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BOOK REVIEW

COMMENTS ON HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW

(Durham, North Carolina: Carolina Academic Press, 2008)

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Professor Richardson's work makes important contributions on two fronts. It is a sophisticated work of both historical scholarship and critical race theory. As historical scholarship, *The Origins of the African-American Interest in International Law* is a synthetic work, drawing on diverse historical sources to recount a detailed narrative of African-American claims to, interests in and appeals to international law over approximately two centuries spanning, with occasional peeks both forward and backward in time, from the landing of the first African slaves at Jamestown in 1619 to the 1815 Treaty of Ghent, ending the War of 1812 between Britain and the United States. Regarded as such, the book is richly rewarding. Professor Richardson excavates historical source material for evidence of the claims made by people of African heritage for freedom, human dignity and self-determination. These claims were variously expressed throughout the period of the Atlantic slave trade and the enslavement of people of African heritage in the Americas, often through conduct and other means might escape a more traditional historian's gaze. Richardson gives voice to these claims as interests in international law, even if they were not always conceived of as such by their authors and even if international law – in the imperfect form in which it existed at the time – did not recognize the justiciability of the claims.

Second, the book is a contribution to the tradition of critical race theory. It partakes of some of the narrative and

methodological strategies of that tradition, including the fictive reconstruction of historical events, with new African-American voices added to the mix. But Professor Richardson is equally at ease with the approach to international law of the New Haven School, and he is thus able to write with great authority of how African-American history can be understood to have comprised a tradition of appeals to international law or international legal norms as a source of remediation of the injustices that African-heritage people suffered in the Americas

Viewed as a work of history, the book is not a typical product of archival research. Professor Richardson does not and does not claim to have undertaken original historical work. Rather, he has read innumerable historical monographs, works of legal and sociological theory, international law and critical race theory. Armed with this store of knowledge, he is able to recast a relatively familiar historical narrative –that of the Atlantic slave trade and the African-American experience – through the lens of international law.

It is a shame that the academic discipline of history does not more highly prize such works of historical synthesis. One need not always mine the archives to make historical discoveries. The most important historical discoveries are often hidden in plain sight. So it is with this book. There have been many histories written on the African-American experience, but Professor Richardson's focus on the intersection of the history of the Atlantic slave trade with various overlapping legal regimes within which that trade developed permits us to view the history with fresh eyes.

And works of historical synthesis are not so easy to compose as they might seem. The story must be well told and it must be told from a novel perspective. This calls for two surprisingly distinct sets of skills. The historian who can tell a good tale is rarely the historian who can understand the broader ramifications of that tale any more than the tenor who sings Puccini could have composed the arias he sings. And alas, intellectual historians who plumb the depths of consciousness in order to exhume our deepest thoughts, aspirations, achievements and fiascos rarely do so without

inflicting upon us so much erudition that we lose entirely the ability to turn a page.

Telling the tale is especially challenging when it comes to the history of marginalized groups, since traditional historical sources rarely permit such groups to tell their stories in their own voices. Rather, the narrative historian must recreate their stories from such non-narrative sources as exist, such as birth, death, tax and census records and from non-traditional sources, such as folk tales, songs, fictionalized accounts and, as Professor Richardson does with great success in this book, conduct. In addition, legal documents are often the historian's best hope for reviving some sense of the experienced of people who were not masters of their own destiny and who, as a consequence, had not mastered writing.

And in this area, Professor Richardson's methodology is most impressive. He attempts to discern the intentions of African-Americans through their conduct and articulates those intentions in terms of legal claims and legal interests. He similarly extracts evidence of those interests and claims from the records of cases in which those interests and claims are not expressly made manifest. I find this approach bold but convincing, at least in this case.

If I were to fault Professor Richardson's approach to narrative, it would only be for being a tad more prickly than I think is warranted with respect to the methods necessary to give voice to the historically marginalized. Such historical narratives are of necessity more speculative than are similar narratives that can be based on more traditional historical sources, such as first-hand, eye-witness accounts, such as journals, autobiographies and the like – or even contemporaneous secondary sources such as journalistic accounts written from a perspective relatively sympathetic to that of the historical subjects. Still, the difference is really one of degree. I am fully convinced that Thucydides was the author of Pericles' Funeral Oration, but the fact that Thucydides presented his own words as though they were uttered by the Athenian leader does nothing to diminish my estimation of him as a historian. Historical recreation is always an imaginative act.

In any case, nowadays even biographers of the Founding Fathers engage in novelistic recreations of 18th-century dialogue, and Stephen Greenblatt and his fellow New Historicists pile speculation upon speculation in order to develop theories of the early modern imagination. In the light of such methodological heterodoxy, it is hardly suspect if a historian of the African-American experience engages in reasonable speculations regarding the frames of mind of 17th and 18th century African-American slaves. It may be that what I have called Professor Richardson's prickliness derives from the methodological conservatism of legal historians, who inhabit a notorious backwater of the historical profession, and from the gulf separating what passes for innovative scholarship in that field and the tradition of creative historical reconstruction pioneered by Derrick Bell, Richard Delgado and others.

While I would not fault Professor Richardson's historical methodology, his invocation of international law can be a bit confusing, if not misleading. The way Professor Richardson speaks of international law in the 16th through the early 19th century is in tension with the international lawyer's comfortable assumptions regarding that body of law primitive state in the early modern era, but it is not Professor Richardson's intention to call those assumptions into question. Rather, what he means by an "interest" in international law is something like an ideal-typical reconstruction of what protections international law might offer – or what rights it might convey – upon enslaved Africans.

But because it is so easy to confuse invocations of this interest in international law both with the real international law (which was not helpful to African-Americans) and with other, more robust forms of what Professor Richardson calls "outside law," I am left wondering about the usefulness of Professor Richardson's terminology. What does it mean to say that people enslaved in the Americas appealed to international law?

It clearly does not mean that they appealed to Grotius, Pufendorf or Vattel or to other early formulations of international law and pointed out to their captors that enslavement was

inconsistent with principles recognized in treatises on international law. They could not do so for two reasons. First, Professor Richardson concedes that, for the most part, African slaves had no familiarity with such texts. He also concedes that, with the exception of the few occasions on which enslaved Africans made their reliance on notions of international law explicit, the extent to which African-Americans were even aware of the existence of a sub-species of outside law called international law is a matter of speculation. In any case, during the period covered by the book, international law did not proscribe slavery and did not recognize the various rights claimed by enslaved Africans. There were always currents within international legal theory that recognized a certain tension between principles of international law and the fact of slavery, but those tensions persisted nonetheless.

There was no right to be free from capture, and there was a very limited body of what we now call international human rights and humanitarian law that constrained warring parties in their treatment of captured persons. Nor were there international rules or customs regulating the treatment of slaves, indentured servants or employees for hire. As Professor Richardson's work illustrates, the status of Africans was very different under Dutch, English, Spanish and Portuguese colonialism, but these differing practices were a product of the laws of the differing empires and were not subject to international regulation. Professor Richardson cannot recount any case in which of any of those governments raised objections to the treatment of slaves under the laws of one of the others. They did not do so because they believed they had no right or interest to do so under international law.

Which brings me to the more troublesome problem – and this continues to be a problem for international law today – the subjects of international law were states. Only states had rights and obligations under international law that they could seek to enforce through adjudicatory bodies, through diplomatic means, or through resort to force. So, even if international law recognized the sorts of legal claims identified by Professor Richardson, individual slaves, even groups of slaves, had no standing to raise such claims. Early modern international law recognized no right of self-determination

and no right of rebellion. There simply was no legal person who could press the claims of enslaved Africans or represent their interests as a matter of international law. While Professor Richardson contends that some independent African communities in the Caribbean and South America achieved a status akin to international personhood, he does not claim that such independent communities arose in North America.

Things might be different if we lived in a monist world in which all international legal norms are automatically incorporated as domestic law as well. In the period covered by Professor Richardson's book, however, England was expressly dualist. As Professor Richardson acknowledges, only Parliament had the power to make domestic law, and international rules were binding only to the extent they were enacted through parliamentary legislation. The Supremacy Clause gives the United States Constitution's more of a monist cast, but U.S. constitutional history tilts more in the dualist direction, as Professor Richardson also acknowledges. As a result, even if international law created certain rights, it would not automatically provide a cause of action or a remedy to African-Americans.

Things also might be different if international law were a sub-species of natural law, although even Grotian natural law permitted slavery and refused to recognize a right of rebellion or escape. But in the period covered in Professor Richardson's book, international law evolved from Grotius's natural law foundations to Vattel's legal positivism, and there it has remained, for the most part, ever since. Even in Grotius's era, the natural law foundations of international law were largely theoretical in nature. Law derived from custom, and early modern practices provide a weak basis for a claimed equivalence of international law and moral law. Both the Roman and the Christian traditions managed to reconcile notions of human dignity and higher law with the permissibility of enslavement and the impermissibility of rebellion. So, while Professor Richardson is able to provide ample evidence of appeals to natural law, to the laws of other nations (including African custom) and to the laws of England and its colonies, he has great

difficulty identifying appeals to international law that are not better understood as really falling into one of the other categories.

More generally, there is a tendency in the book to assume that the natural law approach to international law holds out more promise for African-Americans than does the positivist approach. I have my doubts about that, although I could not dispute the extensive evidence marshaled by Professor Richardson in support of the view that the African-American interest in outside law often appeals to some form of natural law. Still, natural law has rarely been a progressive force. Natural law arguments helped to justify white domination, male domination and heterosexism. And they continue to do so. On the other hand, much that has been accomplished through the international human rights movement in the post-war era has been accomplished through a very simple arrangement. Different cultures might not be able to agree on ultimate truth, but if they can just agree that certain practices are unlawful, then we can probably make some pretty good progress towards international regulation of at least the most extreme forms of inhumanity.

One's enjoyment of the book does not turn, however, on a satisfying rejoinder to these criticisms. I learned a great deal reading it. Its general discussion of a Black tradition of appeal to outside law is informative, convincing and above all helpful in providing a conceptual matrix that aids in the understanding of Black political practices. Professor Richardson states several times in the book that the task will have to fall to some other scholar to continue the narrative he has begun into the present. That is a shame, as a second volume would be of extraordinary use. In his introduction, Professor Richardson situates famous speeches of Martin Luther King, Jr. and W.E.B. Dubois in the context of the Black international tradition in a compelling way. This reader would be very interested to read the narrative that connects Professor Richardson's account of that tradition up to 1812 with these very important 20th-century African American perspectives on international law and U.S. foreign relations.