INTRODUCTION
Afro-America and International Law

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The appearance in the United States of a collection of essays by and about people of African heritage and international law is of great significance in and of itself. Long overdue as a direction of inquiry, such a collection is tangible reflection of international African interests that must be protected in the swirls of interdependent global community processes. Further, it is confirmation that international legal problems and doctrines—affecting the lives of Black people, as well as others—cannot be left solely to others to define. Accordingly, this is the first collection on international law by an American Black-oriented law journal, and to my knowledge the first by any law journal on Black people and international law. The *Black Law Journal* is to be commended for its vision in producing it.

For any collection of Black scholarship, or scholarship about demonstrated areas of Black concern, the question is inevitably asked "What good is it to the perpetual struggle against racial discrimination?" This collection, plus litigation unfolding and other inquiries now beginning to bear fruit, points towards an inevitably affirmative answer, though there are other equally valid rationales for scholarship. For too long international law was thought to be a luxury for Black lawyers and legal scholars, in that it was decidedly peripheral to "survival" issues such as those presented by many constitutional and criminal law cases. However, in recent years we have seen claims made in those and other areas of law ring somewhat hollow, with the cases being "won" in court but then often followed immediately by an indecisive morass of attempted executions of judgments and court orders. To the extent that those claims were originally intended as levers to bring about changes towards nationwide justice, many have fallen somewhat short. But this observation does not in the least deny both the value of those claims meeting success and the importance of the other attempts.

Now, a new supplementary source of legal claims is needed by Black people which is tailored to the changes in the world—and in Afro-American perspectives—since 1954 when *Brown* was prematurely viewed as a culminating point in legal process for Black people. Such a new source, and the foundation for new attempts to increase the systemic influence of Afro-America by importing an emerging global legal consensus, seemingly may be found in: 1) the incorporation of international law doctrine into federal and state law as a source of rights or an additional support for existing (constitutional) rights; 2) the increased awareness of the potential utility and advantage of Black claims in international law to regularize contact and assistance from one African national grouping to another; and 3) an increased awareness of how influence exercised internationally by Afro-Americans carries the potential for favorable domestic results.

Accordingly, one meaning of 1) is that it is now squarely within Afro-America's interests to find better ways to either utilize or hurdle the barriers presented by doctrines such as those barring 'self-executing' treaties, and enhance the extent to which treaty provisions, advantageous in the content and scope of legal obligations they import, can be invoked as part of the "law of the land" under Art. VI of the U.S. Constitution to either support existing constitutional rights or create new rights favorable to Black people. There has been increased authority given in international law to major multilateral statements of human rights principles, such as the Universal Declaration of Human Rights, and concurrently the last generation has seen the emergence of a body of international law providing minimum global protection for human rights. The new Carter Administration has given signs of recognizing that increased authority. Afro-American interests would seem here best served by important treaties, which spell out rights often wider in scope than those currently available in American law, being interpreted as self-executing on their original texts, and by not either having those provisions reduced by judicial rulings to 'moral exhortations' conveying no legal right, nor having them convey only such right as Congress grants by executing legislation. The same interests would also seem to be served by doctrines making it easier to establish the existence of a principle of customary international law, in terms of accelerated expectations for both *opinio juris* and the requisite degree and time of state practice.

By the same token 2) and 3) highlight the pivotal position and potential reverberatory effect that Afro-America, acting through groups such as the Congressional Black Caucus and the National Conference of Black Lawyers, might have on U.S. policy towards Africa and therefore on policy trends in Africa and elsewhere. The long-standing formerly utopian dream of an Afro-American lobby in Washington to protect and enhance African interests relative to American foreign policy is now several steps closer to reality. This has been brought about through the increased consciousness and efforts of several groups in the Black community, and especially through the persistent mobilization of key Congressional subcommittees and outside support by members of the Caucus. Additionally, the federal courts may emerge as a key arena in this respect if appropriate causes of action are devised. In another sense the growing (though slowly) number of Afro-Americans in foreign policy decision-making positions, in conjunction with African-oriented Black academics might constitute a second lobby.

This is especially the case for the complex of questions surrounding racism in Southern Africa and the positions thereon of the U.S. government, its major foreign allies, and relevant multinational corporations, as all of these compare with the interests and preferences of Black people. Such questions include those of choice of law and of law and jurisdiction around the particular body of law on human rights issues to which a corporate subsidiary doing business under a white Southern African regime is subject; the legal basis and enforceability of U.S. Constitutional and legislative anti-discrimination guarantees vis-a-vis the operations of overseas subsidiaries of American-based multinationals; the decreasing permissibility under international law of racially discriminatory policies by overseas multinational subsidiaries and of acquiescence therein by the multinational's home government; and U.S. positions advocated and taken in the United Nations on other international law issues relevant to the more efficient international

enforcement of the law of human rights. Of similar importance are U.S. policy positions taken relevant to achieving an equitable reallocation of global resources to the third and 'fourth' worlds, plus support given (or withheld) for increasing the law-making competence of the UN General Assembly and other significant UN organs. This latter question has special meaning for the struggle to achieve independence for Namibia through, *inter alia*, attempts to strengthen the enforceability of the recent Decree on Namibian Resources by the UN Council on Namibia. Moreover, raising such a question signals the possibility of arguing that various pieces of "international legislation" give rise under certain circumstances to new rights and duties through the UN Charter binding on domestic courts, such as the General Assembly's Charter of Economic Rights and Duties. That question also relates back to 1) *supra* as an area where new law needs making to creatively mobilize the UN Charter in U.S. courts for confirming and enforcing rights in American legal process beneficial both to Southern Africa liberation movements and Afro-American struggles. Some foundation for this is already on the books in the case of *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. den.* 411 U.S. 931, and cases following, which positive implications for mandatory Security Council resolutions to bind U.S. Courts as treaty commitments, and thus for judicial claims in this country to directly aid the struggle against racism in Rhodesia. But that case illustrates the need to develop compelling arguments on issues concerning self-executing treaties and the political questions doctrine in order to fully mobilize international treaty commitments in domestic courts for both domestic and international support for peoples of African heritage.

As set out above, 2) and 3) also imply invoking existing U.S. legislation of international impact, such as tariff legislation and even the Trading-with-the-Enemy Act, plus other existing doctrines of American law such as that of corporate waste as a compelling reason to terminate racism-supporting corporate operations in Namibia and South Africa that may be illegal under recent international law—by new imaginative judicial claims. Such efforts promise to assist in the elimination of *apartheid.* Implied further is the systematic identification and presentation of claims in administrative and other quasi-governmental arenas in Washington and elsewhere where crucial decisions are made about the above questions as they relate to Africa, Afro-America and the protection of human and economic rights. An example would be the Department of the Treasury as it determines U.S. policy towards International Monetary Fund and Ex-Import Bank decisions. The same actions also are of potential use to compel more equitable treatment of Afro-Americans in the United States by the American home companies of the same multinationals.

Further, 1) and 3) *supra*, strongly imply that it is in Afro-America's interests, as well as in the interests of nationally-encapsulated peoples of African heritage wherever located around the globe, to understand the constitutive and public order expectations of South African *apartheid* as it currently functions. Particularly should be examined the pervasive use of legal process as a keystone strategy of its survival in South Africa, in order to ascertain warning signs of the advent of similar pestilence against Black people in other national societies, including the United States. In that case, the mobilization of overwhelming counter-claims would surely head the list of African heritage priorities in that particular state. Similar useful lessons can be gleaned from the evolution into

illegality under international law of South African *apartheid*, notwithstanding claims under Art. 2(7) of the U.N. Charter that its practice as a national policy lies within South Africa's "domestic jurisdiction" and thus is secure from authoritative international scrutiny. Such studies are immediately useful in formulating legal claims that less crude but equally real practices of racial oppression in other states are likewise subject to the same scrutiny. In this connection, it would not seem in Afro-America's interests to adopt or acquiesce in legal theories, claims or decisions the heart of whose reasoning incorporates the notion that South Africa's *apartheid* is *sui generis* in the eyes of the law and therefore unsuitable as precedent and warning for legal decisionmakers. Rather, the commonality of racial oppression and of the legal strategies to enforce it should be kept in the forefront of legislative and judicial attention. Thus, recent suggestions that the adoption of a federal racial code to implement a national Black reparations program would take precedence over the continuing authority of the color-blind principle in the law of equal protection, on the partial grounds that South African-type oppression arising from such a code "simply cannot happen here," should be viewed with a jaundiced eye. This caution is warranted because the lack of a principle of equality, in the South African law of judicial review of executive and legislative enactments, early opened and keeps clear one of the principal jurisprudential streets for *apartheid*'s march.

Our thinking about the future uses of international legal claims should not wither with the notions here. Rather it should be extended creatively to look towards the establishment of international institutions designed specifically to facilitate international communication, for defined purposes and transcending national barriers, among peoples of African heritage throughout the global community. The task is not only to establish such expectations and institutions, but to develop claims at law to give them maximum protection in both international and domestic legal processes.

This issue of the *Black Law Journal*, then, symbolizes the necessity for Black people in America to perceive the global community through their own eyes, and to develop international legal strategies to simultaneously do what is right by their overseas kin while importing new international resources at law through legislative and judicial decisions to get more equity done in America. It is accordingly my privilege to have been associated with the realization of this collection.