The International Law Jurisprudence of Thurgood Marshall

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Introduction

International law conjures up images of large firm lawyers jetting from one glamorous international location to another making deals for an international multilateral corporation. Or one’s thoughts may tend toward civil servants working for their country’s foreign ministry or for an international organization negotiating treaties that stop wars or arguing fine points of public international law before an international tribunal in The Hague or Strasbourg, or some similar place not named Pompano Beach, Florida, Houston, Texas, St. Louis, Missouri, Norman, Oklahoma, Topeka, Kansas even New York City. But the latter are all places where Thurgood Marshall plied his trade as a civil rights lawyer in the 1930s, 40s, and 50s—places where there was very little glamour (unless one considers cramped office space at Columbus Circle New York City offices of the NAACP Legal Defense Fund glamorous). These locales challenge traditional images of international law and international law practice. The images of the civil rights era emblazoned in the minds of anyone old enough to remember old news reports are anything but glamorous (just as most of what is truly international law is not particularly glamorous). But they were locations where important changes in how states’ view their responsibility toward individuals were made, implemented, and publicized such that they became important stops along the path of development of international law.

This article will examine how Thurgood Marshall as a litigator, activist, private statesman, and Associate Justice, influenced this process, leading to the development of international law at various stages of his life.

To understand how civil rights litigation and activism in the United States can be a kind of international law practice, and why Marshall was an international lawyer, one needs to understand how international law is made. Section II describes the process of international legal development and establishes how it would be susceptible to the varying

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influences of Marshall in his various roles during his professional life. Absent an exclusive formal structure of law making, international legal development relies in part on the formal legal structures of the constituent sovereign states of international society. Civil rights attorneys in the United States took advantage of the formal structure of law making in the United States. At the same time, by default and likely not by design, these attorneys took advantage of the lack of structure of, and reliance on state structure by, international law. The process involved a frustrating and dangerous era of trench warfare in backwater courts, led first by Charles Hamilton Houston, and later Thurgood Marshall. The section will examine the constitutional principles involved in key civil rights litigation and how change here influenced change in the counterpart principles in international law.

Thurgood Marshall and his colleagues were not international frequent fliers. But in an era that saw the beginnings of globalization and new media, an era fraught by the paranoia of the Cold War, and the uncharted territory of decolonization, the civil rights strife and legal developments in the richest and most influential country in the world was observed, examined, studied, and emulated internationally.

Fully related to the influence of Marshall’s “litigation” period on international human rights development, is a little known episode in his life during which he was involved in the negotiations for Kenyan independence. Section III recounts the history of this period and the specific issues raised in the Kenyan independence process. Asked to take part because his reputation for success as an American civil rights lawyer (and a common law one at that) had gone global, Marshall’s draftsmanship reflected the values of classical Lockean liberalism. The American civil rights strategy that Marshall and his mentor, Howard law dean, Charles Hamilton Houston had developed, was to call out establishment elites for their failure to live up to this very same Lockean ideal. The Kenyan period of the Marshall legacy raises the question of whether this same tactic was appropriate as an anti-imperialist strategy as well—whether western powers adhered to their own notions of western liberalism within their colonial possessions, or whether new rules applied to “natives” in their own land. If so, this would call into question the usual understanding of a common and shared history of struggle within the African Diaspora, and beyond to other colonial peoples, with the American Civil Rights Movement. Additionally, legal concepts adopted in the original Kenyan independence constitution reflecting western ideas of equal rights and property rights influenced international legal development along the same lines, anticipating North/South --differences on the principle of international rule of law.
Section IV continues the examination into the Supreme Court years. In part due to a reputation developed as a younger man, and in part because the cache of American Supreme Court Jurisprudence, Thurgood Marshall continued to exert some influence as an Associate Justice, on law outside of the United States. In much the same way, if not with the same splash, as his litigation period, Marshall’s opinions and dissents have been cited as influential in court cases in other states, particularly by common law states. As legal principles reach consensus in a variety of states, an argument can be made that the principle is a general principle worthy of the name international law.

The process of international law development sounds like a simple one of loose rules and non-elaborate process, as if any behavior could influence international law. Just the opposite is true. Precisely because the process is a mix of the formal and informal (most of what this article claims is Marshall’s legacy stems from the informal side), picking the domestic law developments that influence international law is one controlled by elites that themselves are susceptible to varying influences, not to mention occasional tendencies toward carelessness or under-inclusiveness. So the fact that developments in equal protection law in the United States (the high point of which was *Brown v. Board of Education of Topeka, Kansas*) became international phenomena speaks to the impact and importance, if not near perfection of the litigation strategy of Marshall and his lieutenants.

I. History and fundamentals of International Law

The international legal system in place after the Treaty of Westphalia that established nation states as the fundamental sovereign order, was originally called the law of nations which, when formalized in the highly influential writings of seventeenth century legal philosopher Hugo Grotius, referred to binding legal rules governing sovereign states. When compared to internal constitutional systems it was essentially a set of rather underdeveloped rules (tending toward the informal) governing how sovereign states dealt with each other in war, interstate relations, commerce, and the treatment of diplomats. International law did not have an international sovereign entity to

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8 MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1-2 (3d ed. 1999).
enforce international law.\textsuperscript{10} It was a system dependent upon notions of mutual benefit.\textsuperscript{11} The gravamen of this system was and is the treaty, and the corner stone of the treaty system was the Latin pact \textit{sunt servanda} meaning simply that agreements must be kept.\textsuperscript{12} The system of mutual benefit would not survive unless there was at the least a legal means to hold states responsible for their own breach of a treaty obligation regardless of changing political conditions. In fact, \textit{pacta sunt servanda} is the legal embodiment of mutual benefit—so much so that no nation has ever challenged the fundamental principle.\textsuperscript{13} The system was rudimentary in the sense that states would do as they pleased anyway despite the legal obligation to follow treaties that they agreed to. But in doing so, states faced being cast as lawbreakers under the principle of \textit{pacta sunt servanda}. That is because the principle focus of international law was state obligations toward each other. It was a system based on state relations. Hence the maxim \textit{pacta sunt servanda} enshrined the unique essentiality of state relations in international law. The rational implication of this system is one of sovereignty as understood as respect. Respect is given if received, hence mutual benefit. Both translate into inviolability, and the tacit understanding of such a system could only be non-interference with internal affairs.\textsuperscript{14}

\section*{A. International Humanitarian and International Human Rights Law}

That tacit understanding changed rather abruptly after World War II. Though there were moves in the direction of a legal development holding states responsible for how they treated people within their borders, the atrocities of World War II pushed these developments into overdrive. As British jurist Hersch Lauterpacht put it in 1945:

\begin{quote}
In the course of the Second World War “the enthronement of the rights of man” was repeatedly declared to constitute one of the major purposes of the war. The great contest…was imposed upon the the world by a power whose very essence lay in the denial of the rights of man as against the omnipotence of the State…
\end{quote}

Lauterpacht continues:

\begin{quote}
[The problem of the protection of fundamental rights of man] [t]ouching as it does, intimately upon the relations of the State and the individual…it implies a more drastic interference with the sovereignty of the State than the
\end{quote}

\begin{footnotes}
\footnoteref{10} Janis, \textit{Id.} at 157.
\footnoteref{11} \textit{Id.}
\footnoteref{12} Hersch Lauterpacht, \textit{The Grotian Tradition in International Law}, 23 B.R.I.L 1, 22 (1946).
\footnoteref{13} \textsc{Anthony D’Amato}, \textsc{International Law Anthology} 81 (1994).
\footnoteref{14} \textsc{James L. Brierly, The Law of Nations} 402 (1945).
\end{footnotes}
renunciation of war and the acceptance of the principle of compulsory judicial settlement.\textsuperscript{15}

It may be sufficient to recount the horrors of World War II as simple justification for a change of direction in international law. Yet, such a foundational change would had to have been accompanied by a theoretical change.

However, sometimes circumstances precipitate theory. Though foundational, state sovereignty and all of its theoretical acoutrements gave way or became amenable to theoretical modification. As one writer put it:

Prior to the Second World War, as long as a state was in effective control of its people and territory, what occurred within its borders was by and large shielded from scrutiny by the principle of state sovereignty. The development and strengthening of international human rights norms have placed some limits on this principle. These limits, however, are consistent with, and to some extent a consequence of recognition that effective control is an increasingly inadequate means of ensuring global stability. The articulation of the right to self-determination after the Second World War, for example, was not a radical norm shift, but rather was viewed as related to the prevention and reduction of conflict. For a world emerging from a war caused in part by one of the most devastating failures of democracy, the concepts of democracy, peace, and stability were vitally linked.\textsuperscript{16}

Hence the core standard values in western liberal democratic systems of democracy, peace and stability were, the reasoning would appear to be, achievable only by interference by the law with state sovereignty. It had been assumed prior to the war, that these core values supported by the non-interference doctrine and state sovereignty, would fuel internal respect for human rights.\textsuperscript{17} World War II obliterated that assumption.

So finally, it was a matter of international interest how states treated persons within their borders—and those persons could be their own citizens and residents.\textsuperscript{18} International human rights law, concerned most directly with the implementation of individual rights domestically at peacetime, began developing during this period.

\textsuperscript{15} HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN v-vi (1944).
\textsuperscript{17} See id.
The first major “legal” act to implement a regime of human rights in international society was the United Nations’ Universal Declaration of Human Rights (“UDHR”), a project of former First Lady Eleanor Roosevelt who served as the chair of the drafting committee. The UDHR became a “constitution” of sorts for the development of more specific rules governing how states treated its own people in times of peace. The UDHR was, however, not strictly a legal document. As a declaration of the United Nations General Assembly (“GA”), it did not carry the legal force similar to that of a national parliament by virtue of the powers granted to the GA under the United Nations Charter. As will be developed further, because international law was rooted in a less formal manner of law making than its domestic counterparts, General Assembly declarations would eventually be looked upon as some evidence of international customary law, though not strictly as legislation.

B. Sources of International Law

The leading listing of international law sources can be found in the Statute of the International Court of Justice (or World Court). The Court is the principal legal body in international law. While neither it nor international law jurisprudence is structured to accommodate an international Supreme Court, it is considered the authoritative international legal tribunal in the world and serves as a quasi judicial

21 See Kathleen Renee Cronin-Furman, 60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect, 25 AM. U. INT’L. L. REV. 175, 182 (2010), pointing out that the “United States, in particular, was adamant that the UDHR “was not a legal document and possessed no legally binding force,” but was instead “a declaration of basic principles of human rights and freedoms,” referencing Eleanor Roosevelt, U.S. Representative to the General Assembly, statement during the General Assembly’s Adoption of the UDHR (Dec. 9, 1948), in Dep’t St. Bull., Dec. 19, 1948, at 751 (emphasizing that the UDHR is not intended to be a treaty or an international agreement but a set of broad principles of rights and freedoms). See also Hersch Lauterpacht, The Universal Declaration of Human Rights, 25 BRIT. Y.B. INT’L. L. 354, 356 (1948).
22 U.N. Charter Chap. IV General Assembly. The powers are limited to recommendations and initiation of studies and initiatives on the development of law:

The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

23 See Flores v. S. Peru Copper Corp., 414 F.3d 233 (2005).
arm of the United Nations system. Section 38 of the Statute identifies the sources of law the Court uses to decide cases:

1. The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. International custom, as evidence of a general practice accepted as law;

   c. The general principles of law recognized by civilized nations;

   d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

The article describes a law making process in international law that is both formal and informal relying on international process, interstate interconnectivity, and intrastate legal development. For example, international conventions are multilateral treaties and represent international legal process typified by a call for law making by the United Nations General Assembly, and the convening of a process sponsored by the UN International Law Commission.

International custom is both interstate and intra state in that it develops from state practice which can be both external practice toward state partners or internal practice toward persons. Custom is recognized when, in either venue, a state regards a behavior as required by law, or opinion juris sive necessitatis.

General principles are principles of law that are thought to be common to all nations. To distinguish this from the first two sources, which are clearly of an international character, it is accepted that the general principles are based upon the domestic laws of the various nations. Perhaps another way of putting it is that there are certain domestic legal principles that states tend to accept and form part of their corpus juris or basic law because they have been found to be indispensable to a functioning legal polity. Examples include certain principles of procedure, the principle of good faith, and the res judicata.

Judicial decisions and the teachings of the most highly qualified publicists of the various nations are considered subsidiary sources of law. That section has been interpreted as describing a somewhat lower

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25 Statute of the Int’l. Court of Justice, art. 38.
27 See Alain Pellet, Article 38 in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 667, 769 (Andreas Zimmerman et al. eds., 2006).
28 Id.
29 Id. at 768-769.
tiered, or subsidiary means of “confirming” or “clarifying” rules found in the prior subsections, and not of creating rules. The section applies to decisions of the International Courts of Justice (ICJ) itself, as well as those of international tribunals, and domestic courts, though there is debate on whether 38(d) applies to domestic decisions, or whether they are better classed as evidence of state practice in determining customary international law which would fall under 38(b).

C. Marshall’s body of work as a Source of International Law

As will be shown, what is referred to here as Marshall’s “international jurisprudence” consists of the avenues by which his work as a lawyer or jurist influenced international legal development. Using Article 38 it is clear that Marshall’s main impact was in the area of domestic judicial decisions. With the regard to the split in opinion on how domestic court decisions are regarded, either way, coming from the highest court of the United States, the Brown and its progeny can easily be viewed as at least a subsidiary means of legal development, and very possibly evidence of United States state practice.

Brown, however, influenced developments in other countries as decisions of several high courts include references to the desegregation case, a trend that demonstrates Marshall’s influence on foreign law, but also could be seen as setting the potential for developing customary law as other countries demonstrate through their court decisions and practice their acceptance of the desegregation principle.

Also important to Justice Marshall’s legacy in international law is the role played by Brown and other cases in the desegregation area that lead to the International Convention to Eliminate All Forms of Racism, because, as will be demonstrated, there is a strong presumption that civil rights litigation in the U.S. influenced the development of U.N. core principles that addressed specifically the practice of segregation, a process that culminated in the Racism Treaty specifically prohibiting the practice.

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30 Id. at 784.
31 Because the Statute itself denies precedential value to prior decisions of the Court, at best they are subsidiary means of determining law. Statute of the Int’l Court of Justice, art. 59. That notwithstanding, ICJ decisions are understood to carry a lot of weight in decisions of the Court. Pellet et al. supra note 26 at 1244. Note also the tension between the need for consistency and the rule at article 59 in this statement by the Court in the Kosovo case: [The Court ] must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely connected cases.

Legality of the Use of Force (Yugoslavia/Belgium), Preliminary Objections.
32 See discussion infra note 77 discussing the Racism Covenant.
33 Id. at 788.
34 See note 80 and accompanying text infra.
Furthermore, to the extent that it is possible to identify a civilized nation, general principles of law recognized by such usually refers to procedural principles like res judicata, but it most certainly also refers to principles like due process of law and equal protection. Though due process of law and equal protection were around before Marshall’s legal successes, it was his major success that re-defined these principles in a way that was remarkable and surprising for the time. The Brown decision stated what seems obvious today, but was by no means obvious in 1954. By 1960, the United Nations began speaking of equal protection as including an obligation to end segregation for the first time in an international document.  

D. Chronology of U.S and International Developments before Brown

The principle attorneys in the civil rights struggle most certainly were aware of their role in international legal development as they were all sophisticated lawyers who went to top schools and probably studied international law at some point in their careers. Yet they were focused on their cases in the small backwaters of the south, mid west, north and west, and likely did not have the time to worry about how their cases were being perceived in international law communities. But the National Association for the Advancement of Colored People (NAACP) did send observers to the conference that set up the United Nations in 1945, and the organization filed a petition to the U.N. urging it to adopt measures protecting minority rights.

a. NAACP and the 1919 and 1921 Pan African Congresses

That it would petition the U.N. when human rights law was at its infancy should be understood within the context of the Association’s previous involvement in a world movement to move human rights to the top of the international law/diplomacy agenda. W.E.B. Du Bois, the editor of the NAACP’s magazine, the Crisis, was instrumental in the development of Pan Africanism as a concept and political philosophy, organizing the post World War I 1919 Pan African Congress as well as the second one in 1921.

The immediate post war period was seen by Du Bois as an opportunity to exert some influence on the inevitable post war changes that he called a “great transformation of the world”. In fact the 1919 Congress was located in Paris for the proximity to the decision makers.

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35 See infra note 65 and accompanying text.
37 Naacp delegation to SF.
The key goal of the Congress and the NAACP’s involvement was to put international rights issues of people of color in the forefront. In 1919 and 1921, international rights issues meant colonialism. That colonialism might eclipse basic rights advocacy in the United States was a concern of the NAACP, though it appears that the organization was willing to finesse the issue by assuring its supporters that civil rights for blacks in the United States would remain its principle concern. It does appear that internationalizing US domestic issues was a non-starter, as Du Bois said, while organizing the first Congress, that bringing up lynching there would have meant his expulsion apparently from France in large part because of American skittishness against embarrassment at the talks.

The acceptance of the NAACP’s international focus cuts two ways. In one sense it exposed the NAACP to criticism from more parochial supporters and critics who felt that the organization should focus its attention on domestic issues. That notwithstanding, it represented a willingness on the part of the Association to involve itself internationally even if any domestic dividend was nominal.

On the other hand, the Congresses represented for Du Bois an obvious fusion of interests between African Americans, and Africans of the Diaspora. Though issues ranging from self-determination and League of Nations involvement, the second Pan African Congress’ call for equal political, civil, and social privileges for black and white citizens—a demand directed toward the European colonial powers, with clear implications for the US domestic scene.

Hence the genesis of the thinking behind the Association’s participation as an NGO at the beginning of the United Nations was that international law could theoretically be used as an external influence to help in the development of domestic law was certainly understood. This time access was local (San Francisco instead of Paris) and the petitions presented represented United States African American concerns. But with the NAACP’s history in Europe following the First World War, it goes without saying that the same consciousness that understood the importance of international law in addressing racism in the United States would have been aware of the impact domestic civil rights litigation could have on international legal developments as well.

b. Key Supreme Court Litigation 1930s-1940s

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39 Id.
40 Id. at 20.
41 Id.
Prior to Brown, the NAACP legal team was involved in a number of cases that established or helped to establish important core principles of our civil liberties and civil rights law in this country. Perhaps the most dramatic departure from civility within the legal system in the U.S. was the practice of government not only allowing segregation of the races to exist, but to mandate and enforce the separation as a matter of government policy. Other matters of civil rights were challenged by the NAACP legal team headed by Marshall and, until his death in the early 50’s, his mentor Charles Hamilton Houston, such as the lack of universal suffrage, in the Houston, Texas case of Smith v. Allright and discriminatory real estate covenants in Shelley v. Kraemer. And though each of these and others were huge wins for the plaintiffs’ lawyers in those cases, it was the cases challenging outright segregation and the illegality of state enforced separate development that were the principle contributions of Marshall’s team before Brown. Brown is significant in that it eliminated any vestige of state justification made for segregation.

Equality should be, in general, an easy concept to understand, and once a polity commits itself to the principle, and, as in the case of the United States after the Civil War, gets over notions of slavery, inherent inferiority (at least in law) and the acceptability of such notions, the rest should be easy. However, the Supreme Court threw a wrench into the logical process by creating a new logic that undermined constitutional protections for two generations. Reasoning that the states could, consistent with the Fourteenth Amendment’s Equal Protection Clause, provide separate but equal treatment to its residents based on race, the

In the area of housing covenants, the legal circumstances are different. In Canada, in the 1945 case of In Re Drummond Wren, the Ontario Supreme Court ruled that a housing covenant prohibiting sales to “Jews or persons of objectionable nationalities” was unenforceable as a violation of both Canadian Law and Canada’s obligation under the U.N. Charter’s anti-discrimination language at articles 1 and 55. Similarly Hurd v. Hodges, 334 U.S. 24 (a companion case to the landmark Shelley v. Kraemer), ended segregation as inconsistent with due process and the “public policy of the United States as manifested in the Constitution, treaties, federal statutes and applicable legal precedents.” Hurd at 35. These North American cases dealt with state or provincial court enforcement of discriminatory housing covenants. In the US cases, an outright judicial rejection of segregation was possible without overturning Plessy because an alternative and theoretically equal yet separate provision of benefits and service could not be provided in the area of housing covenants due to the nature of the subject. However, in Canada, lacking a history overtly similar to the US Jim Crow segregation legacy with judicial endorsement, Wren may have been the “bright line” anti-segregation case for that legal society. But in the United States, the outright rejection of segregation as having any place in a polity professing equality as a standard right, Brown was the first case to move in that direction.

See supra note 2.
See supra note 3. It would be all too convenient to claim that Brown was the first decision by a major judicial body to proclaim segregation is in conflict with the notion of equality without qualification. First of all, in the United States, states that failed to meet the rather meek requirements of Plessy v. Ferguson in higher education were ordered to desegregate. See 163 U.S. 537, (1896). However, in these cases, separate but equal was simply an option that the losing states, perhaps out of racism fueled with arrogance, did not bother to try to achieve.
Court in the 1896 case of *Plessy v. Ferguson* became complicit in the cynical game of denying true equality between the races. The basic flaw in the Court’s holding was explained in the dissent filed by Justice John Marshall Harlan:

> [W]hat can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

The very need or desirability on the part of the state to separate blacks and other non-whites from whites undermined the notion of legal equality. Yet for nearly 60 years this was constitutional doctrine.

The illogical character of the doctrine apparently was lost on government officials and state and federal judges until the *Brown* decision. Civil rights attorneys pursued equality under the “new” logic of *Plessy* in several cases pre-dating *Brown*. Thurgood Marshall’s first major case on the subject was the Maryland state case called *Pearson v. Murray*. In a tactic that became somewhat standard on the part of the states once it became clear that *Plessy* was under attack, Maryland claimed that a program that its offer to assist the plaintiff in getting a legal education elsewhere satisfied the Constitution. The state high court dismissed this position ordering the plaintiff be admitted to the University of Maryland School of Law. The same strategy was reviewed by the United States Supreme Court in *Missouri Ex Rel. Gaines v. Canada* and rejected. Texas and Missouri tried novel but equally objectionable evasions of the *Plessy* standard. Texas tried setting up a makeshift law school for black students, and Oklahoma admitted a black graduate student to its flagship university, but severely restricted his access and mobility on campus. Both scenarios were found by the Supreme Court to be unacceptable and integration of the respective programs was ordered, not because segregation was unacceptable, but because the alternatives to integration were not deemed equal.

*Brown v. Board of Education of Topeka, Kansas* was alphabetically the first case in a group five presented for appeal to the Supreme Court. Each dealt with elementary and secondary level education and in each the issue presented by the plaintiffs represented by Marshall and the

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45 *Id.*
46 *Id.* at 551-552.
47 182 A. 590 (Md. 1936).
48 305 U.S. 337 (1938).
50 See supra note 4.
51 See supra note 5.
NAACP legal team was not whether *Plessy* had been complied with, but was whether separate but equal could ever be constitutional. Recognizing the logic of John Marshall Harlan two generations earlier and discarding the illogic of the interim period, the Supreme Court ruled that segregation by government was indeed unconstitutional.

The decision closed the convenient loophole that *Plessy* erected against integration by dissecting the notion of equality to mean not just the theory of equal treatment, but also the realization of equal treatment by ending color conscious loopholes. It was an examination long in coming and it was an examination that had not been entertained by the international human rights community as of 1954.

*Brown* also made international headlines. Everybody involved in the case knew that it would, because a principle argument by both the United States Justice Department, which supported desegregation and the NAACP lawyers, was the cost to the United States in international prestige and the propaganda value of segregation to the Soviet Union.

c. **International Human Rights Law before Brown—Sir Hersch Lauterpacht**

As noted earlier, international human rights law is a relatively new area. The atrocities of the Second World War were the focus of much of the early human rights work, but even in the beginning of the human rights movement, attention was paid to the state of race relations in the United States. Sir Hersch Lauterpacht, a professor of law at Cambridge University and a future judge on the International Court of Justice wrote an influential book in 1944 called “An International Bill of Rights of Man”. The book was Lauterpacht’s ideas about what should be included in an international document detailing basic human rights. The ideas in that book were influential in future human rights legal instruments. In the section titled “Equality before the Law”, Professor Lauterpacht noted that the U.S. Supreme Court had seemed content with an “interpretation of equality conceived as a mechanical equality of opportunity and advantage.” He went on to say, though, that there “are indications that it may be gradually abandoned by the Court as a whole.” [citing *Missouri ex rel Gaines v. Canada* and *Mitchell v. United States*].

Lauterpacht’s comments made several important
points. First of all is Lauterpacht’s critique of the US system’s meaning of equality. Recognizing the inadequacy of this approach to equality, he notes that the system was “especially in the eyes of foreign observers, stretched to breaking point. It implies the legalization of at least social discrimination, through legislation, against citizens on account of race and colour.”

Lauterpacht’s implication that the illogic of the U.S. view of equality at that time would not pass international muster is questionable in light of the fact that there was no operative international human rights law at the time of the book. Later that decade the Nuremberg trials of Nazi war criminals took place, but the offenses prosecuted were violations of laws of war. An international law of peacetime human rights like equality before the law did not exist in deference to the non-interference principle referenced earlier and the belief in the legal fiction that individuals did not have an international legal personality.

A second point from Professor Lauterpacht’s statement is that the United States was a subject of observation at the beginning of human rights development, particularly in the area of equality principles, perhaps for two reasons. First, the US was becoming the center of power and prestige that we know now. Prior to the war, it might be doubtful if US legal developments would be the subject of significant international commentary. In 1944, politically, it was clear that if there would be any movement on human rights, there would have to be a significant US involvement. The other reason why the United States was a center of observation was probably because it was the only game in town. In 1944 Europe was still the staging ground for the exchange of death blows in an attempt to destroy Nazism, and decolonization, though in the minds of some on this side of the Atlantic, was not a matter of too much interest in London, Paris, or Brussels. It is very possible that among the most significant human rights activity in the industrialized world was the work of the civil rights attorneys lead by Charles Hamilton Houston and Thurgood Marshall.

A third point is that domestic cases matter in the development of international law as indicated in the Statute of the International Court of Justice and the Permanent Court of International Justice before it. Professor Lauterpacht, in developing ideas for an international standard for international human rights, started with a blank international slate. As the only cases cited in this section, he sees Gaines v. Canada and

Supreme Court which determined that Mitchell’s personal rights, including the right to purchase and travel in a first-class train car, guaranteed by the Constitution were “ruthlessly” violated. The Court held that “colored” persons who buy first class tickets must be accommodated equally to the first class white passengers.

56 HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 118 (1945).

57 Id.
Mitchell v. United States through the lens of legal development, regarding the old separate but equal standard as a dying one of little legal value in the development of a new legal regime.


International law development is like, to some extent, a story that goes viral over the internet. One development leads to another, which leads to another. International law is often not considered hard law (by non-international lawyers and scholars). This is a grave error in perception by the critiques, but unlike domestic law, some international laws are susceptible to several different characterizations, including that of being soft law. This characterization applies to the Universal Declaration of Human Rights.\(^{58}\) First, an explanation of terms. Hard law is essentially a species of law that requires adherence. Professors Guzman and Meyer describe one theory of hard law as usually generating higher sanctions, and soft law being at the other end of the continuum as generating little or no sanctions usually because compliance is not required.\(^{59}\) Soft law is also understood to describe hortatory rules, rather than legally binding norms. Accordingly, the UDHR’s reliance on moral force in lieu of binding obligations with remedial sanctions was characterized by Judge Lauterpacht as “a fundamental and decisive ethical flaw in the structure and conception of the Declaration.”\(^{60}\) As a mere hortatory work, it could be binding on states if it becomes customary international law, an outcome that would result only from near universal recognition of the principles in the Declaration—in other words, it have to be regarded as customary international law.\(^{61}\) Another factor militating against it as a binding instrument is the fact that much of the instrument speaks in generalities, and not specifics. Recognizing that constitutive documents should be written generally, it should be noted that there were those involved at the drafting stage that believed the declaration, should take on the nature of a binding instrument, a suggestion that was roundly objected to by those in attendance at the drafting.\(^{62}\) What resulted was, too much fanfare, a listing of general guides that in the end left much to be desired.

Articles 2 and 7 address equality generally. Article 2 is a statement of the Declaration’s accessibility without regard to race, colour, sex,

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59 *Id.* at 171.
62 *Id.*
language, religion, political or other opinion, national or social origin, property, birth or other status. Article 7 states an entitlement to equal protection of the law for all (without the categorical distinctions of Article 2, an inconsequential omission considering the context). What’s missing in either article is a specific description of equality. Does equality mean equal access for all in society? Or does it mean simply that all have the right to the same kind of treatment without regard to access. In other words, do Articles 2 and 7 describe a Plessy v. Ferguson world, or a world beyond that? Of course a national lifestyle was forged upon the U.S. Constitution’s own similarly flawed equality clause, such that a Supreme Court opinion such as Plessy could be the law of the land for nearly 60 years. It is hardly useful to suggest that the Declaration implicitly urged against segregation any more than the Equal Protection Clause in the US Constitution did—until such an interpretation is formally given to a document equally vague as UHDR or the Constitution such a suggestion, especially in 1948 would seem unwarranted. Even as soft law desegregation or antisegregation was not a popular notion even in nonbinding soft law.

e. The Brown Decision, International Law movement toward eliminating colonialism

The Brown case interestingly enough had its own international issues. Because international law can be influenced in so many ways, the fact of the Cold War played into the issues before the Court and both the Department of Justice and the NAACP argued this fact. In Brown in particular, because of the move toward decolonization (which was by no stretch of the imagination a done deal in 1954) by US allies, and the propaganda value of Jim Crow to the Soviets, the Court was urged to drop the Plessy standard and to incorporate a fully functioning equal protection standard in the American legal system. This is what the Court did and in doing so (without acknowledging the international significance of the decision), set a standard that would be followed in


d. United States Secretary of State Dean Acheson provided a letter that was included in the Justice Department brief in the case which stated:

The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. . . [T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.

Address by Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court at the University of Pretoria symposium: Brown v. Board of Education in International Context, the Centre for Human Rights, Pretoria, South Africa.

63 U.S. Const. art. XIV, §1. “Nor...State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
64 Supra note 5.
65 United States Secretary of State Dean Acheson provided a letter that was included in the Justice Department brief in the case which stated:
newly independent states and in other states in dealing with sectarian division.

Just over six years after Brown, the international community demonstrated that an examination of the concept of equality other than the cursory one provided under the Universal Declaration was needed. In 1960 United Nations General Assembly adopted Resolution 1514 calling for the granting of independence to colonized peoples based on the principle of self-determination, and for the end of colonialism, segregation and discrimination.\textsuperscript{66} 1514 was the culmination of years of addressing the problem of colonization and the political/legal principle of self-determination.\textsuperscript{67} Following the Second World War, the allied powers were divided on the issue of colonialism though it became clear that the political and legal restructuring taking place left little room for colonial systems.

Three developments lead to this state of affairs. First, following the First World War, the League of Nations supported a mandate system to administer African colonies relinquished by the defeated German government of Kaiser Wilhelm II.\textsuperscript{68} This system was not intended to be a stepping-stone to independence for those states\textsuperscript{69} despite the cautious optimism of the participants in the first Pan-African Congress taking place as the post war Treaty of Versailles was being negotiated.\textsuperscript{70} This was especially true since the victors each had to some extent vibrant colonial systems of their own.

At the same time the political principle of self-determination, not yet a legal doctrine, was essentially a justification for uniting various peoples from the remnants of the Ottoman and Austro-Hungarian empires primarily in the Balkins.\textsuperscript{71} It was not until after World War II that the principle developed into a legal doctrine with its inclusion in the Charter of the United Nations. The reason behind the development was

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\item \textsuperscript{66} Believing that the process of liberation is irresistible and irreversible and that in order to avoid serious crisis an end must be put to colonialism and all practices of segregation and discrimination associated therewith.
\item G.A Res. 1514, Declaration on the granting of Independence to Colonial Countries and Peoples, 14 November 1960.
\item Resolution 1514 was a culmination of a process of legal development over the issue of self-determination which included references in the Charter to the principle’s application to territories whose peoples have not yet attained a full measure of self-government,” art. 73. The General Assembly was focused on the controversy between the U.N. and the Union of South Africa over the latter’s refusal to modify its mandate over Southwest Africa, where apartheid was practiced.
\item Nicola Bunick, \textit{Chechnya: Access Denied}, 40 Geo. J. INT’L L. 985, 987 (2008-2009), noting that “until World War II, self-determination was understood as a political concept, not a legal right.”
\item \textit{Id.} at 988.
\item \textit{Id.} at 987-8.
\item Supra 66 at 987.
\end{itemize}
revealed in the legal applicability of the principle beyond the limited role of securing an eastern European problem in the Balkans. The Charter establishes “principle of equal rights and self-determination of peoples” though it did not specifically call self-determination a right. That the principle was a fundamental right applied “to peoples in non self governing territories,” i.e. colonies, was established by 1514 which was titled “Declaration on the granting of Independence for Colonial Peoples.”

In the Charter and in Resolution 1514 the concept of equal rights accompanies self-determination indicating a legal affinity between the two concepts. Though the mention of segregation is in the preamble of 1514, the language leaves no doubt that the drafters intended the prohibition to apply conterminously with self-determination and the end of colonialism:

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, and end must be pub to colonialism and all practices of segregation and discrimination associated therewith...

Like the Universal Declaration, Resolution 1514 was not binding in and of itself, but it was influential to the ICJ in its deliberations on two key advisory opinions regarding self-determination. In addition to

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72 See generally Supra note 66.
74 JOSHUA CASTELLINO, TITLE TO TERRITORY IN INTERNATIONAL LAW 1 (2003).
75 G.A. Res. 1514 (XV) (December 14, 1960) as a declaration on granting of independence to colonial countries and peoples.
76 The ICJ referenced 1514 in its Advisory Opinion on the Western Sahara. Its interpretation of legal developments regarding the right to self-determination was, by that Court’s acknowledgment, influenced by the Resolution 1514. It went on to state that:

G.A. Res. 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations.

The ICJ said in its Advisory Opinion on Namibia (S.W. Africa) in 1971 that:
A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (G.A. Res. 1514 (XV) December 14, 1960), which embraces all peoples and territories which "have not yet attained independence”… … Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.

Judge Tanaka, in his dissent to the 1966 procedural dismissal of the Liberia and Ethiopia v. South Africa case stated:
establishing a right to self-determination, 1514 also marked an explicit condemnation of segregation in a UN document for the first time. What had happened between the Universal Declaration and 1514? The *Brown* decision.\(^\text{77}\)

Just as the *Brown* decision, likely influenced Resolution 1514, the non-binding resolution may also have influenced state practice and to the extent that the Declaration and 1514 developed into rules that states generally follow, they too are binding as customary international law.

(query, did the drafters of the convention view desegregation as required by international law?)

Going on ten years after *Brown*, the international community came together again to make more explicit what had been implicit in the Universal Declaration or GA Resolution 1514. Just as the Supreme Court had abolished any surrogate for full and equal protection in the form of integration, so did the International Convention on the Elimination of all forms of Racism.\(^\text{78}\) The treaty, which was presented for state ratification in 1966 and finally went into force in 1969 and is legally binding, was clearer than the Declaration or the European Human Rights treaty which theoretically left room open for separate but equal style protection. The treaty denounced in no uncertain terms segregation and in so doing bound all signatories who ratified the treaty to do the same in their national policies.

\(^\text{77}\) It should be noted that in 1945 the Ontario Supreme Court ruled that segregative housing covenants violated Canada’s U.N. obligations requiring anti-discriminatory practices among member nations:

*Article 1 of the Charter:*

To develop friendly relations among nations
based on respect for the principle of equal rights
and self-determination of peoples, and to take
other appropriate measures to strengthen universal
peace;

*Article 55 of the Charter:*

With a view to the creation of conditions of
stability and well-being which are necessary for
peaceful and friendly relations among nations
based on respect for the principle of equal rights
and self-determination of peoples…

However there appears to be no United Nations document or other international legal document that rejects segregation as clearly as the Supreme Court did in *Brown* and six years later the General Assembly in 1514.

II. The importance of International Law and Foreign Law in domestic courts

The controversy within the US legal system over the appropriateness of international and foreign law as a part of judicial decision-making raises an important point about the thesis of this article. Thurgood Marshall’s jurisprudence is based predominantly on his work in the United States as a lawyer, judge, and Supreme Court Justice. It is also based upon his brief but profound role as an advisor on the drafting of the Kenyan Constitution. None of his work has been in traditional international law venues such as the United Nations or the International Court of Justice, or on any other international legal tribunal. Yet his influence on international legal development is real and acknowledged throughout the world. Yet the principles of international legal development would be significantly stymied if domestic judicial cultures erect walls around their legal institutions.

In 1960, Marshall joined the independence movement in Kenya as a consultant during talks with British officials over an independence constitution. He was brought to the attention of independence leaders in Kenya because his work as a civil rights attorney had already developed an international dimension, both in terms of international press and buzz among legal observers in various countries. The Kenya period, explored in a later section, is an example of how a domestic case and domestic legal arguments can become part of an international conversation on the subject. As the Statute of the International Court of Justice allows, judicial decisions can serve as a subsidiary means of determining rules of law, and Brown and the prior cases trending away from Plessy certainly served the purpose of articulating and helping to establish legal rules that articulated a new understanding of equality, certainly in the United States and most likely within the rest of the Western world. The impact on international documents of these case trends is unmistakable, from the non-binding Universal Declaration and GA Resolution 1514, to the Convention on the Elimination of all forms of Racism which is binding. Furthermore, state practice can also be influenced by decisions of courts from other countries.

This is significant for these reasons. A search of data bases of some foreign courts using the key words Brown v. School Board of Topeka, Kansas turned up several citations from South Africa, the European

79 Jackson will work on this.
80 See sections infra Section IV: Kenya.
81 In re: The School Education Bill of 1995 (Gauteng), 1996 (4) BCLR 537 (CC); 1996 SACLR LEXIS 5 at pg. 63 (Constitutional Court of South Africa). Mentions Brown as a case where intangible factors were considered as an important part of the educational endeavor. And Khosa and Others v. Minister of Social Development and Others, 2004 (6) BCLR 569 (CC); 2004 SACLR LEXIS 2 at pg. 84.
Court of Justice,\textsuperscript{82} and the Israeli High Court among others.\textsuperscript{83} Anti-discrimination and anti-segregation are viewed by these courts as a rule with a genesis in the \textit{Brown} decision.\textsuperscript{84} In examining these cases no decisions rejecting the rule in \textit{Brown} were found. Of course no such rule would be found as \textit{Brown} is not binding in these other jurisdictions, and the decision is used in foreign courts to support a decision against discriminatory policies or to demonstrate international consensus in favor of desegregation.

Justice Antonin Scalia is among the members of the current US Supreme Court who disagree with this trend.\textsuperscript{85} Yet national courts frequently cite decisions from other countries, not as binding law, but

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  \item Their contention, in its legal garb, is that treatment which is separate but equal amounts to equal treatment. It is well known that this argument was raised in the 1950’s in the United States, regarding the United States’ educational policy that provided separate education for white students and African-American students. Addressing that policy’s constitutionality, the United States Supreme Court held (in \textit{Brown v. Bd. of Educ. of Topeka}, 347 U.S. 483 (1954) [30]) that a —separate but equal policy is —inherently unequal. At the core of this approach is the notion that separation conveys an affront to a minority group that is excluded, sharpens the difference between it and others, and cements feelings of social inferiority. This view was expressed in section 3 of the International Convention for the Elimination of all Types of Racial Discrimination.

  \item Justice Ruth Bader Ginsburg speaking at a law conference in Pretoria South Africa noted:

  Of the enduring legacy of \textit{Brown}, Richard Goldstone, retired Justice of the South African Constitutional Court, and Brian Ray, Justice Goldstone’s 2003 term foreign law clerk, wrote that \textit{Brown} had demonstrated "the ability of courts to promote human rights and [of] lawyers to effect social change." Goldstone and Ray referred to decisions in Canada, South Africa, Trinidad & Tobago citing Brown on the importance of education and equal access to it in a democratic society. Those authors also noted cases in New Zealand and South Africa citing \textit{Brown} on the power of courts to "issu[e] orders that would impact budget decisions," and orders that might require continuing court surveillance.


\end{itemize}

\textsuperscript{82} Bartsch v. Bosch und Siemens Hausger te (BSH) Altersf rsorge GmbH, (Case C-427/06); [2009] All ER (EC) 113 at 47. n[37] (Court of Justice of the European Communities) . Mentions \textit{Brown} in respect to the Supreme Court of the United States playing a large role in the process of establishing that discriminating on grounds of race was unacceptable.

\textsuperscript{83} In Ka’adan v. Israeli Land Authority, the Israeli Supreme Court rejected the land authority’s claim that Jewish and Arab Israelis could be treated differently under Israeli law by relying on the seminal American case and by connection, on the Conversational for the Elimination of all Types of Racism:


\textsuperscript{85} Justice Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, 98 AM. SOC’Y INT’L L. PROC. 305, 307-310 (2004). Scalia argues that foreign law is irrelevant to the US constitutional experience, and the use of foreign law tends to be selective. Furthermore it accommodates living document jurisprudence by providing authority that can be used beyond an analytical search for original meaning. See also Justice Scalia’s dissent in Atkins v. Virginia, 536 U.S. 304 (2002) (Scalia, J.,dissenting).
as guides to their own state practices. These guides eventually become accepted practice and form the basis for an opinion juris to form around them. Custom develops from this process and hence international law. Or as Justice Breyer put it in comparing this process to legal development among the fifty states:

The commercial law of the various states, for example, has become close to a single, unified body of law, in part through the work of uniform state law commissioners, in part through a pattern of similar judicial responses to similar problems, in part of the work of intermediate judicial institutions such as federal bankruptcy courts, in part because the interstate nature of commercial contracts means that judges in different states apply each other’s law. Formally speaking, state law is state law, but practically speaking, much of that law is national, if not international in scope. Analogous developments internationally, including the emergence of regional or specialized international legal bodies, tend similarly to produce cross country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas.

These growing institutional and substantive similarities are important because to a degree they reflect a common aspiration—a near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity. Through their respect for basic human liberty, they thus may help to make that liberty a reality. The force of this aspiration, I hope and believe, is virtually irresistible.

Justice Scalia’s position would make it harder if not impossible for the United States legal system to participate in the development of international law. Though he does acknowledge a limited usefulness of foreign court decisions in interpreting treaties, or for interpreting statutes that refer to foreign law, or in testing novel statutory interpretations, he does not concede the practice for the purpose of seeking guidance for statutory and constitutional interpretation outside of these limited parameters. Most of international law development is outside of those parameters, especially in the area of human rights. Indeed the very process that brought the human rights work of Marshall to international attention, allowing that work to influence international law making and national judiciaries, is the very process that Justice Scalia would refrain from joining—thus limiting the same kind of foreign influence on domestic decisions that our court decisions have historically had in foreign systems.

If the model of international law development offered earlier is correct, Justice Scalia’s position would keep any foreign law (as opposed to international law) other than treaty law and foreign interpretations of treaties binding on the US, out of US courts. But foreign law and international law cannot be so easily separated. As mentioned earlier, decisions of tribunals including national tribunals are considered to be a subsidiary source of international law, and by that is meant customary law. Though Scalia is concerned about using such cases for purposes of constitutional interpretation, which is not an unreasonable concern, the result will be as well to run the risk of US non-compliance with various international law rules. As will be demonstrated, Scalia’s position in other national supreme courts would have denied the influence the Brown decision has had over the years in international human rights legal development.


Id. Justice Scalia, supra note 84.

Jackson will work.
IV. Kenya

Thurgood Marshall understood the international impact that *Brown* and the whole body of anti segregation law on which he and his lieutenants had worked. When asked to take part in the drafting of the Kenyan Constitution by independence activist Tom Mboya, he took advantage of the opportunity to use his expertise and apply it to the anti-imperialist struggle.\(^90\)

In 1960, armed with what was becoming an international legal imperative of his own making, Thurgood Marshall went to Nairobi to consult and London for constitutional negotiations in order to press the gospel of equal protection. This is where things got tricky.

What makes the Kenyan constitutional process relevant to the subject of Marshall’s role in the development of international law is that discipline’s tendency, indeed willingness, to observe trends in national governance and policy making and to entertain legal development through these sources. In other words, in several areas of constitution making in Kenya, notions that became part of other post colonial constitutions, in international legal documents, and in the way in which decolonization is to be pursued become candidates for international law either as state practice, evidence of state practice, or as influences in the development of international legal policies.

How did Mr. Marshall do?

**a. Equal Protection**

In the United States, equal protection is a liberating and progressive concept. It is based on the concept of equality, a staple of Lockean political theory, which defined the legal and political training of Marshall as an American lawyer.\(^91\) Thurgood Marshall’s preamble to his proposed Bill of Rights reflects these values:

> All persons are equal before the law and are entitled without any discrimination or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law.\(^92\)

The Draft also includes a more specific protection at II.4. In it Marshall starts out with the basic statement that “[a]ll persons are equal before the law and entitled to the equal protection of the law.”\(^93\) The language is reminiscent of the cursory language of rights used in the

\(^90\) See generally MARY DUDZIAK, EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY 2008. Professor Dudziak’s book is perhaps the most complete elaboration of Marshall’s work in Kenya.

\(^91\) Jackson will work

\(^92\) Supra note 180. (Marshall’s notes from his draft proposal, provided by Cecelia Marshall) (hereinafter Draft).

\(^93\) Supra note 90.
United States Constitution. Marshall went on to elaborate on these rights by specifying that discrimination on the basis of race, religion, descent or place of birth in any kind of employment, holding or disposition of property including both public and private business would be prohibited. The section was based on both the Malayan Constitution as well as the Universal Declaration of Human Rights. It also addressed a problem of the U.S. Constitution, which had no constitutional means of prohibiting private discrimination in 1960. Private discrimination would be outlawed by the Civil Rights Bill of 1964 based on the Congress’ constitutional power to regulate commerce, a strategy found constitutional by the Supreme Court in *Heart of Atlanta Hotel v. United States*.95

Under Lockean principles “all the power and jurisdiction is reciprocal, no one having more than another…should also be equal one amongst another without subordination or subjection.”96 Here Marshall makes explicit the themes that will be found in his Supreme Court jurisprudence on equal protection for the next thirty years—with perhaps one exception. The language is not explicit on the issue of any kind of remediation or affirmative action. Though later affirmative action will become engrained in human rights documents97 it was not within Marshall thinking in 1960 as a matter of constitutional craftsmanship, US civil rights or international law.98

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94 Supra note 62.
96 Id. at § 4.
97 For example, the International Convention for the Elimination of All Forms of Racial Discrimination states at art. 1, ¶4 that

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.


The International Covenant on Civil and Political Rights does not specifically endorse affirmative action, but the Convention’s Human Rights Committee has ruled that “affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.” See Franz Nahlik v. Austria, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996), paragraph 8.2 referenced in Global Rights, *Affirmative Action: A Global Perspective* at 8


98 Affirmative action was not a goal of the civil rights movement by 1960 inasmuch as the major initiatives to utilized preferences, quotas, and incentives for the hiring of minorities, initially in federal government employment and later in private employment began with executive orders from the Johnson and Nixon administrations in the mid 1960s and early 1970s. See J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE 37-43 (2006).
b. Property Rights

Today, following the post-election unrest in 2007, Kenya is going through a constitutional re-evaluation and fifty years after independence one of the main issues is property rights. Again, Lockean style liberalism dictates of the sanctity of property ownership were part of Marshall’s intellectual pre-disposition when he arrived in Nairobi and later London for constitutional talks. Land redistribution is not a part of that model.\(^99\) Yet in Kenya, as in other settler colonies, the best farming land was in the hands of whites who had purloined it through colonial government rules from Africans.\(^100\) Of particular importance are what were known as the White Highlands, African land before colonization and white land in 1960.\(^101\) It is known officially as the Highlands today, and is the best farm land in the nation. Yet Marshall’s proposal for land rights fell far short of redistribution, a fact that causes consternation in Kenya today.

In an article in an edition of the Daily Standard published in Nairobi, from last September, titled “Thurgood Marshall: Did he Auction Kenyan Land Rights” writer John Oywa made the following observation:

Today, only a few may know his input in the first constitution and how he cunningly sneaked the Bill of Rights into the document, ostensibly to protect the minority white settlers who had acquired huge swathes of land.

\(^99\) Locke’s notions of property might be interpreted as in conflict with his theory of equality. To Locke, resources in their original form are the bounty of mankind to which labor is expended to put the resource to better use. Personal ownership of property is the appropriate result of the expenditure of labor. The more labor, or industry expended, the more property can be owned even if this results in disproportionate and uneven distribution of property. See generally Jeremy Waldron, *Disproportionate and Unequal Possession*, in *GOD, LOCKE, AND EQUALITY*, 165 (2002).

\(^100\) Locke was critical of how Native Americans treated land by failing to “cultivate” the land. Locke’s critique compares European modes of production, which he calls labor, to practices of Native Americans:

Thus labour, in the beginning, gave a right of property wherever any one was pleased to employ it upon what was common, which remained a long while the far greater part, and is yet more than mankind makes use of.


\(^101\) Locke would not have called the acquisition by white farmers theft if his arguments regarding Native Americans can be used as a basis. Because it is the function of labor to place value on property and to give rights to ownership, in Locke’s world, the lack of human activity that he defines as labor on the part of Native American renders that wilderness unclaimed and unowned. This view is a powerful rational for colonialism.

*DUDZIAK id.* at 75.
Tucked somewhere in the Bill of Rights was a land tenure clause that allowed the white settlers to enjoy massive land ownership rights, including land leases of up to 999 years.\(^\text{102}\)

University at Buffalo Law School Dean Makau Mutua, a native of Kenya, notes that Marshall did too little to separate the US experience of civil rights from the larger experience of national liberation from colonization. In a review of USC School of Law Professor Mary Dudziak’s book about Marshall’s Kenya experience, he commented:

This is a disturbing omission on the part of Marshall...one can only conclude that his obsession with the protection of minorities did not allow him to see a material difference between the Kenyan and American contexts. He missed the critical fact that in Kenya, racial minorities—whites and Asians—were economically powerful groups that either controlled the state or were favoured by it over Africans. In contrast, the African-American minority in the United States was marginal, despised, alienated, and oppressed by a white power structure at the public and private levels. No two contexts could have been more different.\(^\text{103}\)

What did Marshall do that has Kenyans today taking a second look at his involvement? His concept of property rights and equality—the need to protect minorities, even the powerful white minority, from government encroachment may not have been, in the eyes of some observers, the medicine for a post-colonial society and not an appropriate blueprint for international law.

The subject of land reform is instructive. With colonialism comes several degrees of unfairness. To add to the insult of governing someone in their own land, the institution of title for unimproved land by white settlers, despite traditional claims by resident peoples, leads to a skewed economic system that anti colonialists in both Kenya and other European holdings sought to solve through land redistribution. The obstacle to such redistribution since most land held by title by settlers was improved, cultivated and rendered for profit making farming, is the Lockean notions of property imbedded in the laws of the European colonizer. Holding title implied the worthiness of the holder making land redistribution dependent upon western legal concepts of takings, eminent domain, nationalization, and expropriation. Kenya in 1960 was certainly no different in theory from other colonies except that it was among a smaller group of settler colonies in which significant numbers of non-Africans immigrated, established title to land and settled. This exaggerated the matter of landowner “worthiness” that did exist in virtually all colonies to some extent. Hence the titled landowner had legal recourse and vocabulary of legal principles to protect himself from arbitrary taking of land.

\(^{102}\) Buffalo: LEGAL STUDIES RESEARCH PAPER SERIES

\(^{103}\) Paper No. 2010 – 009. 31 Human Rights Quarterly 1146.
Confronting Kenyans on the verge of independence were two of those protections—compensation for government taking, and whether such takings should be limited to public purposes. On the issue of compensation, Thurgood Marshall’s draft used language from the adequate compensation provision found in the Nigerian Constitution. Under Nigerian colonial common law, adequate compensation meant fair market value, which means “the value of land…if sold in the open market by a willing seller…”. The term adequate compensation can also be found in a US-Mexico agreement from the 1930s entered into as Mexico was expropriating land for the purpose of land reform (the Hull Formula named for then U.S. Secretary of State Cordell Hull). Adequate compensation has gained acceptance as the international legal standard after years of debate during which it was contrasted with the concept of appropriate compensation (meaning what the government feels is appropriate to pay). Of course the Hull Formula and the competing appropriate standard were developed in response to principles of state responsibility toward aliens but both are useful in understanding the psychology of the negotiations on the issue of land reform at Lancaster House.

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No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force—

- requires the payment at adequate compensation therefor;
- gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation, to the Courts;
- gives to any party to proceedings in the Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

MARY DUDZIAK, EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY, 180 (Marshall’s notes from his draft proposal, provided by Cecelia Marshall) (hereinafter Draft).

104 Notes in the draft proposal submitted by Marshall acknowledged that the following language was borrowed from the Nigerian Constitution of 1960 Chapter 3 Fundamental Rights, Compulsory Acquisition of Property:


106 Nigeria: Public Lands Acquisition Act, Cap 167, s. 15(b) (1962).


An example of a current use in international law of the standard is Article 1110(2) of the North American Free Trade Agreement. That section describes the compensation standard as:

…equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
As for public purpose, the notion is imbedded within Chapter 3, the Fundamental Rights part of the Nigerian Constitution, at paragraph 30 titled Compulsory Acquisition:

Nothing in this section shall affect the operation of any law in force on the thirty-first day of March, 1958, or any law made after that date that amends or replaces any such law and does not—

(a) Add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;\(^{109}\)

A later version of the Nigerian law described public purpose as including exclusive government use or general public use, sanitary purposes, new townships, contiguous control (right of way), transportation construction, rural development or settlement.

In using the Nigerian model in his draft, Marshall noted that it would have to be modified to fit Kenyan conditions.\(^{110}\) So, if a future African Kenyan government following Marshall’s original compensation model wanted to acquire private land for whatever purpose, it would have to pay top dollar, or close to it. Marshall’s draft did not satisfy everyone. The African nationalists were not happy with the compensation requirement, and the white settlers were not pleased with the power to take land at all. The Nigerian model did not specifically spell out public purpose, and the alleged vagueness became a matter of controversy during the independence negotiations with the British, raising concern especially among the settlers taking part in the talks at Lancaster house.\(^{111}\) Land re-distribution was not clearly described in the document based on the Nigerian model (Nigeria was not a settler colony like Kenya and faced fewer white black re-distribution issues).

Ultimately, another draft was offered by the British official in charge of the negotiations that was more specific on the public use item than the Nigerian counterpart Marshall used. The new draft added that taking would be “justified in the general public interest” for the advantage of “another person or persons” if the public benefit outweighed the hardship to the original property owner.\(^{112}\) Marshall supported this compromise arguing that he was prepared to stake his reputation on the fact that this language would not be an impediment to land reform. According to Professor Dudziak:

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\(^{110}\) Draft notes, DUDZIAK id. at 180.

\(^{111}\) DUDZIAK at 76-79.

\(^{112}\) Id. at 78.
For him, the proposed balancing of public interests against private ones was the obvious way to show that the “general public interest” was served when another took one person’s property for use.\(^\text{113}\)

Is this western thinking or just fairness? Kenyans remember how the land came into the whites’ possession in the first place while Americans think about due process of law.

The result of the negotiations was the Constitution of 1963. Marshall’s contribution throughout the fundamental rights provisions is apparent. The property rights section, titled “Protection from Deprivation of Property,” specifies public purpose to include public defense, order, safety, morality, health, town and country planning, and promotes the public benefit.\(^\text{114}\) The adequate compensation standard in Marshall’s draft was retained, though renamed full compensation.\(^\text{115}\)

**Western Rule of Law and the Kenyan Polity**

The “Marshall Plan” which became the basis for the Independence Constitution was based largely on Lockean notions of equality and property. And though most of the more nationalist elements of the Kenyan revolution who opposed these principles as a start to national liberation were themselves educated in western colonial environments, either the circumstances or the legal culture of their respective communities within Kenya demanded a different outcome.

That outcome would have been land redistribution. It was an outcome foreign to Marshall in 1960, as his belief in equal rights did not contain the kind of nuance suggested by Dean Mutua:

The purpose of equality in law should not be a blind obedience to formal legality, but an avenue towards equality in fact. Otherwise social hierarchies and oppressions can be privatized by law and legitimized to the detriment of a common citizenship. Sometimes it is

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\(^\text{113}\) *Id.*

\(^\text{114}\) Constitution, art. 75 (1963) (Kenya):

\(1\) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

\(^\text{115}\) *Id.* at 19.
necessary to treat citizens unequally in the law so that equality in fact can be achieved.\textsuperscript{116}

Formal legality, as Dean Mutua uses the term in his review of Professor Dudziak’s book, would have to mean the formal accepted notions of law at a given time. That is because law changes, perceptions about interpretation of basic legal documents and principles are altered by time and circumstance. The Thurgood Marshall of the early 1960s may not have in fact conceived that anything other than the end of formal legal restrictions and the thuggery of the Ku Klux Klan and their white Kenyan counterparts\textsuperscript{117} was needed to set the path of equality for Africans and African Americans. Yet, 18 years later, as an 11-year veteran of the Supreme Court, a different approach to law and equality appeared in Marshall’s jurisprudence, as this excerpt from his separate opinion in \textit{Bakke v. Board of Regents of the University of California}\textsuperscript{118}:

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

\ldots

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has [p401] not been realized for the Negro; because of his skin color, he never even made it into the pot.

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\textsuperscript{116} Buffalo: LEGAL STUDIES RESEARCH PAPER SERIES Paper No. 2010 -- 009. 31 Human Rights Quarterly 1146 at 1154.
\textsuperscript{117} Referring to members of the Kenyan United Party, the all white settlers’ party during independence talks, Marshall stated: “The best way I can explain them is that if you compared them to the Ku Klux Klan in its heyday in this country, the Ku Klux Klan would look like a Sunday School picnic.” DUDZIAK \textit{id}. at 48 referencing “Marshall, ‘Reminiscences,’” 445.
\textsuperscript{118} 438 U.S. 265 (1978).
\end{flushright}
These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the Civil Rights Cases, supra, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S. at 25; see supra at 392. We cannot, in light of the history of the last century, yield to that view. Had the Court, in that decision and others, been willing to do for human liberty and the fundamental rights of American citizenship what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves, 109 U.S. at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Here Marshall is acknowledging the affects of history and circumstance as important factors in interpreting the Constitution, dismissing textualism and Originalism as interpretive tools. Dean Mutua is critical of Marshall’s western assumptions about law and society and the Kenyan polity, as he should be. Yet in Marshall’s separate Bakke opinion, an opinion that Marshall would have denied was a departure from his traditional legal training in the rule of law, Marshall simply reconsiders his assumptions that guided him earlier in his career, and through the only legal culture that he knew, developed a legal position that may have been more appropriate in the Kenyan context in the previous decade.

International Legal Jurisprudence and the Kenyan experience

The thesis of this paper revolves around the concept of international law as a dynamic concept, drawing upon a variety of sources, including national experience (general principles), the collective experiences of nations (customary law), and treaties. Added to that would be sources evidentiary of national and collective national experiences, such as national high court cases.119 Marshall’s Kenya legal experience has elements of these international law traits. He relied on the Nigerian and Malaysian independence constitutions and the Universal Declaration on Human Rights in drafting his bill of rights.120 By utilizing these legal norms in his draft, and to the extent that those norms survived the revisions that lead to the Constitution of 1963, Marshall was providing evidence of law and in the process establishing the opinion juris behind the norms which would lead to the establishment of customary

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119 Statute of the Int’l Court of Justice at 38.
120 MARY L. DUDZIAK, EXPORTING AMERICAN DREAMS THURGOOD MARSHALL’S AFRICAN JOURNEY 73 (2008).
international law on the respective subjects covered in the rights section of the Kenyan Constitution.\textsuperscript{121}

**The Equality Principle**

Equal protection is an example of this process. The United States Constitution contained an equal protection provision for nearly 100 years at the time of Marshall’s involvement with Kenyan independence. Both the Universal Declaration on Human Rights and the European Convention on Human Rights contained equal protection provisions. As noted, Marshall drew the language from the Malayan Independence Constitution and the Nigerian Constitution similarly included the principle. Short of reviewing every national constitution, it is fair to conclude that by 1960 (when Marshall’s draft was completed) and 1963 (when the Independence Constitution went into effect) equal protection had become an established feature of national legal cultures, and with the advance of human rights law’s intrusive internal legal obligations, certainly a candidate for customary international law.\textsuperscript{122}

The equality language in the Draft at II.4 was based on the Malayan Independence Constitution.\textsuperscript{123} Marshall also attributes Article 7 of the UDHR as a source of this section.\textsuperscript{124} In addition to these sources, the equality principle was recognized in at least three United Nations General Assembly resolutions as of 1960 and a total of seven by 1963 and two Security Council Resolutions.\textsuperscript{125} The principle is also a part of the Charter of the United Nations at Article 55(c). The Independence Constitution operated as further evidence of the principle as custom, part of the process that lead to the International Covenant on Civil and Political Right and the International Covenant on Economic Social and Cultural Rights, both of which came after 1963 and the listed evidence and which contain provisions based on the equality principle.

\textsuperscript{121} Jackson work
\textsuperscript{122} See also dissenting opinion of Judge Tanaka, Ethiopia v. South Africa, Liberia v. South Africa (Southwest Africa case) Int’l Court of Justice, 1966 at 291-301.
\textsuperscript{123} The Draft supra 104 at 177.
\textsuperscript{124} Id.
\textsuperscript{125} General Assembly resolution 1178 (XII) of 26 November 1957; resolution1248 (XIII) of 30 October 1958; resolution 1375 (XIV) of 17 November 1959; resolution 1598 (XV) of 13 April1961; and resolutions of the Security Council (with regard to apartheid as practised in the Republic of South Africa); resolution of 7 August 1953 which declares the inconsistency of the policy of the South African Government with the principles contained in the Charter of the United Nations and with its obligations as a member State of the United Nations; resolution of4 December 1963 which declares ”. . . the policies of apartheid and racial discrimination . . . are abhorrent to the conscience of mankind . . .”.
Dissent of Judge Tanaka, id. See also LOUIS HENKIN, GERALD L. NEUMAN, DIANE ORENTLICHER, & DAVID W. LEEBROON, HUMAN RIGHTS 1038-1037 (1999).
The equality principle is also accepted as a general principle of law under Article 38 (c). As Judge Tanaka stated in his dissent in the Southwest Africa case before the ICJ in 1966:

It is beyond all doubt that the presence of laws against racial discrimination and segregation in the municipal systems of virtually every State can be established by comparative law studies. The recognition of “general principles” is fulfilled, namely if we can say that the general principles include the norm concerning the protection of human rights by adopting the wide interpretation of the provision of Article 38, paragraph 1 (c), the norm will find its place among the sources of international law.\textsuperscript{126}

The inclusion of the equality principle in the Kenyan Constitution in 1963 furthered the development of human rights law establishing the principle as both customary international law and as a general principle of law. Although Marshall’s insistence on an adulterated equality principle was certainly a reflection of western principles not fully suited to Kenya’s needs then, the inclusion certainly added Kenya to the list of states accepting the principle as opinion juris and further established it as a general principle. It is worth noting that remedial measures, which would include affirmative action, land redistribution, and other measures, were not established principles as treaty law, custom, or as general principles of law.\textsuperscript{127}

Property

Marshall’s Kenya experience is a subject of criticism today on the issue of property rights. It was also a matter of criticism from the Kenyan left among activists involved in the independence movement.\textsuperscript{128} However, the argument in favor of land redistribution had not coalesced into an international political movement by 1960. Previous efforts to envision a post-colonial or post-neo imperial society based on land redistribution via government taking policies such as eminent domain and expropriation were met with western decisive opposition in the form of both military action against what colonial powers considered to be illegal expropriation, sanctions against host governments, and a total rejection of legal theories that would serve as a foundation for land redistribution policies favorable to host nations.\textsuperscript{129}

\textsuperscript{126} Id. at 295. See also Lauterpacht id. at 115:

The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties. The equality of man is the source of the claim to personal freedom, inasmuch as it rules out the arbitrary power of one person over another.

\textsuperscript{127} See discussion at ___supra.

\textsuperscript{128} Supra note 90 at 9.

\textsuperscript{129} See generally Charles Lipson, Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries (1985).
One such favorable legal theory was the so-called Calvo principle. Though not directly on point with the issues of settler populations in post-colonial societies, the principle would allow national treatment for foreign investors in a variety of regulatory matters, including taking. Foreign investors would, under the principle, receive no better treatment in terms of compensation for property or the terms themselves of the property, a strategy that would internalize the standard for government taking. This principle eventually became a basis for attempts to establish legal standards more conducive to the interests of former colonies and developing nations. As Professor Detlev Vagts describes it:

The inviolability of foreign investment was at risk in the new world. The anti-investment force of communism was compounded by anticolonialism. As the new states crowded into the United Nations, they pushed harder and harder for a loosening of the rules on expropriation. They were strengthened by the perception that the balance of power had shifted from the industrialized countries to the developing world, particularly the possessors of oil, gas, and other natural resources. The high point of this movement was the Charter of Economic Rights and Duties of States, adopted by the UN General Assembly in 1974. It loudly proclaimed the sovereignty of states and their right to nationalize as they saw fit. The capital-exporting states struck back. They instituted programs of bilateral investment treaties, provided guarantees for their investors abroad, and threatened retaliation against expropriators. These protections extended to government interferences less than expropriation.

In fact, the international standard, as already noted, had been established in large part as a result of the standoff between the United States and Mexico during the Roosevelt Administration when the United States insisted upon adequate compensation for government takings of American owned land for public purposes. This standard remains the accepted rule in international law in large part because of a proliferation of bilateral investment treaties drafted to reflect the economic interests of investor nations such as the United States.

Though Marshall’s use of the Nigerian compensation model was consistent with the developing international law model for foreign investment of the time, it also preceded the failed push by developing nations to articulate a different standard for government taking and

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130 Explain Jackson work
133 United States Department of State, Foreign Relations of the United States 706 (December 3, 1912).
regulation of foreign investment. Hence the legal atmosphere in existence regarding land and investment of foreigners (many Kenyans considered European settlers foreigners) did not lend itself to radical legal change in favor of indigenous persons and societies in Kenya. The provisions in the Independence Constitution perhaps further solidified the Hull Formula as customary international law on the subject of land reform.  

V. Justice Thurgood Marshall

To repeat the concept, international law development is a fluid and dynamic process, borrowing from both formal and informal sources and processes. Formal sources include treaty making and international court decisions along with custom and general principles. A more informal source would be court decisions of national courts and General Assembly resolutions as well as general principles of law to the extent they develop into custom. We have seen Marshall’s role in developing formal law by his work as a lawyer in national court cases that in turn influenced the International Covenant on the Elimination on all forms of Racism. And we can see his influence on less formal sources such as General Assembly Resolution 1514 addressing decolonization. His work as a consultant during the Kenyan constitutional negotiations highlights both his use of international law, and the affect of that process on international law.

As a jurist, Justice Marshall’s role was different, yet influential. He spent twenty four years on the bench and as an American jurist, he was most known for his opinions, concurrences, and dissents in cases dealing with civil rights, civil liberties, human rights, criminal law just to name a few areas. In these typically human rights areas of jurisprudence, Marshall’s opinions have been cited by national courts in other countries to clarify their own system’s legal obligations or as outright evidence of customary international law. Indeed he has served as a frequent “guest commentator” in South African cases, a few in Canada and elsewhere in human right and civil liberties cases. In other areas of international law, Marshall, reflecting the limited or qualified use of international law in Supreme Court decisions, has had only a few occasions to write either a majority, concurring, or dissenting opinion addressing specific obligations under international law.

135 It should be noted that the new constitution of 2010 did not radically change the land system in Kenya, and did not depart from the basic requirement of full compensation for takings, though the term, just (understood to be synonymous with full) is used. \textit{Constitution} art. 40 (2010) (Kenya).

136 Breyer, supra note 87 at 265-267. Breyer discusses the ways in which international and foreign law would be relevant to the work of the Court. In his list he includes use to address Congressional intent to harmonize U.S. and foreign or international law in a particular area; the “globalization” of human rights to reflect an international consensus in the area to cast “an empirical light on the consequences of different solutions to a common legal problem”; and the direct use of treaties and decisions of international court decisions where relevant (and the expectation that such uses will rise in the future).
A. Opinions, and Dissents

The US Supreme Court hears cases having to do with foreign law and international law, as well as cases having to do with foreign policy. Though the tendency is to deflate these into a single category of cases, this will be avoided in this article. The Court has in its history ruled on issues of international law as relates to US obligations (as in treaty interpretation\(^{137}\) or customary international law\(^{138}\)) where appropriate and the relation of international law to the Constitution.\(^{139}\) As noted earlier, several current justices have used both international law and foreign law to inform decisions having to do with human rights, federalism, and other issues that are based on U.S. constitutional law. At the same time many international law issues are not decided by the Court because of constitutional and prudential limitations on that court’s competence.\(^{140}\) But it does speak on international law on occasion and Justice Marshall weighed in on subject during his time on the Court.

Among the international law topics heard by the Court during Marshall’s tenure are cases involving matters of foreign relations, including matters where international law was involved (Dunhill), the effect of Congressional legislation abroad (Aramco), treaty interpretation, forum non conveniens, and economic sanctions (Dames & Moore). Marshall wrote key dissents in Dunhill, and Aramco, and majority opinions in cases ranging from treaty interpretation to forum non conveniens. Marshall joined concurrences in the Dames & Moore “sanctions” case, and treaty interpretation. It is not easy to isolate a trend in his positions—perhaps had the present trend among Justices to inquire into international and foreign law positions on topics been in vogue during Justice Marshall’s tenure a clearer view of his Court jurisprudence might be drawn.

1. Dunhill v. Republic of Cuba\(^{141}\)

The case addressed the Act of State Doctrine\(^{142}\) and the question of whether the doctrine had limits of applicability. It was part of a string of litigation from various quarters stemming from the nationalization of private enterprises by the Cuban government following the Revolution. Many owners of Cuban enterprises, including the owners within the cigar industry, either fled the new Cuban regime, or were U.S. citizens whose property had been nationalized, and sought to recover their

\(^{137}\) See United States v. Pink, 315 U.S. 203 (1942).
\(^{138}\) See The Paquette Habana, 175 U.S. 677 (1900).
\(^{140}\) See Baker v. Carr
\(^{141}\) 425 U.S. 682 (1976).
\(^{142}\) Id.
property and assets through the U.S. court system. The success of these cases depended on whether or not their losses were affiliated with an act of the Cuban government. The principle case in this line was Banco National de Cuba v. Sabbatino,\textsuperscript{143} where U.S. owners sued to recover business nationalized by the Cuban government basing arguments on the illegality of the Cuban action. The noting that the act of nationalization was a sovereign act of the Cuban government, the Court invoked the Act of State Doctrine and refrained out of prudential and comity considerations to “sit in judgment” of the sovereign acts of the Cuban government.

The Doctrine was modified in Dunhill’s majority opinion written by Justice Byron White. An American cigar retailer sought resolution of a controversy involving payment for cigar shipments both before and after nationalization by the Cuban government, with the owners, now residing in the U.S. claiming rights to available assets in the United States and the retailer seeking the return of payments incorrectly paid to the Cuban government for pre-nationalization shipments. Justice White distinguished the case from Sabbatino on the grounds that Cuba’s retention of the payments did not constitute a formal act of state, that it was Cuba’s burden of proof to establish that it did constitute such an act, and in any case, the nature of the retention was essentially commercial which White considered an exception to the Act of State Doctrine.

Thurgood Marshall wrote a dissent in the case. Considering his advocacy for property rights during his tenure with Kenyan Independence, the position taken which would have had the effect of upholding Cuba’s right to confiscate private property is interesting. The Marshall position, however, is not a commentary on the substance of governmental confiscation as much as it is a commentary on sovereign authority of a government’s decisions within its own borders. Marshall attacked White’s position at its obvious weaknesses. Where White considered each episodic conflict between Cuba and former owners of commercial interests as separate events, Marshall saw the retention of possibly wrongfully paid payments as part of the continuing acts of the Cuban government brought on by the nationalization of the assets. White’s call for proof that the retention was an overt act of the Cuban government was met by Marshall’s assertion that proof is not needed to characterize the retention as part of the original umbrella act of nationalizing property. Most importantly, Marshall challenged White’s argument for a commercial exception to the Doctrine pointing out that the position did not carry a majority and did not become the law of the case. Marshall further noted that the exception, applicable to sovereign immunity matters, is not appropriate

\textsuperscript{143} 376 U.S. 398 (1964).
for the Doctrine, which is based, not upon immunity for status, but upon the effect a court ruling would have on foreign policy matters often dependent upon mutual respect of sovereign prerogatives of governments. Whatever the nature of the act of state, as a sovereign decision of the Cuban government it would be entitled to the respect of the U.S. judiciary despite the fact that the State Department in this case itself adopted the commercial exception and invited the Court to overturn Sabbatino.

Part of Marshall’s dissent from the majority’s approach to the Act of State Doctrine, an approach that qualifies the doctrine on commercial matters, was informed by one of the principle justifications of the Act of State Doctrine offered by the Court in *Sabbatino*:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.144

The passage, which Marshall cites in part at pages 729-730, is not the principle justification of the Act of State Doctrine, which remains a prudential doctrine of political question.145 However, the Court’s *Sabbatino* acknowledgment and the Marshall dissent’s reiteration more than a decade later of the unsettled nature of the international law of nationalization and expropriation was an important addition to the international law debate on the subject. In his dissent Marshall comes closer to an internationalist perspective on the rule of law than White’s

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144 Id. at 429-430.
145 On whether the Act of State Doctrine is a principle of international law, Oppenheim’s International Law states: It is not clear how far this doctrine may properly be regarded as a rule of public international law or whether it belongs essentially to the province of private international law. Considerations of public policy have often prevented a full recognition of the validity of foreign legislation. There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law.

majority opinion, a trait it held in common with the *Sabbatino*
majority.\(^{146}\)

2. **EEOC v. Arabian American Oil Co.\(^{147}\)**

Marshall’s dissent in this case is also consistent with international law, but perhaps, offers a more aggressive assertion of U.S. power/interest in championing the extraterritorial application of the Title VII of the Civil Rights Act of 1964. Chief Justice Rehnquist, speaking for the Court, ruled that even though Congressional acts could have extraterritorial effect to cover an employment discrimination claim against the defendant, a Texas company operating in Saudi Arabia, its principle place of business, it would have to demonstrate such an intent. Finding no such clear statement of intent, the majority ruled the act inapplicable to the discrimination claim in Saudi Arabia.

Marshall challenged the majority’s “clear statement of Congressional intent standard” and argued that the necessary demonstration of intent to apply the act extraterritorially was discernable in the law. Both the majority and the dissenters agreed that U.S. laws may have extraterritorial effect, but neither discussed the international law basis for such a conclusion, referencing instead the Court’s own cases each of which was based upon domestic law. This reflects badly on the Court of that era in its apparent ambivalence toward international law in a case that so clearly required it.

That states may assert jurisdiction beyond its territory is established by the objective territorial principle, which allows jurisdiction for extraterritorial activities producing gravely harmful consequences to the social or economic order inside a state’s territory.\(^{148}\) The case involved discriminatory acts by defendant’s subsidiary, who was a domiciliary of Houston. The defendant was a Texas licensee, though not necessarily a domiciliary, having its principal place of business in Saudi Arabia.\(^{149}\) In either case jurisdiction could be appropriate under international principles providing jurisdiction over a state’s nationals if defendant’s status as a Texas licensee makes it a domiciliary of the state.\(^{150}\) However, defendant’s domicile in Saudi Arabia does suggest an even stronger case for Saudi Arabian nationality for defendant, making U.S. jurisdiction over it subject the effects test of the territorial

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\(^{146}\) Second Hickenlooper amend. stating that courts should not apply the Act of State Doctrine as a bar against hearing cases that deal with exploration by a foreign sovereign. The Act does allow the courts to continue to review cases whenever the Executive instructs them to do so.

\(^{147}\) 499 U.S. 244 (1991)


principle which allows jurisdiction over extraterritorial conduct that has or is intended to have substantial effect within a state’s territory, subject to a reasonableness test.

As stated, neither opinion seemed overly concerned about the international law issues involved, though the majority opinion’s outcome represented a more cautious approach under international law than Marshall’s dissent. Because the defendant was most likely a Saudi company, the effects test would be a weak link under international law on which to hang U.S. jurisdiction, unless a single act of discrimination can be interpreted as substantial.

3. Other Cases

Justice Marshall wrote in favor of a U.S. law standard of tax calculation as opposed to a foreign law standard in United States v. Goodyear Tire and Rubber Co. The Court was asked to interpret U.S. tax laws addressing the tax calculation for corporations whose subsidiaries paid foreign taxes. Marshall’s majority opinion did not purport to interfere with the foreign tax consequences of Goodyear’s British subsidiary, but it did defer to U.S. law on the issue of accumulated profits, a key component in calculating the amount of set-off a U.S. corporation may enjoy from foreign tax liability. To the extent any international law was implemented the case may be viewed as a developmental case, demonstrating U.S. custom on subsidiary tax treatment or a subsidiary means of determining international law on the issue.

Eastern Airlines v. Floyd et al, with Justice Marshall writing for the Court, was a textbook treaty interpretation decision. At issue were the liability obligations of airlines for injury arising from accidents, a category governed by the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air. Marshall’s opinion examined French and English text to determine if the

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151 Restatement 3d of Foreign Relations Law of the United States, sec. 402 (1); see also IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 299-300 (6th ed. 2003). Brownlie describes territorial jurisdiction and the effects test as applying to criminal matters. The Restatement requires a substantial effect within the territory of the forum state. Restatement Comment d.

152 Restatement 3d of Foreign Relations Law of the United States, sec. 403: § 403 Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

153 Both opinions passed upon an opportunity to lay guidelines for determining jurisdiction in cases like the present, which is based on statutory authority of Congress to regulate commerce. Under the aggregate theory of Wickard v. Filburn 317 U.S. 111 (1942), aggregated affects of similar occurrences were deemed substantial to meet the substantial effects test under Commerce Clause jurisprudence.


convention required airline liability for mental anguish from aircraft accidents. The opinion utilized a variety of sources, including language dictionaries, travaux préparatoires\textsuperscript{156}, a comparison between the meaning of the two language texts, the policy behind the treaty, subsequent additions to the Convention, among other considerations. This process lead the Court to conclude that mental anguish was not included among airline liability under the Convention.

Forum non conveniens, a procedural concept having to do with venue, is a particularly ripe area for international legal development, though so far it is a principle of private international law, which has more to do with choice of law issues in international litigation. Justice Marshall demonstrated an awareness of international sensitivities in \textit{Piper Aircraft v. Reyno}\textsuperscript{157} by addressing the proper forum for litigating a case involving a Scottish parties and an accident that occurred in Scotland. Though the U.S. federal courts in the Ninth Circuit had jurisdiction under U.S. law, the United States procedural concept of forum non conveniens allowed removal to more appropriate forum, including out of state fora. Justice Marshall’s opinion weighed the public and private interests involved as well as the quality of the alternative forum, which in this case would be the Scottish judicial system and ruled in favor of removal.

\section*{B. Citations to Marshall Supreme Court opinions in other Court Systems}

Justice Marshall’s main influence on international law as a member of the United States Supreme Court continued to be in the area of human rights law as citations to his opinions by courts from other nations will attest. The Marshall opinions referenced below are essentially human rights cases, civil rights and liberties under U.S. constitutional law. The use of these U.S. court decisions, like use of the \textit{Brown} decision discussed earlier, provides guidance to foreign jurists for their own constitutional or statutory decisions and are part of the development of human rights law as both customary international law and as a subsidiary means of determining the law in the areas ruled on.

The South African Constitutional Court has referenced opinions by Justice Marshall in its decisions. In \textit{August and Another v. Electoral Comm’n and Others}\textsuperscript{158} the Court relied on \textit{O’Brien v. Skinner}\textsuperscript{159} and specific language from Marshall for the notion that prisoners should be eligible to vote.

\textsuperscript{156} \textit{Id.} at 535.
\textsuperscript{157} 454 U.S. 654 (1981).
\textsuperscript{158} 1999 SACLR LEXIS 1 at pg. 31 (South African Constitutional Court)
\textsuperscript{159} 414 US 524 (1974)


This list was taken from available data bases at the time of the preparation of this paper. This research does indicate that though Marshall’s influence on racial equality was profound, he had significant influence in other areas of equal treatment as well. Further research will undoubtedly disclose his influence in the court system of other countries as well. The proliferation of his influence is the international law is made.

Conclusion

Thurgood Marshall was a western lawyer who believed that application of first principles of human rights would right the wrongs of a world filled with racial discrimination. His Kenya experience may have raised cautionary signs about the application of western notions of egalitarianism in developing societies. In Marshall’s defense, there can hardly be any doubt that the British would have shut down negotiations if white property and political rights had not been protected. The British Empire was not going down quite so easily, and perhaps Marshall, always a pragmatist even among U.S. civil rights leaders, understood that. Notwithstanding that, by the accepted standards of international law development, it is fair to characterize one of our country’s most outstanding constitutional lawyers as an international lawyer as well.
