original conclusion (*Beyond Objectivism*), a 'classical' critical stance is not enough to move away from the political coolness of international legal discourse, for, as he masterfully shows in FATU, its dichotomic structure contains both alternative ways in which to frame international normativity. With international legal discourse being premised at once on facts it does not create, and on norms the effects of which it does not control, neither perspective –either legalism or realism– represents a proper alternative, *i.e.* one that would provide a ground outside of the present discourse. To Koskenniemi, both modes are, on their own, dissatisfactory: legalism on account of its irreducible abstractness, realism because a mere re-description of legal processes as political or social ones misses the point that international legal discourse is itself a socio-political 'fact' surrounded by real expectations and discursive force; if anything, Koskenniemi's objective is to conceive of a way to re-politicize international law *as* law, not to reduce it to politics.

Hence, the 'structural coupling'⁹ of the legalist and the pure facts perspective Koskenniemi reveals seems to lead to an aporia in his critical project. Instead of fulfilling its emancipatory promise by marking out the contours of an alternative, it appears to foreclose any options outside of the dichotomy. (Political) passion seems to have cooled down before it could even start to melt down international legal discourse. Yet perhaps, such a meltdown had never been envisioned by Koskenniemi in the first place, for in spite of his critique of the self-consciousness of contemporary international lawyers, both FATU and *Gentle Civilizer* represent a most impassioned defense of the political relevance and transformative potential of international legal discourse. Indeed, both *Beyond Objectivity* and the *Epilogue* make it clear that the deconstruction of the discourses in which international legal practice is framed does not aim at the destruction, but at the re-description of that practice. It is not targeted at international law as such, but at the structural bias that results from its 'unenlightened' use – with 'enlightenment' referring here to the awareness of international law's deep grammatical structure. That awareness, in turn, brings with it a realization of the groundless, open-ended nature of the discourse that makes it, in principle, amenable to being used for many, including progressive, purposes. For bias is only structural, *i.e.* non-intentional, abstract, and literally irresponsible, when the agents of its reproduction are unaware of what they are doing, when they are almost robotically following rules and professional decorum without making conscious choices. Once the grammar behind this practice is understood, the uses to which it is put become inevitably a political choice attributable to its individual practitioners; a choice that requires justification and is

⁹ For this systems theoretical term see, *inter alia*, Niklas Luhmann, *The autopoiesis of social systems*, in SOCIOCYBERNETIC PARADOXES, 172-192 (Felix Geyer and Johannes van der Zouwen eds., 1986).

subject to open contestation. This, it would seem, is what Koskenniemi points to with his 'culture of formalism,' a re-description of international legal practice as a professional stance that takes comprehension of the field's epistemological condition as an ethical precept for political responsibility. Thus passion is not set against coolness, but becomes its predicate: passionate coolness as the professional ideal of a new type of international lawyer.

Yet does FATU's *Epilogue* elucidate all that is implied in this move towards 'critical' formalism? A number of questions remain. In the first place, the question of the relationship between 'mastery' of the grammar and 'sensitivity' to the uses to which it is put. *Prima facie*, mastery of a language's grammar is seen in light of a speaker's fluency, *i.e.* of her ability to use the language in communication. It does not imply rational understanding of the language's grammatical structure, which, in effect, is nothing but a description of how a language works from a linguistic point of view.¹⁰ Sensitivity to the pragmatic consequences of language use, however, is a corollary only of the latter, and does not spring from simply speaking the language near perfectly. Indeed, as was seen, FATU's main point is, arguably, that merely speaking the language without any rationalization of its grammatical rules leads to structural bias. Only those who have learnt the language through a rationalized account of its grammar from the beginning, or who are consciously interested in the latter, are capable of being sensitive to its use. The causes of either –not least amongst these being, of course, the reading of FATU itself– are external to language competence so that there is no necessary link between mastery and sensitivity. To rationalize discursive practice and understand its grammatical structure requires a choice that precedes the choice on the use of the language. That is, a choice which itself has no ground within international legal discourse, but itself expresses a political preference. Yet, is such a preference likely to emerge among as yet 'unenlightened' practitioners? Is it merely a question of establishing awareness? Or might there not be an actual preference amongst many of those against grammatical enlightenment? Is not FATU's central point that the illusion of apolitical objectivism makes for a good part of the professional identity of current practitioners?

Yet even if a full mastery of the grammar, its corollary, and sensitivity to its uses are assumed, the precise nature of epistemologically cool but politically passionate formalism is not entirely clear. Koskenniemi pits what he sees as the virtues of formalism, notably predictability, transparency, accountability, reciprocity and equality¹¹ against the realist description of international legal practice as

¹⁰ Koskenniemi's own view of language competence is expounded in a separate section of the *Epilogue*, *What a grammar is*, pp. 566-573.

¹¹ KOSKENNIEMI, *supra* note 3, 571.

characterized by ambition, inertia, tradition, ideology, and contingency¹². While the latter account provides, in the author's view, an accurate analysis of what is behind much international legal practicing, that insight does not, in itself, offer a better solution to the particular problems -such as war and peace, or justice and equality among nation states- addressed by international legal discourse. Nor does it speak to the particular expectations political actors have with regard to international law, and which can only be fulfilled by legal, rather than political or sociological discourse. Hence, to seek to respond to the big questions of international affairs in a legal way is, to Koskenniemi, in itself a political choice.

It becomes also a progressive choice if that legal response is 'enlightened' by an awareness of international law's grammatical structure, as is the case within the (hypothetical) 'culture of formalism'. Yet why would, from a progressive politics perspective, such 'enlightened' international *law* be preferable to international *politics*? Is it that only law but not politics implies transparency, accountability and predictability, values which are seen as crucial for both international politics and the 'fairness' of the game? Is Koskenniemi's implied wider hypothesis, thus, that law makes for the better politics? Such an affirmation would seem to stand against the experience of an international legal practice as intricately described in FATU that hides whatever political aspiration its operators may have behind an objectivist screen the sole function of which is to neutralize precisely that political aspiration. To this Koskenniemi can, of course, respond that 'law as politics' does not denote a crude political instrumentalization of legal practice, but instead points to the substantive advantages of the legal over the political language game. These advantages include, as was already hinted, *inter alia*, transparency of the rules of the game, symmetry of its players, logical consistency and coherence of argumentation, and predictability of outcomes, all enshrined in a language of rights that act as discursive trumps; in short, they represent what late modern critical theory would espouse as procedural justice.¹³ The latter has, for Koskenniemi, the wider implication of promoting what he sees as the central challenge of contemporary international affairs, namely greater equality between the global North and South.¹⁴

Yet from what epistemological vantage point could an international lawyer within an anti-objectivist 'culture of formalism' determine that the law actually works this way? How could law's transcendent effect on power be 'objectively' ascertained?

¹² KOSKENNIEMI, *supra* note 3, 570.

¹³ JÜRGEN HABERMAS, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1-10 (1994).

¹⁴ KOSKENNIEMI, *supra* note 3, 610.

Would not skepticism vis-à-vis knowledge of (international) law's foundations also have to relative knowledge of its inner and outer workings? If it did, the assumption that legal discourse is capable of structuring politics in a politically desirable way would be an affirmation of faith, not a statement of fact. Indeed, the 'culture of formalism' would then essentially be a system of beliefs driven by the hope for political redemption, where political effect is law's 'constitutive outside'¹⁵ another which is beyond its limits, therefore (legally) unknowable and yet always implicated in its practice. If it was, it might be a more honest, visionary, and inspiring way to conceive of international law than any other. Yet it would also raise the (mighty) question of whether not only Koskenniemi himself, but also the remainder of the contemporary international legal profession was willing to admit to practicing nothing but faith.

However, even if both grammatical enlightenment and openly professed faith in the political consequentiality of legal discourse are assumed, there still remain doubts as to whether it is really through formalist legal argument that the ideal of international equality can be brought closer. The 'culture of formalism' would, indeed, seem to argue that law, if seen in the right light by its practitioners, may function as a "language of beneficent transformation."¹⁶ It may, in particular, be uniquely suited to advance equality among nations, peoples, groups and individuals by being perhaps the only properly equalizing discourse in which the small and poor can take on the rich and powerful on, formally, equal terms. Examples abound of where and when this occurs, and even the fiercest critics of international legalism would, for instance, have to admit that the illegality of the US-led invasion and occupation of Iraq is dwarfed by the wide-spread legality that currently pervades international trade relations across all power and wealth asymmetries.

Yet the deep relationship between law, justice, and power is more complex and more paradoxical than the 'culture of formalism' would, *prima facie*, have it. Awareness of international law's grammar and faith in the transformative potential of its practice are not enough to reconcile these three terms with each other. The taking away of the metaphysical or post-metaphysical foundation of law does not let it hover above the ground, but as Jacques Derrida and others have shown¹⁷ it

¹⁵ JACQUES DERRIDA, *Of Grammatology* (1974).

¹⁶ KOSKENNIEMI, *supra* note 3, 611.

¹⁷ Jacques Derrida, *Force of Law: The Mystical Foundadtion of Authority*, 11 CARDOZO LAW REVIEW 919 (1990).

only reveals a bottomless abyss of violence and madness. Law only becomes law by being decided outside of itself, *i.e.* literally by being made 'illegally,' and that decision is intrinsically political, not based on a static dichotomy between sameness and difference, but on a sequence of singularities. These singularities are ultimately based on faith, the incommunicable substrates of personal epistemologies. Since they cannot be shared intersubjectively they necessitate a political relationship, that is, one which presupposes both the existence and the irreducible complexity of the respective other (singularity). Justice on this level is simply the recognition of singularity; power is the capacity to act it out. Politics, hence, comes as much before the law as it follows from it.

However, does this type of argument really stand in opposition to the 'culture of formalism'? Or is it merely another of its ingredients, one that becomes visible when one takes FATU's logic a step further? A more thorough reflection of this question would have to go beyond this mere epilogue on the epilogue and develop into a more concrete vision 'ahead'. For now it remains a future project inspired by the rich and multilayered texture of this great book and by the political commitment and intellectual courage of its author.