Buffalo Human Rights Law Review

Volume 17

Article 1

9-1-2011

The Origins of African American Interests in International Law

Henry J. Richardson III
Temple University School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bhrlr

Part of the International Law Commons, Law and Race Commons, and the Legal History Commons

Recommended Citation

Available at: https://digitalcommons.law.buffalo.edu/bhrlr/vol17/iss1/1

This James McCormick Mitchell Lecture is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Human Rights Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
MITCHELL LECTURE, OCTOBER 27, 2010*

Henry J. Richardson III**

INTRODUCTION

Dean Mutua, members of the Law School Faculty, distinguished guests, students, and other friends gathered, I am honored to be invited to give your Mitchell Lecture for 2010. I am honored you would have me stand as the latest in the long line of visionaries who are led by the Mitchell family, as they conceived and endowed this Lecture. And I am honored that you have invited me to stand in a line headed by Justice Robert Jackson, the series’ first speaker. His value to the law and humanity through his tenure on the U.S. Supreme Court, including his magnificent dissent on protecting fundamental rights in the Korematsu Japanese detention case and the wisdom of his Steel Seizure Case concurrence, were perhaps only outweighed by his service to international law as a U.S. Presidential Advisor and then as Chief U.S. Prosecutor at the Nuremberg Trials at the close of World War II. The critical role he played in defining the need for a trial and its central issues, and in extending its holdings to rest under the global rule of law through the present moment, should never be forgotten.

I am further honored that you have chosen me to immediately follow another great lawyer and leader, who presented, as Chair of the NAACP Legal Defense Fund, your 2009 Mitchell Lecture, my friend John

---

* The Mitchell Lecture Series was endowed in 1950 by a gift from Lavinia A. Mitchell, in memory of her husband, James McCormick Mitchell. An 1897 graduate of the Buffalo Law School, Mitchell later served as chairman of the Council of the University of Buffalo, which was then a private university. Justice Robert H. Jackson delivered the first Mitchell Lecture in 1951, titled “Wartime Security and Liberty Under Law.” Mitchell Lecture programs have brought many distinguished speakers to the University at Buffalo Law School. These have included John Payton, Irene Khan, C. Edwin Baker, Derrick Bell, Barry Cushman, Carol Gilligan, Elizabeth Holtzman, Stewart Macaulay, Catharine McKinnon, Carrie Menkel-Meadow, Richard Posner, Clyde Summers, and now Henry J. Richardson. To view a video of the Lecture, visit https://ublaw.wordpress.com/tag/henry-j-richardson-iii/. This annual Lecture Series is held in the fall and is free and open to public.

** Professor of Law, Temple University School of Law. I greatly appreciate the research assistance of Ms. Chimdi Nwosu, J.D. anticipated 2012, Temple University School of Law, and Mr. Steven Cobb, J.D. 2011, Temple University School of Law, and also the support of the Clifford Scott Green Research Fund. This Lecture is substantially adapted from Henry J. Richardson III, The Origins of African American Interests in International Law (Carolina Academic Press, 2008).
Payton. There is no more talented, experienced, and effective lawyer of integrity who has always advanced civil rights and fought racism, as demonstrated by his Supreme Court victories and his dynamic leadership of the nation’s principal civil rights litigation body. He has long understood, including through his leadership in the American anti-apartheid movement, that successfully expanding civil rights in America must be done in a globalized world.

So, in this noble tradition, I want to explore this afternoon a question that, along with its analogs for other peoples, influences our understanding of international law, not least regarding the role of race. I will explore the lessons we might draw from the existence of African American interests in international law. That this historically subordinated American minority would have such interests might be surprising to many people. But those interests, and their origins, antedate the founding of the United States as a nation.

These African American interests carry lessons for the wider interlinked American and global communities; a reality contrary to the belief of all who have perceived African Americans as being only consumers of legal theories and jurisprudential approaches, and not producers and implementers of new and different authority, notwithstanding President Obama’s historic election two years ago. But the struggles and contributions of these interests have helped expand American and global thinking regarding constitutional and international law and the role of race around those issues. In this fifty-year anniversary of the historic civil rights sit-ins that so changed American history, we only need recall the award in 1964 of the Nobel Peace Prize to Martin Luther King, Jr. — a global recognition of authority in his leadership of the American civil rights movement — to realize the global impact these interests have had. All in all, civil rights and its historic issues of race, rights, and black freedom in the United States as linked to those in Africa have shaped international issues in varying contexts for the past four centuries.

These African American interests, passing through the enduring question of what may History teach contemporary policy makers and local people, have helped frame several notions. In discussing them now, I recall my earlier resistance in this project to “drawing the lessons of History” to inform current issues. Here, I overcome that resistance and will succumb to guilty pleasures, hopefully in a restrained and dignified way.

And so this afternoon, I will begin by discussing the origins of African American interests in international law, along with the companion notion of African American claims to outside law. I will then identify a few contemporary implications of the very existence, as well as the invocation, of these interests in both the American civil rights narrative and the larger
human rights narrative. Finally, I will suggest some consequences from these interests for questions of equitable governance into the near future of America as a racially and otherwise pluralistic nation.

I. THE ORIGINS OF AFRICAN AMERICAN INTERESTS IN INTERNATIONAL LAW: A HISTORICAL NARRATIVE

In order to understand the origins of what I call the African American International Tradition, including the origins of African American interests in international law, I needed to work through discourses of international legal history, African American history, and international law. And I needed to do so through a framework of inquiry that was comprehensive in its authoritative voices rather than restrictive, and contextual rather than rule-oriented – namely, the New Haven School of International Law framework.¹

The legal history had to be approached through perspectives about authority held by a people who, in the conventional historical sense, did not prevail, at least relative to community power. African American history had to be approached so as to amplify the voices of African Americans, even where there was no written documentation to serve as a megaphone. International law had to be approached so as to clarify what these strong and vulnerable African-heritage people demanded of that law’s prescriptions and its enforcement for their own freedom. It had to be approached to clarify those demands of black people, which they made for their own good governance in freedom – demands which slave owners and government officials refused to connect to the operation of the “law” of their territorial jurisdictions. Instead, these slave owners insisted on trying to minimize black demands as representing only the irrelevant complaining of their servants.

In uncovering the origins of these African American interests, I had to ask about the international jurisprudence of black folks when whites had not, theoretically, morally, or politically, given them permission to have one. This project had to inquire about a collection of people who from the sixteenth through nineteenth centuries were subjected to an evolving system of exploitative policies, sophisticated captivity, and deadly terror. They were oppressed by those enslaving them to (unsuccessfully) prevent them as they were brought from Africa from seeing their common interest. Subsequently, from the late twentieth century to the present day, these same

people have been subjected to a stream of demands and methodology that
deny that they ever evolved a culture, and contend that they must have no
collective identity beyond American citizenship of civil war vintage. Never-
theless, their forged collective identity has been key to African American
survival and progress.

Let me continue this historical narrative with five clarifications.

First, this narrative opens by developing the context of the slave
trade and slave resistance from Africa into the Atlantic Basin beginning
from the late fifteenth century. But this narrative, of what I call the interna-
tional slave system, fairly quickly, as from about 1609, pulls in to focus on
black claims to outside law on the North American continent. The Ameri-
can slave system was a corner of the international slave system, and black
claims to what I call “outside law” for rights against it are explored in that
vein.

Second, the history of slavery and the slave trade is inseparably
intertwined with the history of slave resistance, resistance that was orches-
trated in a variety of ways. Thus, slavery of African-heritage people and
slave resistance must be seen and discussed as synonymous.

Third, black claims to better outside law were expressed over the
generations by black speech, voices, agency, and action. Black claims were
defined by their normative opposition to slavery and racial oppression; that
is, these claims rested on slave resistance of both black men and black wo-
men over almost four centuries in North America. These claims are the
foundation for the birth of African American interests in international law,
where international law offered the potential for, but was not a constant
source of, better outside law.

Fourth, every coherent people has some collective sense of how
they wish to be governed in the present and the foreseeable future. African-
heritage people in the Atlantic Basin and here in North America knew that
they had a right to be free of slavery. Hence, in resisting slavery, they de-
manded to be governed under some system of law that confirmed their right
to freedom from slavery and racial oppression. The “local” or “domestic”
“law” immediately governing these people in North America and the inter-
national slave system was the law of slavery. Hence, black claims were
made in the context of a continuing search for some better outside law that
would confirm and enforce their right to freedom. The validity of their
claims is not tainted by their white governors historically failing to enact
those claims into the “law” of America.

Fifth, my discussion and focus in this work shows little or no pa-
tience or agreement with lines of scholarship that argue, or have argued, for
example:
that "law," and thus a jurisprudence to define it, cannot exist among a group without identified legal institutions and rules;

• that nationally subordinated groups may have "cultural norms," but since the national state must monopolize "law," they cannot be understood as having their own definitions and theories of "law";

• that no legal history can exist regarding any culture, race, or group who were too primitive, too subordinated, or both, to leave a coherent written record;

• that theories or views of law cannot arise out of a group which has failed to reach a certain stage of development so as to produce lawyers and legal scholars who consciously aimed to develop a jurisprudence and leave such a written record; or, finally

• that international law strongly, as a matter of essential policy and for the sake of public order and stability, must remain defined as the agreed upon "law" between sovereign states, and thus no actions or communications by subordinated national groups can or should be understood by scholars, officials, or observers as representations of a jurisprudence of international law without the explicit consent of that sovereign national government.

Long trends of globalization, the legal demise of constitutive colonialism with the invalidity of its supporting scholarship, the value interactions among all global groups across state boundaries, the rise of human rights, and the ease of communicating normative claims globally all lead me to conclude otherwise.

Let me now pick up the main thread of the historical narrative.

I begin with the opening of the African Atlantic slave trade, in part to show the historical result of the European debate about who – whites, indigenous peoples, or Africans – was going to do the necessary hard and dangerous labor in the New World colonies to ensure survival and export trade profits. Africans lost! This early history also demonstrates that race and the rights of African-heritage people, who became African Americans, have always been international questions.

Throughout this narrative, blacks participated in and affected international politics as part of their struggles to survive, to carve out niches of accommodation, and to free themselves from slavery and racism as much as possible.
The early chapters discussed the landing of the Twenty Africans at Jamestown in 1619, and their status under British, Virginia, and international law, even as they were preceded by earlier Spanish slave settlements and slave revolts in North America as early as 1512. We can identify here the implicit black claims to outside law that the Jamestown Twenty seem to have been in a position to make, claims revolving around their status as indentured servants or slaves, had they possessed the resources and opportunity to frame them.

From the beginning, blacks had a consciousness of affairs beyond the eastern American shores, beginning with their collective memory of Africa and Europe’s relations with African peoples that led to their horrendous voyage across the Middle Passage to America. African notions of liberty and patterns of resistance, beginning with the African origins of the European slave trade, are part of the underpinning of their claims to outside law. This was the case for blacks in, for example, pre-Revolutionary Dutch and British New York, where blacks made implicit and explicit claims to outside law in resisting slavery. These efforts notably included blacks’ coordination of their resistance with potential outside European military invasion into the territory, and the New York slave revolt of 1741, which was brutally suppressed.

This exploration of black claims to outside law encompasses slave revolts and maroon communities (communities of escaped slaves) throughout the Americas. This includes the international legal issues raised by the Republic of Palmares in Brazil that existed for most of the seventeenth century as no less than an independent African state until it was conquered by European troops. Maroon communities in the Caribbean, and Central and South America, influenced slaves through news and stories in the thirteen North American colonies as sources of inspiration or models for resistance. It is now clear that there was a coherent international slave system linking Europe and the Americas during this period.

In this same historical period, international law was coalescing into a coherent legal system, including through the major work on the subject by Hugo Grotius in 1625. Thus, black claims to outside law intersected with notions in Europe and the Atlantic colonies about how international law should be formulated and interpreted: what that legal system should render legal and what it should render illegal. Grotius’ work was based on natural law, and was surrounded by much jurisprudential debate. The Jamestown Twenty and other blacks had freedom interests in how those debates should be resolved, and in how they should relate to that debated jurisprudence among white American colonists.

I explore African claims to outside law, including those raised by maroon communities during the eighteenth century, relative to slavery
under contemporaneous international law. These include “treaties” between local colonial governments and maroon communities in the Americas, and the question of there being a partial international legal basis for slave revolts in the work of Grotius.

As black communities evolved in British North America approaching the American Revolution, in spite of their captivity, slaves’ claims to outside law on the plantations of the Southern colonies still remained possible. But free blacks – though small in numbers – had somewhat more latitude to express them, and did so for the interests of their slave mothers and fathers, brothers and sisters, cousins, sons and daughters. Prior to the American Revolution, they had surprising access to international flows of information from London and the Caribbean. This produced an historical synergy between black North American claims to outside law, and those from inter-American and Caribbean slaves, at least for enlightenment and inspiration.

With the approach of the American Revolution, the contradiction between white European colonists’ talking of “slavery” to describe their relationship with Britain, and the actual circumstances in which they were keeping “their own” African slaves under their noses and in their own houses, stimulated new kinds of black claims to natural law. This new thinking included claims to international law to the extent that it was then still based on natural law, and free blacks in northern colonies led the way here. Black petitions for freedom based on claims to a better outside law began to appear, as did black freedom suits. The latter can be understood as black claims to domestic law. The petition by the slave Lancaster Hill to the Massachusetts House of Representatives in 1777, and its claims to outside law, illustrates black perspectives in the Revolutionary war era demanding better law. It also indicates levels of information among blacks about inter-American slavery resistance, including the travels of black sailors as a transmission belt for such information.

The Revolutionary War put blacks squarely in the middle of two contending candidates for sovereignty over the same territory of North America’s eastern seaboard. And therefore blacks were naked, as a group, on the international stage. They had to choose their loyalties as well as their most likely survival options, but in the end, as a group, they chose their most likely freedom options. In numbers, during the Revolution, most – but not all – blacks saw the British as potential liberators, including through the declarations of Lord Dunmore, and chose to try to help their fight, or at least seek security by moving towards their military lines and encampments. Caught up in the approaching military battles, blacks’ personal decisions often had to be made quickly about, literally, which way to run. From their position on the international stage, these blacks’ decisions and actions
involved both implicit and explicit claims to outside law and to international law. Such claims can be seen even more clearly under the glare of the strong historical argument that the American Revolution, particularly in the Southern colonies, was fought at least as much to preserve the North American system of African slavery as it was to free the thirteen colonies from Britain.

When the Revolutionaries had successfully defeated the British, the British honored an evolving principle of customary international law of slave military service conditionally justifying a grant of freedom by taking at least 30,000 ex-slaves with them to Nova Scotia and later to Britain. Thereafter, some of those slaves were taken by the British for their early imperial settlement of the African territory of Sierra Leone. Analogously, victorious American colonists honored their obligation by manumitting up to 12,000 slaves who had fought for them, while bitterly opposing the British removing any of “their” slaves at all.

Post-revolution questions turned to the need for new constitutive arrangements for the new nation and the relationship of black claims to outside law to the evolution of such arrangements. Black claims to both outside and domestic law were made during Shays’ Rebellion in Massachusetts, closely preceding the Constitutional Convention. In Philadelphia, blacks were not thought to be part of the Convention. The premise had already been voiced in the 1750s that the United States was destined to be a European-heritage controlled nation. But blacks were in the room in Independence Hall in the minds and fears of the Constitution’s Framers.

African Americans were entering a new stage of social and political organization in 1787, especially in Pennsylvania under the leadership of Richard Allen, as well as in other northern states. They had already developed a history of over a century of claims to outside law, including international law, from their lives in America. Therefore, they necessarily had an interest in the outcomes of the Constitutional debates about the international law-related provisions of the Constitution.

Thus I asked, using a fictional narrative, what interests did blacks have in the drafting of these constitutional provisions? Here a window of influence of contemporary Critical Race Theory is opened into the scholarship of American legal history. Without the pioneering work of Derrick Bell in using fictional narrative to clarify deeper truths behind contemporary constitutional issues, including through his civil rights lawyer heroine Geneva Crenshaw, my inquiry here would have been greatly limited. The debates around each international law-related constitutional provision are explored as if African Americans had sent, and the Framers had accepted, informed and committed black representatives able and present in Independence Hall to help shape the U.S. Constitution. Black claims and interests
are explored in light of the Convention debates and perspectives of the Framers regarding how the United States, as a new sovereign nation consolidating itself vis-à-vis other sovereign states, ought to incorporate and confirm its rights and duties under international law.

My fictional black representatives advocated for African American interests in the Convention as long as they could, but finally they had to walk out when the Fugitive Slave Clause became the last straw! It might have been a very tense exit, however, because when Geneva Crenshaw appeared before the Framers to inform them of the racial discrimination in the American future that their decisions would cause—decisions regarding the Three-Fifths Clause, the Fugitive Slave Clause, the 1808 Clause and other provisions allowing the Constitution to permit slavery—the Framers ordered a loaded cannon to be brought up and prepared to fire at the Independence Hall podium where she was speaking, just as Ms. Crenshaw escaped in her time capsule!

The subsequent narrative discusses the post-constitutional claims to outside law and international law by blacks to confirm their right to freedom up to about 1808. This includes issues about the resumption of the African slave trade into the United States, the reinstatement of constitutional authority for its regulation, and slave revolts including Prosser’s Rebellion. The hugely significant body of black claims arising from the Haitian Revolution, beginning in 1791, make it difficult to overestimate the impact of that revolution on the United States, including with respect to the content of black claims to the revolution as outside law. This part of the narrative further discusses a line of early federal cases showing black agency on their international facts regarding their claims to outside law. It goes on to explore black claims to outside law made by their fleeing over the international boundary to Spanish-ruled Florida to escape southern American slavery. It explores the forced westward migration of slaves by slaveholders to extend the American plantation system to the Mississippi River in the late eighteenth and early nineteenth centuries. This migration brought blacks in close proximity to European sovereign regimes, and their cultural remnants on American soil. These pockets of foreign culture represented concentrations of easily accessible outside norms, to which free blacks and slaves could look to confirm their rights, such as the right to participate in armed militias, and to normatively resist new waves of American slavery and racism moving into the Mississippi territory.

African Americans made important claims to outside and international law, and also to domestic law, regarding the approach, conduct, and conclusion of the War of 1812. I examine these claims in the context of blacks living in New Orleans and Andrew Jackson’s actual and implied promises of manumission of slaves in return for military service in winning
his major victory against the British there to end the war. Those promises were now expressive of an evolved principle of contemporary customary international law, giving slaves a conditional right to freedom in return for military service to the territorial authority. Black claims of rights were made in connection with blacks offering and giving military service to both American and British forces, and again when thousands of blacks sailed away with the British at war's end. More implicit but identifiable black claims to international law were made in relation to the conclusion of, and black interests in, the drafting and interpretation of the Treaty of Ghent ending the war in 1815.

Thus, black interests in international law had evolved more clearly by the end of the War of 1812. They had evolved from their origins through innumerable black claims to outside law relative to slavery and the slave trade, up through the American Revolution, the westward forced migration, and the War of 1812. These interests now comprised, by the second decade of the nineteenth century, an African American stake in the prescription and implementation of international law.

Let me conclude this historical narrative with a story from the end of the War of 1812.

Joseph Savary was a black man who emigrated from Haiti to the New Orleans area as a free black. He joined the notable pirates and hired militia band headed by the legendary Jean Lafitte, who was himself possibly a person of color. Lafitte operated during those years out of the Louisiana bayous and marshes on the Mississippi in New Orleans and off the Gulf coast, and he is thought to have played some covert, supportive role in General Andrew Jackson’s defense of New Orleans. Savary joined General Jackson’s forces and became a valued black military leader for his troops in New Orleans.

So here we have a free black man, pushed into New Orleans by the Haitian Revolution, steeped in contemporaneous international politics in the Gulf and Mississippi delta region, and, arguably, a supporter of U.S. government interests, who through his service at New Orleans was consistently making claims to domestic American law.

However, the story continues. Following his triumph at New Orleans over the British, General Jackson granted permission for all military regiments of his forces to make a post-battle victory march through the city, except for the black regiments — and certainly excluding the black regiment led by Savary. Savary was incensed by this racial exclusion. He defied the orders excluding his troops, and marched his unit through New Orleans anyway (and was not or could not be prevented from doing so). He then cut his ties with Jackson and resumed his career of smuggling and related activ-
ities with Jean Lafitte. Subsequently, he left the Mississippi delta region to emigrate to South America to fight in Simon Bolivar’s revolutionary army. Savary’s defiance of Jackson’s orders excluding his unit from marching in victory through New Orleans was the expression of a claim to outside law underpinned by a hatred of ungrateful Americans. He claimed the right to fully benefit from the bargain proffered to blacks in that situation, and stood against Jackson’s (and thus America’s) violation of the international legal principle of conditional black freedom, the promise of compensation, and/or proper recognition to blacks who fought to defend territory. The latter two benefits Jackson had explicitly promised black troops in his pre-battle oration. Savary’s subsequent return to the service of Jean Lafitte expresses a further claim to outside law for the right to establish his own commercial arrangements in conjunction with cooperating entrepreneurs in the delta region, in defiance of U.S. law. Savary’s emigration to fight with Simon Bolivar represents another claim to outside law for the right of blacks to choose and join military struggles for the freedom of oppressed peoples anywhere in the international community.

Savary’s story illustrates how the same black person, leader, or group may be at one point committed to a course of action and belief expressing claims to domestic law for their right to freedom – here the general laws, aims, and policies of the United States – but later alter that commitment if it failed to adequately protect that right. If the black claimant came to believe that claims to domestic law provided no local relief from white oppression, or if domestic law worsened that local oppression, then he or she became a candidate for becoming a claimant to a better outside law for the rights they knew were owed to them.

Whether such black people actually made claims to outside law depended on factors such as capacity, courage, opportunity, depth of anger or despair, and a total evaluation of the surrounding circumstances and the probable consequences. Savary illustrates this shift with respect to the question of the withdrawal of earned white recognition of black military honor, coupled with the violation of explicit promises to black soldiers by General Jackson, and relative to Jackson’s violation of the confirmed international principle regarding freedom trade-offs for black military defense of white-held territory.

But Savary’s story also shows that all blacks involved in contemporaneous international politics cannot automatically be assumed in their major transactions with white officials, governments, and communities to be making claims to outside law. Such blacks may make different claims – to domestic or outside law, or both concurrently – at different phases of their lives and struggles. Their actions must always be identified in context, however, to empathetically impute when blacks have made a claim and what its
likely content was. Here, Savary’s actions in context allow us to easily impute his intent, and provide a more complete understanding of both his claims to domestic law and his subsequent claims to outside law.

From many, many such stories has come the birth of African Americans’ interests in international law.

II. CONTEMPORARY LESSONS FROM AFRICAN AMERICANS HAVING INTERNATIONAL LAW INTERESTS

I said at the beginning that I was going to give in to the guilty pleasures of temptation to draw “lessons of History” for present policy makers and people from the history of emerged African American interests in international law. However, drawing lessons from history brings along inherent issues that must at least be recognized. Whoever steals a people’s history steals their freedom, because they steal their capacity to fix the truth of their relations with both their own values and with other peoples and cultures. Thus, drawing lessons from the history of a particular group leads us to ask whether those are lessons the foundation for which was stolen from under that group.

Part of the great importance of the approaches of critical jurisprudence in international law that have arisen in the last three decades — including Critical Race Theory, Third World Approaches to International Law under Dean Mutua’s insightful leadership, Critical Latino/a Theory, and Feminist Jurisprudence — has been that each seeks to examine the question of whether and how the history of subordinated groups has been stolen by others through oppression and massive distortion, and to frame issues of authority to correct the present jurisprudential and legal consequences of such distortion. All of these critical approaches demand the consideration of current policy relevance and present authority to the history of oppression of particular groups and peoples by other groups, interests, and their heirs. They further demand that that authority be incorporated into legal thinking of the current consequences of this discrimination and oppression. This is necessary because, as Anthony Anghie, Dean Mutua, and others have demonstrated, the nineteenth century model of the Euro-sovereign state, with its norms of dominating lesser peoples, has never quite gone away. And for all of these groups, including African Americans and their emerged interests in international law, such critical examination and guardianship, on both the theoretical and the local planes, frame Noam Chomsky’s principled assertion: “But there is no reason to subjugate ourselves to the doctrine of the powerful.”

It almost goes without saying that peoples can be subordinated not only by the oppression that directly coerces them, but also by the historiography of that oppression by subsequent influential historians who will, for
the moment, hold that people’s history in the palms of their hands. Notwithstanding this oppression, as the African American history of its international law interests along with concurrent struggle in the academy shows, subordinated peoples can have a jurisprudence on which they act without a dominating people or group’s permission.

In this spirit, let me suggest two policy categories where contemporary lessons from the history of African American interests in international law can be drawn. I will then close by discussing a wider American governance category that frames such lessons. The two initial categories concern, first, lessons for African Americans on the need to more completely recognize and organize to act on our international law interests, and second, lessons for the U.S. treaty making process from the existence and inclusiveness of African American international law interests.

Since the late nineteenth century, with roots back to slavery, there has been a divergence of perspectives among African Americans about the wisdom of identifying and acting on their international law interests. The questions encompass those about the best political route of this people to liberation, those about African Americans’ limited resources for their own lives and communities, resources which are insufficient to be diverted towards international efforts, and finally those about whether to refrain from involvement in order to escape majority retaliation for daring to “meddle in” international issues. In my historical work, I reflected this divergence by focusing primarily on those black folks who did make claims to outside law, while also examining those who made claims to domestic law to garner relief from slavery and racism. I believe over the intervening years that this divergence has waxed and waned. Today it has weakened, but strong divergent residues remain in local communities for generally the same underlying reasons.

However, now African American interests in international law have been confirmed as lasting, and are increasingly being defined through various public African American-related issues, such as the emerging joinder of American slave reparations questions with slave trade reparations questions under international law, or the framing of police brutality issues under American obligations under the Torture Convention. We now all live in an intensely interdependent global community that willy-nilly penetrates into local communities. I believe that African Americans should take the lesson of their own international legal interests, and finally dissolve those remaining divergent perspectives which would still try to build a wall of purely domestic interests. The remaining attempts to maintain such a wall are being overtaken by global interdependence processes.

The Black International Tradition, of which African American international legal interests are an embedded part, is part of the present life of
African Americans and of the United States. Every domestic issue of concern to African Americans now, particularly with the rise of international human rights law, has its international analog. African Americans have already scratched the surface of the potential for political and intellectual mobilization around conjunctions of international legal norms, domestic deprivations, and rights-protection leverage. Now, this must become a normal process in mainstream African American political thinking rather than continuing to be relegated to what may be called the “far Black Left.” The Black Left, and its historical forebears who helped frame early African American claims to outside law, has served as the “canary in the mineshaft” to warn of oncoming survival and racial dangers in the political and economic status quo. It has then usually struggled for the doctrines located at the cutting edge of freedom processes in given situations. One example is the leadership of W.E.B. Du Bois on the United Nations Charter. Another is the National Conference of Black Lawyers. And so it is now time for the African American community as a whole, regarding its interests in international law, to overtake the Black Left on these issues.

This overtaking includes greater African American recognition of the extent to which its community has already drawn on the authority of its international legal interests. I suggest, for example, African Americans could more fully recognize the importance of Martin Luther King, Jr. as an international human rights leader. In 1960, around the time of the Sharpeville Massacre, King publicly opposed the South African system of apartheid that produced this crime and called upon African Americans to do the same – a call in opposition to American policy. At the time, he did not have much public company in doing so. His 1964 Nobel Peace Prize confirmed the global recognition of American civil rights issues as international human rights issues, and King’s leadership of the civil rights movement as that of a global human rights movement. His 1967 Riverside Church Speech may, in its own way, be as great as his “I have a Dream” speech four years earlier. It was nothing less than King’s deliberate argument for the illegality of the Vietnam War under international law, and for the reasons for African Americans – and all people – to oppose it to restore America’s moral mission. President Lyndon Johnson’s public excoriation of King for departing civil rights to meddle in international affairs only continued the national history of majority retaliation against significant “unpermitted” African American definitions of their own international interests.

An even larger example of African Americans overtaking their own Black Left, and perhaps not yet recognizing the full importance of their international law interests, is the Free South Africa Movement of the mid-1980s.
This movement represented the fusing of the American civil rights movement with the international human rights movement against South African apartheid, and against American policies about apartheid. It was pulled together nationally under leadership that included Congressman Charles Diggs, Congressman William Fauntroy, Randall Robinson of the NGO TransAfrica, Professor Goler Butcher, Gay McDougall, Reverend Leon Sullivan and his Sullivan Principles of corporate and investor responsibility against apartheid, much of the black community of churches, black caucuses in state legislatures and municipal governments, and other anti-apartheid and progressive groups and leaders across the country.

The Free South Africa Movement prescribed new national and international legal rights principles as it grew, including the obligation to divest from the international economic support processes and institutions of a foreign, racially-oppressive regime. It prescribed the norm that trade with an oppressor carries the liability of the trader giving aid to that oppressor, and therefore constitutes an endorsement of the racist policies of that regime. In essence, these principles placed international duties upon corporations to provide equal treatment and benefits to overseas black workers, notwithstanding the local law of South Africa. They essentially called for extending U.S. equal protection standards to unprotected overseas populations who are affected by U.S. policies.

The Free South Africa campaign grew into a national mass movement. It inexorably moved into Washington to take a major foreign policy issue away from the U.S. executive branch and its policy of "constructive engagement." In 1986, it produced veto-proof legislation, the Comprehensive Anti-Apartheid Act, to directly support South African liberation through economic sanctions and corporate obligations. In doing so, this movement, with the work of Reverend Sullivan and his Sullivan Principles as part of its codified expression, directly laid the foundation of the global principles and evolving law of multinational corporate human rights obligations and social responsibility towards vulnerable peoples within those multinationals' spheres of influence.

In essence, the Free South Africa Movement defined a major push to infuse international human rights norms within the domestic jurisdictions of both South Africa and the United States. It did so through new norms regulating the influence of major multinational companies based in America that had considerable economic impact in South Africa. This corporate regulation had considerable human rights law impact in the world community. Thus, the movement directly contributed to expanding expectations about the international legal doctrine of state responsibility, especially regarding duties of states relative to multinational corporations subject to their juris-
diction, and the American obligation to extend and promote global racial equality through regulation of multinational corporations.

But there has been a relative dearth of scholarly analysis and publications on the Free South Africa Movement, its issues and strategies. In light of the long, hard struggles to confirm African American interests in international law, I wonder whether the very success of this African American-led movement, in producing new and better American policy and law, has led us to be somewhat afraid of looking at it too closely. If so, I hope it is a fear soon vanquished.

III. LESSONS FOR THE U.S. TREATY-MAKING PROCESS

African Americans, other minority groups, and their perspectives tend to be sparsely, if at all represented in the rooms where key decisions about drafting and ratifying American treaties are made. The advent of Barack Obama as President modifies this observation, but only to a limited extent. President Obama, given his constitutional responsibilities and American racial limitations, cannot govern as the capstone embodiment of African American interests and goals. Thus, African American treaty interests must continue to be developed collectively, sometimes in opposition to Presidential policies.

A further lesson defines an analytical direction. For each American treaty, we must now ask two questions: first, what role does the treaty or its debates promise to play in African Americans’ normative debates around their next best route towards equality and liberation from racism; and second, since African American interests potentially relate to the entire spectrum of international law, how can we ensure that African American “permission” here is not confined only to rights-related treaties, but their interests are welcomed into all American and global international legal narratives?

The Treaty of Berlin of 1884, in which the United States had a strong interest but did not ratify, and by which European powers divided up Africa for their own aims, provides an example of the first question. It became a fulcrum around which the last stages of the nineteenth century African American debate about African emigration and colonization revolved.

The United Nations Charter, promulgated in 1946, is another such example. Its drafting and ratification became a fulcrum around which the following intense liberation issue revolved: whether African American rights in America could only finally be secured, including under law, by making common cause with colonized and newly independent African and other peoples of color still trapped in or just emerging formally from European imperial control, in their struggles for independence and sovereign rights. Such common cause would unroll irrespective of American foreign
policy regarding those populations. Or alternatively, whether the legal and strategic foundation of African Americans’ rights in America must prominently and exclusively rest on American law, on possible equitable rights interpreted under the Constitution, and on advocating supporting collective claims such as the history of black military service to the United States. The latter formulation would require African Americans’ international outreach to be consonant with Washington’s foreign policies, including towards overseas peoples of color, even as such policies were driven by both domestic racism and United States’ Cold War fears about communism.

Let me now briefly turn to the second question—namely, historical lessons about African American interests in international law relating to the inclusive content of those interests. The present range of such African American interests is expanding. For example, there are now more African American international law-related appointees in federal government positions, but this expansion should push into wider subject areas. Examples might include the desirability of a policy modifying the Nuclear Non-Proliferation Treaty of 1968, the interpretation of the Copenhagen “political agreement” on climate change, and the international legal issues regarding the melting of the Arctic polar icecap and continental shelf drilling under Law of the Sea and the rights of the Inuit People.

An equally important lesson is that the American public narrative, policy norms, and decisions about identifying questions that should be resolved under international law, and those that should exclude this law in favor of contingent negotiation, leveraging, accommodation, and coercion are no longer a monopoly of the American majority acting through Washington. This lesson includes questions about the proper judicial authority, national and international, over issues touching national sovereign sensitivities. But African American interests in international law evolved inherently touching American majority sovereign sensitivities, such as refuting the jurisdictional distinction between “slavery” and the “slave trade” in the early 1800s. Other such issues have included the judicial capability to order the President to honor America’s U.N. Security Council obligations against apartheid, and the recent U.S. attempts to undercut the authority of the International Criminal Court, though a slight recent shift of American policy may be noted.

A prime example here is the general judicial refusal to rule on the merits of the legality of the Vietnam War. This refusal brought America to the question of non-state international tribunals, including the Bertrand Russell Tribunal that contentiously adjudged the legality of that war. This in turn brings us to the participation of prominent African Americans on that non-state tribunal—James Baldwin and Stokley Carmichael, plus the testimony of a African American soldier about atrocities—and on other
international tribunals, such as Alice Walker and Cynthia McKinney on the Russell Tribunal on Palestine, now in a formative stage. So, here we have these African Americans asserting African American interests under international law, in officially scorned, non-state tribunals operating under international law. They can be interpreted as having recognized these interests in several senses:

- that neither the United States nor any other state had a monopoly to determine which important questions were to be excluded from international legal assessment under the rule of law;
- that such decisions belong to all concerned people, not excluding minorities;
- that their interests as African Americans extended to the question of the adequacy of international and national judicial institutions to make necessary decisions on the merits of historic legal issues;
- that those interests extended to joining a judicial or quasi-judicial arena independent of state power to determine such legal questions when they considered that the rule of law required it; and lastly,
- that their interests included the possibility that non-state tribunals for global issues have a continuing valuable role to play into the future.

But some other African Americans have taken a different path to define African American interests in the judicial function regarding international law. They have acted on the interest of African Americans entering into and improving existing established judicial institutions by the excellence of their legal acumen, insights, leadership, knowledge of oppression as the law should respond to it, and width of intellect. No better example exists than the tenure of Judge Gabrielle Kirk McDonald sitting on, then being elected President of, the International Criminal Tribunal for the former Yugoslavia, and her excellent legal work in, for example, the Tadic case. She now sits as an arbitration judge on the U.S.-Iranian Claims Tribunal.

IV. AFRICAN AMERICAN INTERESTS IN NATIONAL GOVERNANCE

Having identified a few of the lessons which flow from the confirmation of African American interests in international law, I will close by discussing a lesson pertaining to national governance.

I suggest that African American interests in international law generate major implications for the governance of America as a pluralistic nation
and for scholarly approaches to understanding American pluralism, including greater inclusion of African Americans’ opinions in research on racial policy attitudes. The challenge will be to incorporate the additional African American dynamism on key public issues spurred by these interests, while overcoming or ameliorating majority perceptions that such dynamism and interests represent a group threat to their welfare.

American governance and scholarship must now incorporate the trend, already underway, that African Americans and every minority and coherent disadvantaged group in the American process has, or will define, their own interests in international law in a globalized world. The central government/dominant group monopoly of interests, interpretations, and invocation has been lost, and international law interests are now quite irretrievably decentralized, notwithstanding continuing efforts at constitutional suppression, which, I believe, will increasingly be in vain.

In a broad sense, American governance strategies — state, local, and federal — must increasingly assume that group interests in international law, its application, and interpretation, will be publicly invoked and used to extend the perspectives of these groups independently out into the international community. This process will reshape the definitions of what is legitimately to be governed by international law under the rule of law, rather than exclusively under national law, or local discretionary, contingent, executive or commercial decision-making. National governance strategies must increasingly comprehend that these international legal invocations and actions by minorities and vulnerable groups are now embedded in the bundle of rights to which these groups and their members are fairly entitled. Such entitlement goes to both the least of groups, and to the most powerful, in their joint quest for leverage and domestic mobilization through international norms and legal process.

We may safely suspect, however, that those most powerful have been running down the field with their demanded entitlement for some time. Big banking, big corporations, federal (and, to a lesser extent, state) governments, big labor, big lobbyists, and representative groups of all of the above in their various iterations have worked out strategies to invoke international law interpreted in their interests, so as to leverage domestic governmental and social policies in the United States.

For example, multinational corporations have constantly pushed and leveraged doctrines supporting their international legal prerogatives of investment protection for their overseas foreign subsidiaries in host third and fourth world states. They push the importance of their investments for third world development and progress and to combat terrorism, to in turn push reshaping U.S. policy definitions of overseas “democracy” and therefore third world eligibility for U.S. trade, military, and development assis-
tance. They have done so, in maximizing their profits and influence, to try to exclude the international human rights of local workers and effective unions, although there is some degree of human rights protection through U.S. trade statutes applying to those countries. Multinational corporations have further mounted their pressure to formulate U.S. policy definitions of "democracy" in developing countries through the implementation of the equation expressing the degree to which that government welcomes U.S. corporate foreign investment, and the extent to which it protects among its people only a limited version of political and civil rights, and excludes economic, social and cultural rights. This leverage against sovereign peoples of color tends to be confirmed to corporate advantage with American support in bilateral investment agreements, resting under international treaty law.

In the same connection we note, in an adjacent policy arena regarding essential decision making within and about World Trade Organization appeals by the United States, there is a real question as to whether the appeal and U.S. litigation strategies, under state-determined international rules, are in a substantial percentage of cases, best understood as really being shaped and conducted by the U.S. major corporate players in interest – players who also may be major political campaign contributors – as versus their rival players opposite in the appeal, rather than as the independent strategy and best law and practices of the U.S. government in the national interest. As Sylvia Ostry, former Canadian ambassador during the Uruguay Round, famously said, "America does not have a trade policy. It has clients."

The potential for African Americans and other minority groups to "catch up" with such inside and outside strategies of using their international law interests to leverage the international obligations of the United States, and thus improve their own positions within the United States, has several implications. They pertain to the loss of this monopoly by powerful groups and institutions, including for leverage in treaty ratification and for the making of U.S. foreign policy.

The foreign policy question notably includes federal officials’ asserted constitutional prerogatives to contingently and discretionarily decide whether or not to violate American international legal obligations. These encompass violating Americans’ and other persons’ international human rights through assertions of exclusive federal and executive authority and through legally unreviewable decisions about national security requirements. Fortunately, the Supreme Court has recently somewhat limited the executive’s discretion. Constitutional reflections of dualism notwithstanding, I believe we are headed for the day when American international treaty and other international legal obligations, not least regarding human rights writ large, will belong to America’s multicultural people to directly invoke
and interpret, rather than being restricted to the government and the country’s most powerful actors.

The above issues, I suggest, also resonate in other ways in American governance. They directly imply the necessity in American politics and culture to widen the notion of group assimilation, especially racial assimilation, into the American ideal. Group assimilation must be widened to encompass the new reality that each contemporary and newly “assimilated” American group will no longer publicly rely on – nor can it be forced to rely on – Washington’s policies on the “correct” American posture on the content and choice of major international questions for the country, and especially not for the correct posture on the role and authority of international law and lawmaking to govern these questions. Currently, there is the heavy Washington reliance on patriotism, obscurity, vague invocations of national interests, scare tactics regarding national enemies, friendly interpretations of constitutional authority, and the momentum of federal legal authority and practice, to mobilize sufficient national cooperation to realize globalized American policies.

The broad implications of African American interests in international law lead me to suggest, however, that Washington must increasingly rely on the persuasive substantive and value credibility of such policies to this wider and more diverse range of international legal constituencies in the America polity. The proposed policies increasingly must be legitimate to a diverse America that comprises a majority of peoples of color who are increasingly organized to project their own world-views about law, heritage, and justice into the world community. Washington’s proposed policies must be persuasive under these groups’ own interpretations of their own jurisprudence. Those group interpretations necessarily intersect in a globalized world with international law norms, and not least international human rights law norms writ large, as well as with notions of the American national interest. They will integrate those world-views into their American concerns about their continuing rights and welfare in their lives on American territory.

To the extent that Washington and other dominating factions try to reject this growing reality, they will only be able to try through strategies of heavier secrecy, suppression of public voices and government access, and intensified policies of majority/minority subordination. In the foreseeable future, however, the traditional American majority will no longer be the majority. They will only be the people and groups clinging, by persuasive or non-persuasive means, to the power of the American state and to the levers of formal and codified domestic lawmaking.
CONCLUSION

From the perspective of History moving into contemporary narrative, we can see that American law, culture, domination, and threats of retaliation which were designed from early slavery to prevent African-heritage and African American folks from making claims to outside law, including international law, as a basis for their rights to be free in the United States, have increasingly converged with the growing American international legal obligations to protect the rights of African Americans to do just that.

We see also, through the present day, that this convergence has been met, as a matter of American policy, culture, racism, and subordination, with the expenditure of much energy to deny the existence of such American obligations to African Americans. Much energy has been spent to deny this convergence through the employment of legal doctrine and strategies, ranging from the narrative of W.E.B. Du Bois and the American ratification of the U.N. Charter regarding the rise of international human rights law, to the later strategies of Washington negating its ratification of major human rights and racial discrimination treaties with many reservations, declarations, and understandings designed to hold U.S. law harmless from international rights obligations.

We go on to note other recent strategies of Washington refusing to recognize, notwithstanding a global treaty with 120 ratifications, South African apartheid as an international crime against humanity. More recently, we note both President Bush’s and President Obama’s refusals to send official delegations to global conferences, such as Durban I and Durban II, to discuss the framing of international legal norms against the wrongfulness and destructive consequences of the international slave trade, and even denouncing the participants in those conferences.

This convergence of the implications of African American interests in international law, and international obligations of the United States to protect, incorporate, and even promote those interests, is a challenge that must be met to govern America in its dynamic multiculturalism as a major state in the world community. We can indeed note that the ongoing American story is slowly making some adjustments in this general direction while continuing to deny the reality of other elements of the same convergence, but this genie cannot be squeezed back into the bottle, whether by forcible police state suppression or otherwise.

Thus, we now ask how equitably, under law, will we manage this challenge and move to a new dimension of pluralistic governance. That dimension must accept as the new American political and legal normality African Americans, minorities, and other vulnerable groups framing, invok-
ing, and using their interests in international law both in harmony with and against American government decision making, and directly advancing their international community goals, including for the greater protection of their rights in America. Moving to this new pluralistic normality will potentially affect major questions in the American narrative. These will include interpretations of its Constitution that are hopefully wise enough not to try to roll back forces of History larger than any reality of American domestic or international power, resources, or tragically misguided national resolve. We in the academy have our essential and irreplaceable role to play in understanding, further explaining, and defining the equitable requirements of this convergence. I am optimistic that we will play it well.