

University of New South Wales Law Research Series

**DISCIPLINARY PRIVILEGE AND THE
PROMISE OF DECAMPMENT: A RESPONSE
TO JAMES THUO GATHI'S 'THE PROMISE
OF INTERNATIONAL LAW: A THIRD WORLD
VIEW'**

FLEUR JOHNS

Forthcoming (2020) 114th ASIL Annual Meeting Proceedings, 1-8
[2020] *UNSWLRS* 41

UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au

W: <http://www.law.unsw.edu.au/research/faculty-publications>

AustLII: <http://www.austlii.edu.au/au/journals/UNSWLRS/>

SSRN: <http://www.ssrn.com/link/UNSW-LEG.html>

DISCIPLINARY PRIVILEGE AND THE PROMISE OF DECAMPMENT: A RESPONSE TO JAMES THUO GATHII'S 'THE PROMISE OF INTERNATIONAL LAW: A THIRD WORLD VIEW'

*By Fleur Johns**

It is an immense privilege to respond, as discussant, to James Gathii's 2020 Grotius Lecture.¹ I have known and admired Professor Gathii and his work for decades. He is one of those people who manages to combine great accomplishment in international legal scholarship and practice with an unswerving commitment to teaching, collegiality and mentoring. In these, and in other ways, James Gathii walks his talk. And his talk, as you have heard, is challenging.

Gathii's lecture issues two challenges to this year's meeting of the American Society of International Law and to the discipline and profession that it represents. The first is a challenge to the discipline's "limited geography of places and ideas".² Gathii asks us to scrutinize carefully the places to which we look when registering significant theoretical and doctrinal developments in international law. In particular, he asks us to note the discipline's endemic under-attention to institutions and experts located in Africa and to legal innovations for which they are responsible. The second is a challenge to take account of that distinctive point of embarkation for work in international law that is the "subaltern epistemic location" assumed by TWAIL.³ I am going to address each of these challenges, to try to amplify them a

* Professor, and Australian Research Council Future Fellow, UNSW Law, UNSW Sydney.

¹ James Thuo Gathii, *The Promise of International Law: A Third World View*, _ AM. U. INT'L L. REV. _ (2020).

² *Id.*

³ *Id.*

August 5, 2020

little, and to consider what they might mean for scholars writing and practicing from other epistemic locations. To do so, I want first to connect these two challenges to the theme of the annual meeting of the American Society of International Law: The promise of international law.

I. THE PROMISES OF INTERNATIONAL LAW

At least two notions of the word “promise” surface in Gathii’s lecture, where they work in some tension with one another. The first is a notion of promise as a declaration or assurance made to another person or, in an older meaning, a feeling of assurance.⁴ This is the promise of contractualism. The second is an idea of promise connected to futurity. That is, promise as an indication of a future event or condition. This is the promise of counterfactualism.

As to the first, Gathii works to dislodge that sense of assurance that international law often seems to offer. Perhaps, he suggests, we should not feel so confident in the amplitude and beneficence of our discipline’s promises. More specifically, Gathii challenges that disciplinary assurance that enables “international law produced in places like Arusha” to be hidden “in plain sight”, as he says.⁵ International law, as a discipline, claims to invite engagement from all places and all peoples. Anyone willing to sign up, so to speak, is supposed to be welcome. Yet somehow, African jurists always seem to be on the outer of its promissory dealings.

As Gathii makes very clear, his point in asking among whom the promises of international law are made is not to argue for broader recognition. His argument is, rather, for

⁴ *Promise, n.*, OXFORD ENGLISH DICTIONARY ONLINE, at <http://www.oed.com> (last visited Aug. 5, 2020).

⁵ Gathii, *supra* note 1.

August 5, 2020

resistance – that is, resistance to (quote) “knowledge production systems that silence [African jurists] and their engagements with international law”.⁶ To put it possibly too crudely, this is an argument for anti-racism, not for racial tolerance.⁷ Gathii’s call is for action, not for permission.

Alongside this call, Gathii’s lecture also evokes a second idea of the promise of international law. He does so by refiguring the futurity with which international law is commonly invested. In his account, international law’s future promise is most apparent in the willingness of TWAIL scholars to both “struggle against the international law they were taught” and yet remain “enamored” of it – to still see it as amenable to being “rescued”.⁸ The promise of international law so rendered is not a near-neighbor of its present. The future condition of international law evoked in the (quote) “rebel imagination” of TWAIL is almost surreal in its insistence upon multiple possibilities latent in the now.⁹ And yet its engagements are also resolutely practical, as Gathii highlights when he speaks of the many ways in which TWAIL scholars are active in the practice of international law.

It is important to note that this second sense of promise is not a negation of the first. TWAIL scholars’ continued willingness to work on international law’s future does not correct or make up for the blindness of the discipline stemming from its misplaced assurance. Rather, this futurist sense of promise proceeds directly from the discipline’s confident myopia. It is precisely because the creative work of international lawyers working in Arusha has been “marginalized doctrinally and theoretically” that TWAIL scholars taking Arusha

⁶ *Id.*

⁷ On the complex politics of anti-racism, and the critiques of racial tolerance that surface within it, see Alana Lentin, *What Happens to Anti-Racism When We Are Post-Race?* 19(2) FEM. LEG. STUD. 159-168 (2011); Yin Paradies, *Whither Anti-Racism?* 39 ETHNIC & RACIAL STUD. 1-15 (2016).

⁸ Gathii, *supra* note 1.

⁹ *Id.* (quoting Vasuki Nesiah, *Decolonial CIL: TWAIL, Feminism and an Insurgent Jurisprudence*, 112 AJIL UNBOUND 313, 317 (2018)).

August 5, 2020

and other Third World locales as an epistemic starting point can offer something other than an affirmation of the pre-existing order: something that smacks of the future.¹⁰

What, then, is this other future that international law might yet promise? And how might we get there, if we seek to do so? To think through these questions, let us return, now, to the two senses of location – and prospects for relocation – that James Gathii offers in his talk. The first is geographic and the second, epistemic.

II. THE LOCATIONS OF INTERNATIONAL LAW

The promise of international law that Gathii calls forth is geographic not historic. That is to say, the alternative future of which he speaks is spatial rather than sequential in its relationship to the present. The work required to arrive at this other place is redistributive, rather than developmental. This futurity is not a matter of advancement. It is not a condition towards which we may expect, almost inevitably, to progress.¹¹ Instead, the anti-compartmental, intersectional approach to international law of which Gathii speaks – this is already here, already in practice. We can, so to speak, go there.

Likewise, the promise of listening to and learning from jurists working in Arusha is not the promise of cosmopolitan erudition. This is not the Grotius Lecture as travelogue. Rather, its promise is borne of displacement and replacement. It seems to me that by proposing that international lawyers learn more from legal work ongoing in Arusha, Gathii is not asking for a dash of African jurisprudence to be included in the existing international

¹⁰ Gathii, *supra* note 1.

¹¹ In this way, Gathii's lecture rejects that progress narrative that is ubiquitous within the discipline of international law. See THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* (2009).

August 5, 2020

legal canon in some taste-enhancing way. I hear him saying, in effect, international lawyers: move aside, decamp. There is another canon from which you may learn. There is another ground from which to begin. But, in order to do so, you must give up some of the things you know, practice and teach. You must cut some ties, break some bonds, and relinquish some powers that you relish. You must rehing the discipline on another pivot of places and ideas and then do so again and again. That is, we who live and learn in places like Washington DC, Geneva, New York, Paris, London and the Hague – or, in my case, the somewhat less central location of Sydney – must try to take other places and traditions as keystones for our work, or defer to those who do. In my case, I hear this as a call to center First Nations jurists and envoys as founding thinkers of the international in settler colonies like the one I inhabit.¹²

That other pivot is the distinct epistemic location of which TWAIL is a marker in Gathii's lecture. Again, TWAIL is not, by Gathii's description, just one perspective among many. It is not an ornamental enhancement to international law's décor. It is an entire world – at once, both material and ideal. TWAIL has an account of sources and sovereignty, self-defense and self-determination, the law of the sea and the laws of war. It offers far more than tweaks and add-ons. TWAIL is at least as general a world view as that of so-called “general” international law routinely set out in textbooks. And like all world views, it has blind spots and biases embedded within it. TWAIL cannot claim to be outside of power. On the contrary, TWAIL scholarship is often highly self-critical. At its most cogent, it is as intolerant of its

¹² On First Nations' internationalisms, and encounters among internationalisms, see, e.g., RAVI DE COSTA, A HIGHER AUTHORITY: INDIGENOUS TRANSNATIONALISM AND AUSTRALIA (2006); Mark McMillan, *Koowarta and the Rival Indigenous International: Our Place as Indigenous Peoples in the International*, 23(1) GRIFFITH L. REV. 110 (2014); Mark McMillan & Sophie Rigney, *The Place of the First Peoples in the International Sphere: A Logical Starting Point for the Demand for Justice for Indigenous Peoples*, 39(3) MELB. U. L. REV. 981 (2016).

August 5, 2020

own complicities and chauvinisms as it is intolerant of so much of international law's tepid ambivalence towards power and privilege.

III. THE POLITICS OF PRIVILEGE

If TWAIL scholarship makes knowledge otherwise – that is, in a register of relentless anti-subordination – then what does that scholarship demand of international lawyers proceeding from other epistemic locations and in other registers?

One answer could be nothing at all. TWAIL scholarship doesn't come begging at the door of non-TWAIL scholars. TWAIL scholarship doesn't need to integrate or collaborate. There is quite enough energy and heterogeneity within the movement-of-sorts that is TWAIL in order to sustain and grow it. Gathii's lecture, and the accompanying bibliography, make this very apparent.¹³

Gathii's lecture is, however, more generous and open-doored than that. It is addressed, in part, to those “interested in engaging with and learning from this scholarship” and keen to “diversify their syllabus and curriculum”.¹⁴ This suggests a second possible answer: listen, learn, and move things out of the way.¹⁵ Delete core texts from the syllabus. Try inserting African jurists, Indigenous jurists and others working from subaltern locales at the heart of the international law 101, whether in teaching or in practice. And, Gathii seems

¹³ James Thuo Gathii, *The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)* (June 25, 2020) at <https://ssrn.com/abstract=3635509> (last visited Aug. 5, 2020).

¹⁴ Gathii, *supra* note 1.

¹⁵ Listening, in this context, has little if anything to do with the kind of exchange of arguments and counter-arguments contemplated by Habermasian discourse theory, or routinely enacted in legal practice and scholarship. It recalls, rather, the “insurgent”, uneasy listening of James Baldwin. See Shana L. Redmond, *Of Treads and Thunder: The Insurgent Listening of Lorraine Hansberry and James Baldwin*, 49 *THE BLACK SCHOLAR: J. BLACK STUD. & RESEARCH* 51-64 (2019); ED PAVLIĆ, *WHO CAN AFFORD TO IMPROVISE? JAMES BALDWIN AND BLACK MUSIC, THE LYRIC AND THE LISTENERS* (2016).

August 5, 2020

to be suggesting, don't presume to know what TWAIL scholars are on about or assume that they all agree – read the work. James Gathii's lecture has provided us all with many authors and texts to follow up on.¹⁶ In part, this lecture has been an invitation to a kind of virtual study group.

Yet, as the Indian literary theorist Gayatri Spivak has cautioned, to listen for the subaltern voice entails more than fixating on concrete experiences of the oppressed.¹⁷ The subaltern epistemic location that Gathii invokes is irredeemably heterogenous. It is not one place, one viewpoint, one voice. It is not a place of powerlessness. It is also not a place of distinctive black genius – that figment of apologetic fantasy of which the Cameroonian philosopher Achille Mbembe is so scathing.¹⁸

No, the epistemic location that Gathii wants to allow those of us embarking from other locations to encounter may, in his rendering, be inviting and hospitable. But it is neither abject nor celestial. It is fraught.

Those of us reading and writing from other epistemic beginnings must engage, I think, with humility. We will make mistakes. Goodness knows, I have. Our good intentions will not insulate us from responsibility for these. The history of racism is replete with good intentions and good manners. Taking up the challenge of anti-racism, with TWAIL scholars as main-stage interlocutors – this requires far more than benevolence, far more than incremental reform. It demands redistribution and handover. It requires breaking things, but doing so with care and insight, not in the Silicon Valley mode. Read and listen, but also – re-allocate resources, devolve power. This is something of what I hear James Gathii saying to

¹⁶ Gathii, *supra* note 13.

¹⁷ Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988). *See also* Gayatri Chakravorty Spivak, *Scattered Speculations on the Subaltern and the Popular*, 8 *POSTCOLONIAL STUD.* 475 (2005).

¹⁸ ACHILLE MBEMBE, *ON THE POSTCOLONY* 12 (2001).

August 5, 2020

me and to other international lawyers. This is the promise that I hear him offering.

International law's future may be already here — just not in the places and ways in which we tend to look for it.

I am grateful to James Gathii for relocating and recalling the promise of international law. These are troubled and troubling times, but they are also times at which fundamental, structural change seems within reach and indeed already underway – change that would be well informed by the TWAIL commitment to anti-subordination. That is, if we are collectively up to the task of realizing this moment's promise.