

**The Origins of  
African-American Interests  
in International Law**



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Henry J. Richardson III

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*To Renee,  
who as my wife and love has made me  
better than I would have been,  
and this book likewise.*



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# Prologue

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When, in 1965, Martin Luther King began to speak out publicly against the Vietnam War, many people in the United States—whites, some Blacks, and others—questioned his appropriateness and wisdom of doing so. They questioned whether the century’s foremost civil rights leader should—indeed as President Lyndon Johnson would so publicly excoriate him—‘meddle’ in the foreign affairs of the nation instead of “sticking to civil rights.” King indeed considered the same questions but was not constrained by them. The public debate and official disapproval were subsequently fanned into greater intensity by King’s epochal Riverside Church Speech in New York, on April 5, 1967. King opposed the Vietnam War for, among other reasons, being illegal under international law, for putting America on the wrong side of history in fighting against the world’s poor people, and for having its policies captured by what he called the intertwined “triplets of militarism, materialism, and racism.”

In doing so, King at the Riverside Church outlined nothing less than an alternative approach to the entirety of international relations. It rested on the necessity of projecting a neighborly love for all the world’s men and women, and for the United States’ not demonizing its enemies but projecting itself into their situations as a basis for better understanding and better, more peaceful, and moral policymaking. This international philosophy continues to resonate in the political thinking of many African Americans about foreign affairs. It resonates also at the core of the global anti-war movement which arose in answer to the American invasion and occupation of Iraq from the Spring of 2003.

The discomfort and even shock of many Americans at King’s insistence on speaking out about international questions seemed to stem from their surprise based on the misunderstanding that Blacks had stayed out of, were not concerned with, were not knowledgeable about international debates, questions, and policymaking. Included in this misperception was the assumption that Blacks did not participate in any general sense in the dialogue and decision-making, both national and international, as well as the opinion that they *should not* do so. Ralph Bunche’s ongoing fine career, going from strong civil-rights roots to become one of America’s premier diplomats and one of the world’s foremost statesmen, had not registered on the national psyche in this regard. Moreover, except for Black soldiers being always available to fight and die in America’s wars, African Americans—as this great misunderstanding continued to unroll—probably should leave these matters to more elite, powerful, and official white men.

In other words, those with misgivings about Martin Luther King in this regard did not know of, or rejected what they suspected of the African-American International Tradition, which pre-dates the founding of America as a nation. This Tradition generally refers to the history of Blacks invoking the linkages between their freedom and international issues. If they did have some sense of this Tradition, more than a few among them would have tried to oppose it with the conceptual tools, doctrines, and theories of the white-dominant academic institutions—including university departments of international re-

lations and law schools. They would have applied, as well, the accepted processes of scholarly enlightenment to undermine and deflect the authority and validity of its historical teachings. Indeed American History is only now just recovering from such a racially driven, scientifically disguised attack on the history of the constructive roles of Black officials and leaders during the post-Civil War Reconstruction era.

King's work was a continuation of the Black International Tradition. It included his mobilizing arguments of and demands for equity under international law from the vantage point of Blacks' trying to protect both their interests and the national interest of the United States as an intrinsically moral—in its concern for justice for the dispossessed—nation. His concepts were the latest stages in a four-centuries-long historical conversation within Black communities and, through the deadly screens of slavery and racism, between Blacks and whites. I try in this Book to explore the origins of that conversation, particularly as they reveal the birth of African Americans' stake and interests in the process and authority of international law.

My initial idea for writing on the relationship of African Americans and international law was to do a book on the subject which would cover the entire historical period of African-heritage people in this country, from about 1619 to the present day, with projections into the near future. From past work I had thought, incorrectly, that the crux of such a book would consider questions arising in the twentieth century, or in any case subsequent to the 1884 Congress of Berlin, in which European powers divided African spheres of influence arbitrarily among themselves. That Congress attracted considerable attention from African Americans at the time. In this frame of mind, I sat down several summers ago to seriously plan, continue the research, and outline such a book.

However, at the end of that summer I had outlined about six chapters which chronologically only had taken the inquiry to the American Revolution. African slaves and African Americans during their first two centuries of enslaved existence in British North America had engaged in many and varied international pursuits, demands, strategies, and lines of communication relative to England. These included: sailing on the high seas, voluntary and involuntary contacts with the West Indies, escaping to Spanish Florida, linkages with slaves in the Caribbean, and participating on the international stage in the American Revolution itself. Furthermore, I knew of no scholarship on the birth of the Black International Tradition, though I had previously referred to its manifest existence in the 19th and 20th centuries. The legal historical story was clearly longer and wider. Any opening book must seek to understand the richness of those origins of this Tradition, and, more specifically, of the African-American stake in the approaches, interpretation, and application of international law.

And so this book explores the birth of the Afro-American International Tradition and particularly the roots of African Americans' stake in international law. I consider these sources as only formally arising in about 1619, the date the first Africans were landed at Jamestown in the British North American colony of Virginia. But the reality is that they arose considerably earlier than that British colonial year. I explore this as it winds back to Africans earlier on the North American continent and back to the European slave trade out of Africa. The book ends at around 1820, just following the close of the War of 1812 between America and Britain.

This historical period also roughly corresponds to two other key historical creations of humankind grouped around the Atlantic Ocean basin: the rise of international law as a modern legal system, particularly among European states and their Atlantic colonies, and the rise and flourishing of the international slave trade in African slaves by European

merchants and governments into the New World. Only by placing African slavery in the British North American colonies in the context of the International Slave System encompassing and linking the New World, can the actions, struggles, demands, and decisions of slaves and Free Blacks in North America relative to international law be properly understood. This is what I have tried to do, from the vantage point, as far as can be discovered, of those African and African-heritage people.

Thus, necessarily, this is a book reflecting on the early era of modern international law as that legal system dealt with race, seen from the perspectives of African slaves and the emerging community of African Americans, and from an historical reconstruction of what their pertinent interests appeared to be at that time. Issues of European indentured servitude and Native American enslavement during this period are never far away. This is also a book that considers the relationship among the consolidation of the United States as a new sovereign nation, race and slavery, African-American interests, and international law. The rise of international slavery during this period made race both a pervasive and an international question, and race increasingly became a justification by white Europeans and then white Americans to support perpetuating the international slave system.

## **The International Channel of the River of African-American History**

This book tells, among other stories, that of the failure of the international slave system to prevent Blacks from making demands about confirming their rights under some kind of outside law. That includes international law, even though they may not have used the term, which was to be applied to their circumstances and help relieve them from slavery and racism and other abuses.

Black Americans laid the first foundation stones for their International Tradition at the same time and, arguably, earlier than the conventional forerunners—the British colonists—of the United States laid theirs. From before 1619, matters of “international affairs” were significant in various, and often different ways in the lives of Blacks in North America. We cannot make sense of Blacks’ claims to outside law to confirm their right to freedom without developing the international historical context from which those demands arose. Nor can we, without such context, understand the degree to which their African heritage was embedded in their enslavement and the evolution of their claims to outside law. Furthermore, the historical context of the evolving international slave trade is essential to demonstrate the establishing of Euro-white-dominated structures of international and national captivity of Blacks. That context eliminates any correctness of having white actions and perspectives dominate the narrative of Black claims to be governed by better law. Finally, exploring the question and ultimately finding in the affirmative, of whether Black claims to outside law and to better international law rested on Black resistance to slavery requires the historical context of the international slave trade, as well. This context intersected in so many ways with American national perspectives and legal process, and that intersection was seen, contrarily, by many contemporaneous Blacks as a single unity of their enslavement.

Chapter 1 explores the birth of the West African slave trade, first importing a relatively small number of African slaves into Spain and Portugal, and then expanding to the roaring international slave trade into the New World, beginning with Columbus as perhaps

the first such slave trader. This inquiry includes the legal and jurisprudential debate over the permissibility of first enslaving Indians and other indigenous New World peoples and then changing over to African slaves who could be more easily treated as economic units in the brutal conditions of plantation labor. It also includes the rivalry between Spain and England for control of the slave trade, with other European participation, and inquiry into the drum beat of Africans' resistance and rebellion against being enslaved from the beginning. Throughout, issues of present historiographical interpretation are explored. Finally, all of the above issues are considered in the context of early international legal trends at the time and their accompanying issues of interpretation.

Blacks were affected by international politics. They participated in and affected those politics as part of their struggles to survive, carve out niches of accommodation, and free themselves from enslavement or from as much of slavery's oppression and society's racism as possible. Chapter 2, in telling the story of the landing of the *Twenty*, the first African slaves at the Jamestown dock in 1619, investigates their legal status under British, Virginia, and international law as to whether they were slaves or indentured servants. Further, the Jamestown landing is put in context of the documented presence of African-heritage people and settlements on American shores as early as 1512, and of the historical meaning of the wide recognition of the former and the scant recognition of the latter. The history of those early Blacks enables us to identify and discuss the first implicit Black claims to international or "outside" law. These are then compared with such implicit claims as the Jamestown *Twenty* were seemingly in a position to make, had they possessed the resources and opportunity.

Blacks in the North American British colonies participated in international politics as best they could in their quest for freedom. They did so even though they were denied formal access to its European-controlled decision making. They participated even if all they could do was to demand of "outside" forces and sources of different norms that, for example, relief be supplied to counter local oppression, or that threats of their being taken overseas to the Caribbean for *more* slavery not come to pass. From the beginning Blacks had a consciousness of affairs beyond the Eastern American shores, beginning with their collective memory of Africa and Europeans' relations with African peoples that had brought them to their present circumstances. They clung to these cultural memories and used them as best they could under slavery's captivity.

Chapter 3 opens by building on the story of the *Twenty* and then explores and clarifies the notion of claims to "outside law" as it relates to African notions of liberty and the African origins of the slave trade. This discussion tries to understand, among other questions, what perspectives on their new conditions the *Twenty* might have brought with them on the horrible Middle Passage from Africa across the Atlantic in their slave ship, as so many millions more of Blacks were to suffer. And inevitably as part of their being collectively entwined, as African slaves in one of many New World colonial territories, in questions of international politics and economics from the beginning of their presence in North America, they were making explicit and implicit claims to outside law. These are next explored, in much of Chapter 3, in discussing Black claims out of their lives in pre-Revolutionary Dutch and British New York, notably including the slave revolt in New York of 1741, and the ensuing trials and executions of Blacks.

Chapter 4 continues the exploration of Black claims to outside law by inquiring into slave revolts and maroon movements and communities—communities of escaped slaves—throughout the Americas. This includes a discussion of the international legal issues raised by the Republic of Palmares in Brazil which existed for most of the 17th century, as no less than an independent African state until it was militarily conquered after repeated

British, French and Portuguese assaults. This is followed by a discussion of the relationship of these maroon communities to African slaves in the thirteen North American colonies, as sources of information or models for action. By this time it is clear that there is indeed a coherent international slave system linking Europe and the Americas during this historical period.

International law applies to the full range of international politics. Hugo Grotius, the accomplished lawyer and scholar, in Holland during this same period of Blacks' early presence in North America (1625–1660), first organized international law principles into a modern legal system. He recognized this premise from the beginning.<sup>1</sup> And therefore Black demands—whether explicit and written or implicit and unspoken but acted out—that outside international forces should improve Blacks' local welfare, or at least not magnify local conditions into yet more oppression, also frequently encompassed implicit or explicit claims. These were about how international law should be formulated and interpreted: what it as a system should render legal and what it should render illegal.

Chapter 5 discusses Grotius' work as it relates to doctrines of natural law, conceptions about slavery and the slave trade during that period, and the jurisprudential debate from the 16th through 18th centuries about whether natural law was a proper basis for international law. It further discusses the interests that the Twenty and other similarly situated African slaves had in how that debate might be resolved, and the consciousness of that debate by white American colonists relative to what African slaves might possibly have known about those issues.

That the then-existing international legal decision makers and officials had no concern for the substance of Blacks' claims, or for granting Blacks' access to make them, does not control the present discussion, because it does not touch the integrity of the connection between such claims being made and the emerging African-American Experience. Knowingly or not, Blacks were making demands to re-interpret and normatively change international law, which after all evolved, at least in part, to protect the burgeoning International Slave System in the New World, and whose principles from the beginning had to cope with its existence. Blacks were not, for the most part, claiming that their behavior in rebelling, opposing, and contradicting their enslavement and the racism directed against them was *legal* under contemporaneous international law. And they knew that such behavior was illegal under slave codes and other similar local law, beginning in the late 17th century.

Chapter 6 explores at some length African claims, explicit and implicit, including those raised by maroon communities, to outside law during the 18th century in the context of issues raised by slavery and the slave trade under contemporaneous international law. Such issues include the following: the legal competence of African slaves under international practice, treaties between local colonial governments and maroon communities, and the question of whether there was any international legal basis for slave revolts in the work of Grotius or otherwise.

As their fate and status evolved in British North America from 1619 towards the American Revolution, the emergence of full-blown African slavery, including in the Southern Colonies, did not completely stifle slaves' claims to international or "outside" law. But it did spotlight Free Blacks' claims, who generally had somewhat more latitude to express them, and the extent to which their claims also served the basic interests of their slave mothers and fathers, brothers and sisters, cousins, sons and daughters.

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1. See Sir Hersch Lauterpacht, "The Groatian Tradition in International Law," *British Yearbook of International Law*, vol. 23, n. 1 (1946) 1–53.

Claims continued to be made by some members of most if not all classes of Blacks, fed in part by their surprising access to flows of international information from, for example, London and the Caribbean. There was an historical synergy between Black North American claims and those from Inter-American and Caribbean slaves at a level of at least enlightenment and inspiration if not immediate model-building for revolts, and this synergy evolved prior to the American Revolution.

As that Revolution approached, the contradiction between white European colonists' publicly applying metaphors of "slavery" to describe their relationship with the Britain of King George III, and the actual circumstances in which they were profiting from "their own" African slaves under their noses and in their own houses, stimulated new kinds of Black claims to natural law. These included, implicitly, claims to international law to the extent that it was then still based on natural law, as Grotius had formulated. These Black claims in the revolutionary era mobilized this contradiction around the same principles underpinning the Declaration of Independence and the formulations of rights in the forthcoming U.S. Constitution in 1787. Free Blacks were in a better position to make these claims more openly than were southern slaves, in part because of the comparative looseness of Northeastern slavery. However, those claims were intended to reflect as much of the interests of southern slaves as was possible for their northern Brothers and Sisters to do.

Chapter 7 introduces a petition by the slave Lancaster Hill to the Massachusetts House of Representatives, in 1777, for an act that would set him and other slaves free. This petition serves as a paradigm to discuss freedom suits, similar petitions by Blacks during this period, and a general trend by Blacks during the Revolutionary era to make claims to natural law, as outside law, as a basis for their freedom from slavery. The petition is discussed in the context of Black perspectives in the Revolutionary war era, and also in connection with levels of information among Blacks about foreign international slave system-related events, through the travels of Black sailors as a transmission channel for such information. It is quite possible that these claims to natural law were made with more than a little knowledge about similar claims elsewhere in the European-Atlantic-American basin.

Claims to international law by Blacks, especially in the southern colonies, became quickly and tightly linked to Black survival with the outbreak of the American Revolution in 1776. This was because that War put Blacks squarely in the middle of two contending candidates for sovereignty over the same territory of North America's eastern seaboard, and therefore they were naked—as a group—on the international stage. They had to choose their loyalties or at least their most likely survival options, but, in fact, as a group they chose their most likely *freedom* options. In numbers most Blacks saw the British as potential liberators and chose to try to help their fight or at least seek security by moving towards their military lines and encampments. Caught up in the approaching military battles, their decisions often had to be made quickly about, literally, which way to run. And from their position on the international stage, these decisions and actions involved both explicit and implicit claims to international law made to both the American colonists and the British forces. Such claims can be seen even more clearly under the glare of the strong historical argument that the American Revolution, particularly in the Southern colonies, was fought at least as much to preserve the North American system of African slavery as it was to free the thirteen Colonies from Britain.

Thus Chapter 8 analyzes Lancaster Hill's claims in connection with contradictions about freedom among the perspectives of white American colonists, and in connection with contemporaneous perspectives in international jurisprudence. This includes the important *Sommersett* case in Britain in 1772, as well as Black perspectives and actions during the Revolutionary War. I explore the question of whether Blacks had an interest,

regarding the contemporaneous debate about whether international law should be grounded on natural law or on positivist territorial sovereignty premises, in natural law emerging predominant (contrary to European trends at the time). Black claims to outside/international law are identified throughout this discussion.

When the Revolution successfully defeated the British, the British honored their obligations under international law by taking at least 30,000 ex-slaves with them back to Britain. Analogously, the Colonists honored theirs by manumitting up to 12,000 slaves who had fought for them, while bitterly opposing the British removing any of 'their' slaves at all. Post-Revolution questions turned to the need of the new nation and its fractious thirteen sovereign states for new constitutive arrangements under which to govern itself. The issue was not whether, but how international law was to be incorporated in such new arrangements and documents. As a dozen or so years passed of mounting troubles which threatened the Union, how would this issue unfold in 1787 in the Constitutional Convention in Philadelphia? Blacks were frozen out of that august body of Founding Fathers, but were entering a new stage of social and political organization, especially in Pennsylvania and other parts of the North. They already possessed a history of claims to outside law, including international law, arising out of their life in America. And they necessarily had interests in the outcomes of the Constitutional debates about the international law-related provisions of the Constitution, even if the legal historian must provide heuristic assistance to give such interests concrete form after all these years.

And this is the general collective focus of Chapters 9, 10, and 11. The history of Black claims to international law up to that point provides a sufficient basis to at least inquire about their interests, regarding the Constitutional Convention's debates and outcomes in Philadelphia and the subsequent State ratifying conventions. This is all the more the case because of the prominence—even domination—of the slavery question at the Philadelphia Convention.

These three Chapters ask, through using the approach of a fictional narrative, what interests in the outcomes of the Framers' debates about drafting the international law-related provisions of the Constitution did Blacks have? They go on to explore the debates around each such separate provision in this regard. Even though Black delegates were not physically present in Independence Hall in Philadelphia—but Black servants to the Framers were—they and the question of slavery, plus the historical outcomes of Black claims to outside law and international law in North America as of that moment were manifestly present in the Framers' debates. Thus Black claims and interests in international legal process are considered in these chapters, as if they had had informed and committed representatives able and present in Independence Hall to effectively help shape this historical discourse and draft the relevant constitutional provisions. They are considered in light of the Convention perspectives of the Framers about how the United States, as a newly sovereign nation consolidating itself *vis-à-vis* other sovereign states, ought to incorporate and confirm its rights and duties under international law.

As the young United States approached the 19th century under a new Constitution with its history imbued by international questions at every turn, we find that the Black International Tradition—increasingly including Black claims to international law—is coterminous with that of other groups in the country and longer in time than some. Identifying and analyzing Blacks' explicit and implicit claims to international law up through the drafting of the U.S. Constitution enables us to identify their *interests* up to this point, and the *stake* of Blacks as they appeared to define it in the international legal process.

Chapters 12, 13, and 14 collectively consider post-constitutional claims to outside law and international law by Blacks to confirm their right to freedom up to about 1808. The inquiry particularly includes the resumption of the African slave trade by the United States, and the resumption of constitutional authority for its federal regulation as of 1808. These chapters also discuss the hugely significant body of claims arising from the Haitian Revolution beginning in 1791. Further they explore the consequences of the British abolition of the international slave trade among its colonies in 1799, and of American governmental actions to conquer Florida territory and destroy that sanctuary from American slavery for Black slaves and Black Indians vis-à-vis Spanish ownership. The consequences for Black claims to outside law from the forced migration of Blacks in the movement of slavery and the plantation system westward to the Mississippi River were large and significant in bringing Blacks in close proximity to European sovereign regimes. These regimes represented *loci* of relatively easily accessible outside law to which free Blacks and slaves of diverse racial mixtures could claim to confirm their rights to buffer new waves into Mississippi Territory of American slavery and racism.

In Chapter 15, Black claims to outside and international law regarding the approach, conduct, and conclusion of the War of 1812 are explored. They are examined in the context of Blacks in New Orleans, of Andrew Jackson's actual and implied promises of manumission in return for military service, now linked to what had arguably become a principle of contemporary customary international law giving slaves a conditional right to freedom. Black claims are further explored regarding Black military service to both America and the Britain, and again, regarding thousands of Blacks sailing away with the British at War's end. Further, more implicit but detailed Black claims to international law are explored regarding the conclusion of, and Black interests in, the drafting and interpretation of the Treaty of Ghent to end the War by America and Britain in 1815.

Chapter 16, as the concluding chapter, reflects on Black claims to outside/international law from the entire preceding inquiry. It identifies Black interests in the international legal process. It further argues that fundamental Black interests had evolved by the end of the War of 1812. They had evolved from their origins through innumerable Black claims to outside law relative to the slave trade, and up through the American Revolution and the War of 1812, to comprise by the second decade of the 19th century an African-American stake in the invocation, prescription, interpretation, and implementation of international law.

We therefore might begin to perceive, through new lenses, the 20th and 21st century question of why are Black initiatives in international affairs and claims by Black groups to interpret international law still raising many white American hackles, even as the probability of some of them being authoritatively enacted (e.g., the Free South Africa Movement in the 1980s) has now risen somewhat.

## Central Concepts

The central concept in this book, that of Black claims to outside law, owes a large debt to the scholarship and teaching of the great scholars Myres McDougal, Harold Lasswell and their associates, including Michael Reisman, at Yale Law School, as they developed their 'New Haven School' Law, Science, and Policy jurisprudence. My involvement in this approach to law and legal reasoning is apparent throughout this work. And elsewhere I

have referred to the utility of LSP jurisprudence to help support the subsequent appearance of needed critical jurisprudential approaches to international law, such as Critical Race Theory, Critical Latino/a Theory, and Feminist Jurisprudence.<sup>2</sup>

Thus the central notion of Black people making claims/demands to be governed by a better outside law and to define and protect rights to freedom and equity that they are denied by their white governance under local law, stands in this regard on familiar jurisprudential ground. The companion notion that Blacks' claims to outside law can be clarified, analyzed regarding their uniformities in a process of claims over time, and understood in international community context across a wide range of values, from this notion, suggest further that African Americans evolved stakes and interests, of recognizable policy content, in the prescription and application of international law. This would have been a different, more difficult, and likely lesser book without this comprehensive and rich approach to law and justice as a foundation to enable African-American actions and voices to speak to the future.

But no supporting foundation comprises the entire house. The notions of Black claims to outside law and then to international law, while adapted from building on the New Haven School, also are led beyond that work in some ways that Professor McDougal and his associates may not have intended or even approved, by the contextual conditions, strengths, drives, and persistent threats to African-heritage peoples. These peoples were generally claiming against community authority, and not to it. Adapting here the New Haven notion of "claim" for Black people demanding better outside law in complex situations enables this Book to be analytically focused on Black 'voices' who made such claims and demands. It thus enables the story of the origins of Black International Jurisprudence to be told, or at least credibly suggested, from the vantage point of the Black people who owned those evolving perspectives about law.

Thus New Haven jurisprudence helps define here a workable path through the minefields of tendentious questions of historiography regarding African-heritage peoples.

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2. The major international law works of Myres McDougal, Harold Lasswell, and Associates include the following: Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953); Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771 (1958); Myres S. McDougal et al., *Studies in World Public Order* (New Haven: Yale Univ. Press, 1960); Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation Of International Coercion* (New Haven: Yale Univ. Press, 1961); Myres S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale Univ. Press, 1962); Myres S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic, *Law and Public Order in Space* (New Haven: Yale Univ. Press, 1963); Myres S. McDougal, Harold D. Lasswell & James C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven: Yale Univ. Press, 1967); Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497 (1975); Myres S. McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale Univ. Press, 1980); Myres McDougal and Michael Reisman, *International Law Essays: A Supplement to International Law in Contemporary Perspective* (New York: Foundation Press, 1981); *International Law in Contemporary Perspective: The Public Order of the World Community* (New York: Foundation Press, 1981); Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven: New Haven Press, 1992).

For recent studies in Critical Race Theory and International Law, see, e.g. Symposium, *Critical Race Theory and International Law*, 45 VILL. L. REV. 827 (2000).

For the foundations of Feminist Jurisprudence and international law, see Hilary Charlesworth & Christine Chinkin, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

For recent studies in Latino/a Critical Theory and international law, see e.g., Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. Miami Inter-Am. L. Rev. 177 (Winter 1996–1997).

These include that of writing valid history (including legal history) regarding personal or group objectives, but in the absence or impossibility of surviving written documents from the claimants. It includes the issue of identifying and clarifying Blacks' claims about legitimate authority where the monopoly of the surviving written documentation about the lives and actions of the Black claimants was produced and held by whites, who were writing from radically different and usually racially destructive perspectives framing the context and recording the information about those ("their") Black persons.<sup>3</sup>

Blacks, when they made claims for a better outside law, including a better international law, to govern them, were definitely claiming for a new or radically reformed constitutive process of authoritative decision for both the United States, from the 17th into the 19th centuries, and for the contemporaneous international community. They largely had to construct their own opportunities to make such claims and usually did so at great personal and political risk. And while their claims sometimes aimed to be sufficiently precise and to be directed to affect the prescription and application of certain policies and results towards their freedom in the contemporary American/international constitutive process, Black claims were largely made in resistance to the constitutive process of slavery. The results Blacks were demanding required the actual replacement of slavery with racial equity.

Thus, this Book sees their claims to outside law as factors helping to establish Black identity and survival by defining and demanding alternative processes for confirming and protecting their rights. White officials, populations, and elites were determined not to permit these same rights to come into contemporary legal, moral, cultural, economic, religious, or political existence. The validity of these identified and clarified Black claims to *outside law*, accordingly, rested foremost on their being expressed in some understandable fashion and their policy content being clarified to reveal Black aspirations and political demands for a better life. These claims' validity for Blacks or for the legal historians to whom, among others in future generations, they speak, did not in this sense depend upon their probability in affecting, for example, the reallocation of community or jurisdictional power values in American constitutive process where they as Blacks were embedded.

By contrast, what I designate as Black claims to *domestic* law did indeed aim to affect results and outcomes regarding their rights under contemporary constitutive, local and slave law. These included, for example, freedom suits in local American courts to be decided under rules and expectations that 'law' was to uphold the slave system. This distinction has direct implications for related New Haven concepts, such as the irrelevancy for most Blacks of working to clarify the "common interest" except over the longest historical period, and, particularly the notion that Blacks' rights would rest on uniformities of community expectations under the constitutive process. Rather, this book aims to reflect the certainty of Blacks that they had rights to be free of slavery and racism, to live in human dignity on some normative basis that lay outside of existing constitutive process, and that their validity was not touched by the ubiquitous opposition of the surrounding slavery-supportive local and national process.

I pause to clarify an important distinction here. By "claims to outside law" I am not suggesting that Blacks were claiming to the historical past to bring forward a governance model for ensuring their freedom, or otherwise to a general history of slavery or general human history from which they drew their right to be free of slavery. Rather, I believe they were claim-

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3. "American Indians, Blacks, Chicanos and Puerto Ricans," DAEDALUS – JOURNAL OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, vol. 110, n. 2 (Spring 1981) vi–vii, 3–4, 11, 13, 22, 25.

ing to outside law as an identified normative system, in their eyes, outside of the local rules and norms of their enslaved captivity. As this book subsequently develops, there were a number of such possible normative systems. Such systems were not necessarily mutually exclusive. Blacks identified and invoked, in particular situations, one or more such bodies of norms through their belief and interpretation that *those* outside norms gave them a right to freedom, and therefore comprised better law by which they should be governed. Outside law was defined by Blacks' interpreted beliefs about other outside criteria of right and wrong arising from a variety of sources, discussed herein, ranging, for example but not exclusively, from the law of God, to British postures and policies in the American Revolution, to the model of liberation presented by the Haitian Revolution, to natural law-based principles of freedom invoked by white American colonists. Common among all of these sources of outside law is the interpreted belief of Blacks, which they acted on or otherwise expressed, that each such source confirmed or gave good promise of confirming their right to be free of slavery and treated with dignity.

Not all Blacks were claimants to better outside law all the time. Likely, most were usually not. But when such claims were expressed, there are frequent indications of Blacks' consciousness that they were acting or speaking for many if not all other similarly situated or particularly enslaved/oppressed Blacks in that period, and not just for their individual personal interests. This book adopts and profits from that inferential width of references in identifying and clarifying issues, groups, and categories of Black claims for better outside law and for better international law. It also does so, where pertinent, regarding Black claims to survive, resist, build lives and communities as best they could, including through their 'freedom calculus' as discussed herein, under domestic law.

Finally, as further developed in these chapters, I argue that generally the capacity of Black women to make claims to outside law during this historical period was less than that of Black men, given the huge burdens and dangers of any Black person or group making such claims. Their added personal vulnerabilities and oppression under slavery, their child-rearing and other family responsibilities, and the vulnerability of struggling Black family groups under slavery to be split asunder all contributed to their lesser general capacity to claim to outside law. But their supporting of Black men, including mates and sons, to make such claims, as well as examples of their making such claims directly, e.g., by also fleeing towards British lines in the American Revolution, must not be underestimated either in their importance, or when faced with the probability that Black women were more involved in making and supporting such claims than the infirmities of historical research can presently reveal to us. As I note herein, more scholarship is needed on Black women's making claims to outside law during this era.

## Debts, Dues, and Gratitude

I have not yet found any other work on the roots of the African-American stake in international law and the roots of the African-American International Tradition. Elliott Skinner's book, noted below, provides useful structural context, though for later in the post-Civil War 19th century.<sup>4</sup> Y.N. Kly has written a quite insightful contemporary treat-

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4. Elliott Skinner, *African Americans and U.S. Policy toward Africa, 1850–1924 – In Defense of Black Nationality* (Washington, D.C.: Howard Univ. Press, 1992).

ment of issues raised by African-American rights under international law in a human rights frame.<sup>5</sup> And in an earlier article in the *American Journal of International Law* analyzing African-American interests in international law relative to the Gulf War, I spelled out the proposition that part of the African-American International Tradition was their long-standing stake in how international law is invoked, interpreted, prescribed, and applied.<sup>6</sup>

But if there is no work directly on point, there are notable anchors of history, context, and doctrinal encouragement. Perhaps without knowing it, when Vincent Harding wrote his important pre-Civil War history of African Americans, *There is a River*, and enunciated the notion of a ‘River’ of ‘celebratory (of survival and progress towards freedom) history,’ he was laying one of the cornerstones of Critical Race Theory to inform African-American International Legal History.<sup>7</sup> An anchor work serving a similar purpose with a richness of research, insights and purpose was A. Leon Higginbotham’s *In the Matter of Color: The Law of Slavery in Colonial America*.<sup>8</sup> I am especially in Judge Higginbotham’s debt for this magisterial work, which focuses on the impact on Black lives of slave codes and cases, on which I rely substantially at several points, and for our personal friendship; his passing was much too premature.

A primary anchor must be the comprehensive work of John Hope Franklin, who has now (with Alfred Moss) produced the eighth edition of *From Slavery to Freedom*, which is the foundational work of African-American history.<sup>9</sup> An inspiring example of superb scholarship and clear writing, it conveys insights as it also demands humility of any who would follow related scholarly pathways. Parallel inspiration was supplied by Franklin’s superb biography of George Washington Williams, arguably the first African-American international lawyer at the turn of the 20th century. Williams’ “Open Letter to President William Henry Harrison on Behalf of the Africans of the Congo against their Belgian Colonizers” was nothing less than a powerful international legal brief, founded on the Pan-Africanist interest of Black Americans in lawful and humane treatment of their African brothers and sisters under international law. It comprised a powerfully grounded argument that European imperialism and colonialism must be subjected to the rule of international law, under which even the least of colonial subjects who were members of the non-white, non-European “Other,” had valid and potentially enforceable rights. Williams’ direct implication was that colonialism was an invalid exercise of power, especially by the Belgians in the Congo, if African rights were not protected.<sup>10</sup> This is another foundation stone for the extension of Critical Race Theory to International Law.

In addition, it is fortunate that Ira Berlin published *American Slavery: The First Two Hundred Years* at a timely moment for my own research, when I was able to rely on it often and fruitfully. His notion of distinct periods of slavery in the three latitudes of the

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5. Y.N. Kly, *International Law and the Black Minority in the US*, (1985).

6. Henry J. Richardson, III, *The Gulf Crisis and African-American Interests Under International Law*, 87 Am. J. Int’l L. 42 (1993).

7. Vincent Harding, *There is a River: The Black Struggle for Freedom in America* (New York: Harcourt Brace Jovanovich, 1981).

8. A. Leon Higginbotham, *In the Matter of Color: The Law of Slavery in Colonial America* (New York: Oxford Univ. Press, 1978).

9. John Hope Franklin & Alfred Moss, *From Slavery to Freedom: A History of African Americans*, 8th ed (New York: Knopf, 2000).

10. John Hope Franklin, *George Washington Williams: a biography*, (Chicago: Univ. Chic. Press, 1985).

American colonies, and his analysis of the succeeding distinct character of slave communities spanning the two centuries at the center of my own work, provided quite valuable insights and information about slave perspectives.<sup>11</sup> My own discussion of African-American claims to international law has profited accordingly.

Finally, recent work in three valuable books on the international slave trade by Robin Blackburn, Hugh Thomas, and Herbert Klein provided essential information and perspectives on the slave trade in the New World across a wide spectrum of values, e.g., power, wealth, and loyalty patterns. They also quickly confirmed the existence of an International Slave System stretching from Europe and Africa throughout the New World and ample evidence and discussion of that System's integration and strategies of preservation and maintenance. The North American corner of that System and the entrapment but functioning of African-Americans in it, are central to my own narrative.<sup>12</sup>

This book was written episodically over almost two decades, with a considerable and continuing infusion of help and encouragement from many people. Its genesis in concrete form, and the initial research and preliminary drafting of the concept occurred during a 1988–89 sojourn as Visiting International Scholar at the Joint Center for Political and Economic Studies in Washington, D.C. The Center's President Eddie Williams, Vice President Eleanor Farrar, and the Center staff were consistently supportive in resources and environment. Professor Linda Williams, a resident scholar then and later in the Political Science Department at the University of Maryland at College Park, was a delightful and stimulating colleague with many helpful suggestions.

My year at the Joint Center was made possible through a grant from the Rockefeller Foundation, and I am pleased to express my appreciation to them, particularly to James Gibson, for their part in the long gestation of this book. During this period also I benefited from the first installment of a number of suggestions and encouragements from Professor Gwen Mikell, Chair of the African Studies Program at Georgetown University, and from Professor Emeritus Elliot Skinner, the esteemed anthropologist and former U.S. Ambassador, from Columbia University. Professor Skinner's book (on early African-American interests in U.S. foreign policy), as earlier noted, was an early inspiration and helpful resource for my own thinking.

Temple Law School, its Dean Robert Reinstein, and my faculty colleagues have been consistently generous with their encouragement, support, and feedback. Dean Reinstein provided several Summer Faculty Research Fellowships and released time during semesters over the years plus other ample resources and opportunities for research and writing. My colleagues Samuel Gyandoh, Mark Rahdert, Sharon Harzenski, David Kairys, Frank McClellan, Rafael Porrata-Doria, and Mary Hanna, and Conrad Weiler of the Political Science faculty all shared generous and useful suggestions and questions. A special debt of gratitude goes to my long-time friend and colleague, and the progenitor of International Critical Race Feminism, Professor Adrien Wing at Iowa Law School, for her generous reading and many helpful comments on the entire manuscript at a late stage. And my colleague Barry McCarthy was notably generous in earlier sharing of his considerable

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11. Ira Berlin *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge: Belknap Press, 1998).

12. Robin Blackburn, *The Making of New World Slavery: from the baroque to the modern, 1492–1800* (New York, Verso, 1997); Hugh Thomas, *The Slave Trade: The story of the Atlantic Slave Trade, 1440–1870*, (New York: Simon & Schuster, 1997); Herbert S. Klein, *Slavery in the Americas: A Comparative Study of Virginia and Cuba* (Chicago: Univ. Chicago, 1967).

and valuable insights as an excellent legal historian in doing a close and critical reading of most of the first draft of the manuscript. The Law Library, under the stewardship of my late colleague, warm friend, and fellow international lawyer (among his many other talents) John Lindsey, and now under that of the strong Director of the Library John Necci, and his excellent staff, has been consistently and wonderfully helpful in tracking, securing, and alerting me to all ranges of source materials.

Many of the issues and discussions in this book have found their way into one international law class or another, and a debt is owed to my students for their reactions, comments, and occasional disbelief, or approval. More directly, particular and invaluable assistance to this book was given throughout a decade by a series of dedicated, enjoyable, and excellent research assistants. Their work and their observations and insights on the slowly unfolding chapters, in the midst of my other responsibilities of teaching and life in general were essential and matched my pleasure in working with them. They include Mary Louise Johnson, Matthew Johnson, E. Nego Pile, Marcelle Benjamin, Maria Luisa Bunggo, Karen Rainey, Kelly Philips, Deborah Canty, Patrick Eddis, Bernadette Ferro, Sr., Doris Turek, M. Kelly Malone, Alisa Erhreshetyn, Kwame Anthony Gyan, Deidre Heine, Bansri Mehta, and Michael Poulshock. In the later stages, Joshua Bernstein and Christa Frank contributed, invaluable, their inspired research, organizational suggestions, and insightful critical observations in such a fashion as to be delightful colleagues in helping pull together the manuscript, a process in which Ms. Frank continued her excellent and essential work, and to which Michael Foley, my paralegal assistant, and Margaret Finn and Rachel Groner, with timely copyediting, were also essential. During this latter time also Naa-Amerley Amarteifio, Tonya Williams and Catherine Nguyen contributed valuable research and organization of source citations. My former Secretary for many years, Ms. Tracey Brown, helped keep me organized at Temple and produced early drafts and revisions. And at many important hours of working on this project in recent years, the Café Tryst and its staff in Washington, D.C., provided essential nourishment and atmosphere for contemplation, writing, and sometimes for interesting procrastination.

My wife Renée provided the depth of consistent encouragement and support that only a loving and wise soul mate can, including understanding, cheerleading at needed times, putting up with my distracted attitudes especially in the final stages of this work, and sweetly reminding me, sometimes perhaps without much success, of the advantages of clear brevity. And throughout my entire life, including that encompassing this writing, much warmth, confidence and encouragement flowed from my late mother, Roselyn Richardson, a civil rights pioneer in her own right in Indianapolis, who was the best writer in the family, who always listened to and understood any strange ideas that I loved sharing with her, and who taught me to dream widely. My brother Rodney Richardson gave the insights of an experienced, skilled, and respected practicing lawyer and former judicial magistrate, reminding me over the years about how decisions in local communities get made.

And from a nearby dimension barely offstage, separated merely by the thin membrane of physical life the following family and friends lend inspiration: in addition to my mother, my father Henry J. Richardson, Jr.,—for a half century Indiana’s premier civil rights pioneer and lawyer who did his considerable, invaluable best to school a sometimes recalcitrant but appreciative son about how the world really works; my irreplaceable friend Haywood Burns—“the people’s lawyer,” legal stalwart of the Movement and Dean of CUNY Law School; Goler Teal Butcher—the warm world-experienced warrior of international law from Howard Law School and ‘mother of us all’ in the American anti-apartheid movement; and Clarence Clyde Ferguson of Harvard Law School and so much more who smoothed the way and mentored so many of us. They were all urging me on, as were

other valued friends along the journey, providing in their special committed wisdom about justice, the world and Black folks, the kind of safety nets that only they could give, then and now, against many pitfalls.



# Introduction

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Notwithstanding the passage of almost 400 years, considerations of race, however disguised in the academy and the public forum and re-shaped by history, not least in the United States, remain pervasive in the 21st century among the descendants of the same peoples as in the 17th century. This clearly includes race-related questions arising under international law and in the study of international relations and diplomacy. And thus the mere fact that this book is written—or any other book about the history of African Americans, of which there have recently appeared a trend of new volumes—inevitably asks for an explanation of the proper role that this history should play in today’s decisions about race, color and African heritage. How should we best understand the current authority of the precedents and lines of descent of these historical claims and interests? I begin to explore that question in the remainder of this Introduction, up to and through the story of W.E.B. DuBois’ Senate testimony on the United Nations Charter, and to raise other connected issues throughout this work, and in its final chapter.

## Questions of Approach

This book is accordingly about African-Americans and the beginnings of their acting as *participants*, in Myres McDougal’s term, in the international law process.<sup>13</sup> They could not “participate” in the 16th through 19th centuries as did the sovereign governments and their leaders and high officials of empires in the Londons, Paris(es), Lisbons, and Madrids of the world, or even as the local governments of colonial territories in the New World did, for example, in the thirteen colonies of British North America. But collectively African slaves and African-heritage people were the target and focus of much international concern among those same governments, and periodically they acted to leverage or protect themselves against those governments. African-heritage peoples were impacted by the stream of decisions, interpretations, and jurisprudential formulations about international law during those centuries.

Concurrently, this was also the period when modern international law emerged, as previously mentioned, largely defined by the Dutch lawyer and scholar Hugo Grotius, as a coherent legal system, following his first major work in 1625.<sup>14</sup> There is no doubt that wherever they were in the New World, including principally for our purposes in the North American British colonies, African-heritage people “participated” in the in-

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13. Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven: New Haven Press, 1992) 141, 417–423, 557–558.

14. Lauterpacht, *supra* n. 1; See. e.g. Michael Akehurst, *Modern Introduction to International Law*, 5th ed. (London: George Allen & Unwin, 1984) 13–14, 216.

ternational legal process, even if they lacked formal standing under that law to do so. Discrepancies among three areas: the perceived realities of international concern about African slaves in the New World, their impact on Europeans' lives and objectives, and the absence in the applicable European-prescribed international law of principles and procedures granting African slaves/African-heritage people access to legal decision making under the law, raise at least two categories of inquiry. One is about the adequacy of that legal system(s) to do justice to *all* the people it governs or affects. The second is about the story of the normative relationship and the demands of the excluded people(s) to that legal system. Specifically, it concerns what that law ought to hold regarding slaves, as it in practice operated to govern or take their lives while barring any short-run chance for them to influence its commands or enforcement. There was some promise for African-heritage people in international legal doctrine, at least in theory, notwithstanding its governance and accommodations with the international slave system in the 17th and 18th centuries in this regard. However, the promise faded as the jurisprudential underpinning of international law shifted from natural law to territorial sovereignty. Thus the second line of inquiry above occupies much of this book's attention.

To tell the story of African-Americans' relationship to international law up through the American Revolution and the War of 1812, with references to analogous legal claims of African peoples elsewhere in the New World, we must develop our best sense of the demands that they actually made to international law for a better life, i.e., for relief from slavery and racism on the land and in the communities where they lived. Since African-heritage people during this period were barred from being formally trained as, nor had access to international (or any other kind of) lawyers (save for extremely rare exceptions), we must find their demands in the various forms that they were actually expressed, e.g., with their feet, as well as with their mouths or pens. We can then interpret the content of these demands as pleas for relief under 'better' international law that Black people would have demanded to exist, had they had access to the legal process with the requisite opportunities, education, resources, and advocacy skills to be effective within the rules, rituals, and decisions of that process. This characterization of demands for specific beneficial results under international law regarding rights, duties, policy objectives, and the allocation in the community of power, wealth, knowledge, and other resources we can call an African-American "claim" to international law, as Professors McDougal and Lasswell developed this notion of "claim" in the New Haven School.<sup>15</sup>

Black folks made what we call an *implicit* claim when there were no overt words or direct expression demanding better international law but when by their actions they indicated by implication, in context, a demand for more freedom. As the content of their demand is familiar to international law (even though it was not agreeable to contemporary authoritative doctrine), we can call this interpreted demand an *implicit* claim; furthermore, it reflects an *interest* that African-heritage people had in interpreting, prescribing, and implementing international law.

This book explores the explicit and implicit claims to outside law and international law made by African-Americans up to through the War of 1812. When these claims—their contexts, content, and patterns—are considered in their similarities, we then have a basis to discuss the wider *interests* of African-Americans under international law during this period. A further refinement of such interests and their commonalities leads us in the direction of understanding the *stake* of African-Americans in international law coming out

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15. See Lasswell, *supra* n. 13, at 1461–1475, 1548–1552.

of this period in their history, from its slave trade origins into the early 19th century. It is my hope that subsequent scholarship will carry this story into the 21st century.

## W.E.B. DuBois Testifies

On Wednesday, July 11, 1945, the pre-eminent African-American intellectual, a founder of American sociology, a founder of modern Pan-Africanism, and chief publicist for the National Association for the Advancement of Colored People (NAACP), W.E.B. DuBois, testified before the Foreign Relations Committee of the U.S. Senate in favor of the United States' ratifying the United Nations Charter. This Charter was intended, and did become the foundation of the new post-war international legal order. The drafting of the Charter had been completed earlier that year, in the historic San Francisco Conference of fifty nations along with several non-governmental organizations. DuBois was not the only American testifying before the Committee supporting Charter ratification—many did. President Truman, believing that the Charter and the successful formation of the United Nations was essential to U.S. interests and welfare, very much wanted ratification and was giving his strongest support to the process. However, DuBois was the only African-American so testifying, presumptively representing the NAACP, but somewhat cryptically labeling the status of his own testimony as “speaking only officially for himself”.<sup>16</sup> Much racial, legal, political and social history, including considerable politics and rivalries among NAACP leaders behind the scenes, led him to that table in a crowded Senate hearing room on this day. That history also shaped the content of his testimony and the American government's reaction to it.

In testifying before that Senate Committee in support of the Charter as a treaty, which was before that body for its advice and consent for U.S. ratification, DuBois, notwithstanding his minimalist labeling of his testimony's status, was representing, in fact, the likely majority of politically informed African-Americans. For some months Black folks had been expressing their support for the Charter in the Black Press across the country. But he also saw himself as representing the “pressing cries of the 750,000,000 unrepresented [who] were not expressed and even forgotten at San Francisco,”<sup>17</sup> that is, the colonized peoples of color held under the empires of European states around the world. He had been fighting for them since the beginning of the 20th century, and he strongly believed—and had consistently so written and spoken—that African-Americans must make common cause with them to effectively protect their rights in the United States. His stance on these issues competed in the discomfort it caused many in the NAACP leadership, and many in the law enforcement and security agencies of the U.S. government. This discomfort only intensified under DuBois' consistently experienced, strong, and superb advocacy of the position, including for example, his work on resuscitating the Pan-African Conference, of which he was an original founder, in October 1944.<sup>18</sup>

Also in testifying before the Committee, DuBois was following a well-worn procedure under the U.S. Constitution which, among other implications, laid out a primary pathway for introducing principles of international law contained in treaties into domestic

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16. David Levering Lewis, *W.E.B. DuBois – The Fight for Equality and the American Century, 1919–1963* (New York: Henry Holt, 2000) 510.

17. *Id.*

18. See Lewis, *supra* n. 16, at 499–503.

American law. In 1945, testimony by any African American on any subject in a Senate hearing was rare enough. Testimony by African Americans supporting U.S. treaties—to say nothing of this Charter which even then was projected to be the foundation of establishing a new post-World War II world order—was unprecedented.

Sitting before the Committee testifying on this day, DuBois was representing the majority of African-Americans, urging ratification of the Charter under a constitutional procedure in which his people had not only an interest, but more fundamentally, a *stake* in seeing that it was carried out in a certain way. By “stake” I refer to the following. African-Americans had been for more than three centuries so deeply involved in and afflicted by the political, economic, legal, cultural and international processes that built America from an eastern seaboard string of struggling British colonies to, in 1945, the major victor nation and military industrial powerhouse at the close of World War II. And during the same three centuries, Black folks, long before, during, and after the Civil War and Reconstruction, had been so profoundly involved in their own high risk and parallel domestic and international struggles against slavery and systemic racism. Their struggle was to maintain their families, educate their children, and develop and link their communities into an African-American culture. Thus their collective concern was now widespread and their hope was heartfelt, as it had been in earlier eras and forms for the American Revolution, the Haitian Revolution, and other international path-breaking events from the 18th century until this moment. Their hope and demand was that the emerging new world order, of which the UN Charter would essentially be the constitution, would serve their fundamental collective goal to be free from racism, in ways that American law, white majority policies and sentiments, and the American economy clearly had not provided.

Even for those Black folks who were unaware of the Charter or any of its issues, its ratification and the way it was ratified by the United States would, one way or another, involve their interests and those of the Black community. Thus they had a stake in the outcome. Many Black folks did consciously believe that it was crucial to the welfare of the “race” (Black folks) that the Charter be ratified as a U.S. treaty. That is, that the U.S. Constitution must work through governmental hearings and decisions about ratification to produce that result. In this sense, DuBois was testifying in favor of the Charter as a vital constitutional interest and also as a vital international interest. That the Charter was nationally important was a general conclusion shared by white and Black America; however, the nature of the stake each racial community had in this Charter differed radically.

Why did DuBois and most African Americans see the U.N. Charter as so important to their welfare? From the beginning of America as a country African-Americans—as African and African-American slaves, men, women and children, Free Blacks, creoles, Native Americans, Black Indians, and other mixtures of blood and status of color—had a stake in the drafting and interpretation of the U.S. Constitution, even if they did not directly participate in doing so. This stake definitely included the constitutional provisions and understandings which addressed slavery and slaves, the inclusion of the Bill of Rights as the first ten amendments to that document, and the posture and prerogatives of the United States as a sovereign nation under international law.

The presence of Black folks in the thirteen Colonies had been a looming one, which whites experienced as threatening and difficult and thus demanded complete social and physical control. They saw Blacks as essential to their organization of the national economy and to their personal sources of wealth and way of life, and this demanded complete social and physical control to the point of captivity. The African presence, and increasingly the African-American presence in the colonies since almost two centuries before

the Revolutionary War, their presence in that War on the international stage, their continuous history of opposition and revolt and as the racial and enslaved “Other,” all guaranteed that a Black presence would, one way or another, infuse the minds of the Framers as they drafted the Constitution. This is notwithstanding that any presence of Black representatives among them as they did their historic work in Independence Hall in Philadelphia during that hot summer of 1787, was to them unthinkable. I will return to these constitutional questions in later chapters.

The point is that although DuBois in his testimony was reflecting the huge *stake* African Americans have always had in the interpretation of the U.S. Constitution, that *stake* had not fully defined the path towards Black freedom. And therefore DuBois’ testimony was reflecting a second critical element as well: the *stake* of African Americans in defining and interpreting international law.

DuBois, having secured permission to speak before the Committee, appealed to the Senate to consent to ratification of the Charter but expressed certain fundamental reservations. As noted above, he underscored the “pressing cries of the 750,000,000 [colonized peoples of color] unrepresented [who] were not expressed and even forgotten,” at San Francisco.<sup>19</sup> He further told the Senators that the principle of “taxation without representation is tyranny,” applies equally to “Latins, and Slavs, and the yellow, brown and black peoples of America, Asia and Africa.” DuBois further asked the Senate to validate as a *first* (sic) principle of international law that “at the earliest practical moment no nation or group shall be deprived of effective voice in its own government.”<sup>20</sup> These themes encompassed the desire of most Black Americans—as expressed through previous weeks of articles and editorials in the Black press—for the Charter to be ratified because of its human rights provisions and the obligations they imposed on the United States. In a word, those provisions, principally Articles 55 and 56, and 1(2), obligated all treaty parties to, at a minimum, cooperate with each other to institute fundamental human rights for all peoples throughout the world community. That is, the duty ran to all peoples within the borders of each such state or territory for which each state had responsibility, as well as in other territories. This language was not an afterthought at the San Francisco Conference. It had found its way into the final text of the Charter from similar language in the previous Atlantic Charter promulgated by the United States and Great Britain in 1944, the last full year of the War, as part of the statement of fundamental principles anticipating the formation of the United Nations.<sup>21</sup> It was clear that this underlying Charter vision of a new post-war international community saw the protection of human rights globally under the rule of law as essential to the furthering of international development and progress, as well as to the maintenance of international peace and security. However, DuBois was skeptical “that the Atlantic Charter and the imperatives of the Four Freedoms would be formally honored in the parliament of nations (San Francisco) about to convene three thousand miles away.”<sup>22</sup>

Thus DuBois’ testimony, resonating with the wishes of most Black Americans on these questions, formed a claim to international law that their right to be free of racism and to equal rights under law was confirmed by the UN Charter. The U.S. government was thus obliged under international law to implement these rights, and, furthermore, through its own Constitution it was obliged to implement such rights for U.S. citizens under its own domestic law. In other words, African Americans were claiming rights under inter-

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19. *Id.* at 510.

20. *Id.*

21. *See id.* at 503–507.

22. *See Lewis, supra* n. 16, at 503.

national law that they could not claim under domestic U.S. law. They were claiming not only that they had such international legal rights, but that now such rights were binding at the local level by operation of the Constitution regarding treaties. An additional “outside” source of law—international law—was being invoked to deliver and apply rights in local settings where otherwise the local U.S. law was upholding various forms of racism. In the southern states that law was aggressively and notoriously protecting and defining unrelieved systemic and deadly racial apartheid.

## The Immediate Context of DuBois’ Testimony

We can only really understand the setting in which DuBois delivered his testimony by considering it, briefly, from three vantage points. One was that of national Black politics around DuBois and his world view, the NAACP leadership, and the San Francisco Conference. The second was that of U.S. federal politics about race and civil rights for African Americans. The third was that of the emergence shortly following the end of World War II of the Cold War with the Soviet Union.

After being estranged from the NAACP, despite his being a founding member, for 10 years, DuBois was prevailed upon to return to the fold by its President Walter White, in mid-1944 when DuBois was 75 years old. This act in light of DuBois’ prominence, was seen as something of a coup for White, who, however, misinterpreted the situation. White and others greatly underestimated DuBois’ talents and energies by assuming that his life’s work was now done and that he could therefore be confined to a non-substantial role in the Organization. DuBois took his new position very seriously and had an expansive vision of the work he had yet to do. This organizational misperception led to clashes within the Organization about DuBois’ role at San Francisco. Underpinning the conflict was the continuing discrepancy between DuBois’ belief that African Americans could only confirm their rights through international solidarity with other peoples of color and the NAACP’s beliefs that African-American rights strategies must only be played out through the parameters of U.S. constitutional law and foreign policy. Fears of being labeled ‘communist’ by American officials in the emerging Cold War led NAACP leaders in this direction.<sup>23</sup>

In the run-up to San Francisco, DuBois worked on resuscitating the Pan-African Conference. In the same vein, he criticized the work of two influential white study commissions on international questions for minimizing or ignoring the plight and representation of non-governing colonial peoples and for failing to mention African-Americans and Asians “being deprived [of] rights.”<sup>24</sup> Further, DuBois in the State Department auditorium critiqued, in front of influential white people, Undersecretary of State Edward Stettinius’s special briefing of over 100 organizations looking towards San Francisco, for passing over the question of colonized peoples, and he made similar criticism at other conferences during this period. He also began a correspondence campaign to the State Department in his official status as an observer or consultant in San Francisco for the NAACP, and to the leadership of the NAACP and other mainstream organizations demanding that the “Department of State give Negro Americans some specific recognition.”<sup>25</sup>

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23. *Id.* at 497–502.

24. *Id.* at 503.

25. See Lewis, *supra* n. 16, at 504.

Walter White had been traveling in the Pacific, but DuBois' activities spurred him to unexpectedly return, and then convince the NAACP Board to downgrade DuBois's role in San Francisco to 'assistant consultant,' and to accept Eleanor Roosevelt's intercession to make possible a three-person NAACP delegation: White, noted Black educator Mary McLeod Bethune, and DuBois, appointed to serve with 46 non-governmental organizations accredited to the U.S. delegation. DuBois publicly praised the delegation but was not happy about his demotion.<sup>26</sup> It seems clear, as David Levering Lewis notes, that the NAACP as an organization had paid little more than rhetorical attention to the civil rights implications of the United Nations until DuBois' return.<sup>27</sup>

On April 25, 1945, the San Francisco Conference held its opening ceremony, with DuBois, White, and Bethune in attendance. Quite involved in this process was also Ralph Bunche, the talented Black U.S. diplomat, scholar, defender of rights of colonized peoples in a more behind-the-scenes manner than DuBois, and future Nobel Peace Prize winner, who was the only Black member of the U.S. official delegation. These four would remain in San Francisco for five weeks. Nine days earlier, President Roosevelt had died, and Vice-President Harry Truman had been sworn in as President.

While the NAACP delegation generally lobbied governmental representatives to adopt the Charter, DuBois, using Bunche's position with the U.S. delegation, transmitted precise language that he hoped to see inserted in the Charter, and as part of this strategy issued a press release on behalf of the NAACP delegation, which advocated that "no nation or group shall be deprived of effective voice in its own government and enjoyment of the four freedoms."<sup>28</sup> His proposed language to the American delegation also included the following: (i) "the colonial system of government, however deeply rooted in history and custom, is today undemocratic, socially dangerous and a main cause of wars; and (ii) the United Nations recognizing democracy as the only just way of life for all peoples make it a first statute of international law."<sup>29</sup> One principal focus of DuBois at the Conference centered on Russia, China, and unrecognized India, as well as on the support received from these delegations for the causes of racial equality and anti-imperialism. The Soviet delegation, led by Foreign Minister V.M. Molotov, stood up for human rights and the emancipation of the colonies; DuBois was 'ecstatic' when Molotov stated that human rights were "indispensable to international peace and security." He also continued to write his Defender column for the NAACP magazine, *The Crisis*, and during this period also his book *People of Color* was published. All of this contributed to some tension between DuBois and the other two NAACP delegates.<sup>30</sup>

As David Levering Lewis noted, the Russians got "enormous propaganda value from their anti-imperialist pronouncements," which distressed many American consultants and observers.<sup>31</sup> And more notably, between the beginning of the San Francisco conference and mid-May 1945, it was announced by the U.S. Secretary of State that the United States would neither propose nor support a human rights declaration as an integral part of the Charter. Both NAACP Executive Secretary Roy Wilkins and DuBois were stunned by this announcement. It confirmed, among other things, not only the U.S.' dismissal of DuBois and the NAACP on this issue, but also the marginalization and subordination of Ralph Bunche within the U.S. delegation. It further confirmed the identification of interna-

26. *Id.* at 505.

27. *Id.* at 505.

28. *Id.* at 509.

29. *Id.* at 510.

30. *Id.* at 505.

31. See Lewis, *supra* n. 16, at 508.

tional human rights issues, including the global legal protection of racial equality, by many in the U.S. government during this period as an element of ‘communism’ or ‘pro-communism.’ This was the case even if in order to make such policy, the United States, clearly by decision of President Truman, had to formally repudiate at San Francisco major principles of the very prominent and hope-laden Atlantic Charter promulgated by Roosevelt and Churchill as the basis of a post-war international order.<sup>32</sup>

After the close of the San Francisco Conference, DuBois requested permission to testify before the Senate Foreign Relations Committee, which was granted, to speak “officially only for himself.” He did so without notifying the NAACP, which produced resentment among those who thought that Walter White should be the one representing the Organization. Subsequently, the Committee did invite White to speak, but he chose not to do so.<sup>33</sup>

Let me now turn to the context of DuBois’ Senate testimony regarding U.S. federal law and civil rights policy towards African-Americans, the Charter ratification process, and the emerging Cold War with the Soviet Union.

## The Federal Context of DuBois’ Testimony

At notable times, the interpretation by the U.S. Supreme Court of the lack of rights of equality and due process of law for African-Americans, especially in the 1857 case of *Dred Scott v. the United States*, and in 1896 case of *Plessy v. Ferguson*, produced major forces in shaping African-American legal, social, political and economic history. Such legal decisions were thus powerful impulses in defining the collective African-American struggle on all fronts to overcome these barriers, realize their equality of rights under American law, and to end the racism levied against them since before the birth of the United States.

At the time of DuBois’ testimony, Charles Hamilton Houston, Thurgood Marshall, and a corps of other brilliant Black lawyers under the umbrella of the NAACP, in conjunction with several white progressive lawyers, were already at work on the step-by-step federal litigation strategy that would lay the foundation for overcoming the separate-but-equal doctrine of *Plessy*.<sup>34</sup> Notwithstanding the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution giving rights to Blacks following the Civil War, *Plessy* had become the foundation for the apartheid system of comprehensive racial segregation in the southern states, as well as for racial segregation in the North, during the Twentieth Century until 1954.<sup>35</sup> In that year the efforts of these lawyers—intimately and fervently supported nationally by the Black community—culminated in legal victory in the monumental Supreme Court case of *Brown v. Board of Education of Topeka, Kansas*,<sup>36</sup> which held that racial segregation in schools was inherently unequal.

However, DuBois’ testimony before the Senate had occurred nine years earlier. Racial segregation was abundant in the North and omnipotent in the South. Male and female African-American troops after the War were being demobilized from segregated

32. *Id.* at 507–509.

33. *Id.* at 519.

34. See Lewis, *supra* n. 16, at 497.

35. See Haywood Burns, “From *Brown* to *Bakke* and Back: Race, Law and Social Change in America,” *DAEDALUS*, vol. 110, n. 2 (Spring 1981) 219–220.

36. 347 U.S. 483 (1954).

units in the U.S. armed forces to return to an American society for which they fought in the name of democracy and freedom, but which was no less racist for them than before the War. There was no federal law against racial discrimination and only a smattering of minor anti-discrimination statutes in some Northern states. Because of the seniority system in the Senate, all major Senate committee chairmanships were held by Senators from very safe southern districts for their re-election, and therefore of extended longevity and seniority in the Senate to ensure the perpetuation of the segregated South. These included, infamously, Richard Russell, Strom Thurmond, and Theodore Bilbo. As had the Framers from the Southern states at the U.S. Constitutional Convention in 1787, who threatened to quash the very emergence of a U.S. Constitution if it did not sufficiently protect the slavery system, these Senate leaders were dedicated to quashing any piece of federal legislation or treaty, including the UN Charter, they saw as threatening legal segregation and its underlying virulent racism in any of their states.<sup>37</sup>

In a word, for legislation and treaties, as well as for many other purposes of governance, including nominations to the Supreme Court, the President had to gain at least the acquiescence of those Senate leaders. President Truman had been in office less than a year after the widely mourned death of four-term President Franklin D. Roosevelt. He was already beginning to show himself more competent than many had believed of this relatively unknown ex-Vice President and ex-Senator from Missouri. He had even in a few utterances indicated that, for a U.S. President, he might support modest progressive steps towards limiting racial segregation, and he would give more such indications in the next few years. But now in 1945, he was deeply committed, as was his Democratic Party and most of America's people, to getting the United Nations Charter ratified.<sup>38</sup>

A further element of context loomed, which, as previously noted, had broken into view at the San Francisco Conference. The clouds of the approaching Cold War between the United States and the Soviet Union were already visible in the increasing diplomatic conflicts between the governments around decisions about the governance of a devastated occupied Germany. They could be seen as well in conflicts around the formation of a war crimes tribunal at Nuremberg to try German Nazis, and in emerging conflicts about the political future of the East European countries. Because of DuBois' international prominence as a founder of Pan-Africanism and as a leader in the international peace movement, he was already under investigation by the U.S. government for advocating global legal protection for the rights of colonized peoples in parallel to similar Soviet declarations. He was, as well, in the middle of growing dissension in the leadership of the NAACP. Nevertheless he testified before the Senate, and his testimony resonated throughout much of the African-American community.

In an important sense, the UN Charter was somewhat of a mirror in international law of the U.S. Constitution—no small thanks to the prominent role played by U.S. representatives. This was so in the latter document codifying the principle that the protection of citizens' rights against abuse by government must be a fundamental duty of government and a definition of good governance. Thus all constitutions, including the UN Charter as the constitution of a new world order, must be assessed regarding their protecting those individual rights. The United States would be obligated under international law and the Charter to act and cooperate with other states to protect the human rights of all peoples and people.

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37. Cf. Lewis, *supra* n. 16, at 87, 121, 193.

38. See *id.* at 507–508.

But there was a second prong to the federal importance of DuBois' testimony, of which both African Americans nationally and key Senators were aware, that rested on a certain provision of the U.S. Constitution. Under Article VI(2) (the Supremacy Clause) of the Constitution, treaties of the United States are to be given equal authority in U.S. domestic law to federal statutes. Thus it was possible, at least in theory, for individuals to petition in federal or state court for their rights under particular *treaty* provisions, to be upheld the same as they analogously would be in a provision of a federal statute. This is largely what African-Americans were looking forward to in pushing for the ratification of the UN Charter, and this wish was being expressed at that time in articles and editorials in the Black press all over the country.<sup>39</sup> African Americans were looking to the human rights provisions of the UN Charter, as a treaty, to confirm their fundamental human rights under international law which were binding on the United States. In this book I refer to this general demand as a *claim* to international law, and to 'better' international law—what international law should be for African-Americans.

DuBois and Black folks across the country were, on various levels, equally looking forward to this source of rights protection under the human rights provisions of the Charter (international or "outside" law) being brought into U.S. domestic law through Article VI(2) of the U.S. Constitution. Such rights would thus be potentially available to each and every Black American to go into federal or state court and, with proper definition and advocacy, sue to protect his or her rights to equality as, now, a principle of U.S. federal law.

## Outcome

Faced with such an African-American claim to international law under the United Nations Charter, which stood on a strong legal basis, the United States Senate and the Executive would have none of it. Likewise, these issues discomfited some among the NAACP leadership. For the Southern barons who controlled the key Senate committees and whose assent the President needed to get the Charter ratified, this claim was a direct strike at the multiple levels of legal segregation erected under southern states' law. This legal structure had not been challenged up to then under federal law. It was basically designed to keep Black people servile, in their place, and available for unlimited cheap labor. This dedication to racism as national public policy conjoined with and mobilized another fear embedded in constitutional doctrine since the first days of the Republic. That was that the President might, regarding the balances of power among the federal government and between the federal government and the states, use the Supremacy Clause to legislate by treaty on subjects where Congress refused to act. It was all the more fearful when that subject was equality of rights for African-Americans. Thus, some deal had to be struck regarding Charter ratification here.

Several sets of norms, fears, and hopes collided around the fact and substance of DuBois' Senate testimony and its resonance with national African-American hopes and perspectives. They included the following: race and the potential threat to American racism from international legal doctrine through the new Charter as that threat would be mobilized by African-Americans; U.S. policy against the Soviet Union in the early Cold

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39. *Id.* at 502–505.

War; the suspicion of American official cold warriors about the issue of internationally protecting the rights of colonized peoples and peoples of color, including African Americans, as being either a Soviet issue which America should oppose or a dangerously inflammatory issue against the domestic and international interests of the United States; the official governmental linkage of DuBois' actions and advocacy with these 'dangerous' issues, which was to some extent shared by elements in the NAACP leadership against DuBois; and the broad U.S. political support for the idea of the United Nations and the Charter, where President Truman's leadership in this regard was strongly asserting that these outcomes served America's best post-War interests.

The Truman administration was faced with these clashes and disputes, but faced also with the necessity of getting the Charter ratified through essential Senate committees as a treaty. It was also confronting the necessity of not being able to exclude all references to international human rights in the Charter, plus the undesirability of allowing the Soviets and their allies to dominate the emerging Charter international rights discourse. And so the Administration pursued a policy of limited discussion of human rights issues, ignoring their application to peoples of color globally and domestically. Truman's policy also undermined the authority of such rights as legal rights under international law that created international and domestic duties on all state-parties to the Charter.<sup>40</sup>

We have already noted that the Administration's policy pronouncement for the San Francisco Conference held that the United States would not take a position one way or another on inclusion of human rights provisions in the UN Charter. In his address to the Senate presenting the Charter for its advice on ratification later that year on July 2, 1945, President Truman did indeed mention the rights provisions of the Charter and their anti-discriminatory content, but only as "objectives of the Charter" and not as duties on Member States.<sup>41</sup> He had even gone a half-step further shortly before in his final address to the San Francisco Conference, when he linked the eventual attainment of the Charter's rights 'objectives' to the protection of international peace and security, a weaker version of Soviet Foreign Minister Molotov's declaration on the same issue.

But Truman otherwise undermined the authority of the Charter rights provisions by subordinating them to the framing of a future "international bill of rights acceptable to all the nations involved," and by relegating their rights content as that to which the world 'can begin to look forward.'<sup>42</sup> Two days later, Senator Connally, in his report to the Senate on the San Francisco Conference, concurred. He emphasized in his discussion of the Economic and Social Council under the Charter, which is charged with implementing the human rights provisions, that

neither the commissions nor the Economic and Social Council will have any authority or power to impose upon any State any regulation or provision whatsoever. The final choice and decision in respect to all such recommendations will remain with each individual State.<sup>43</sup>

In other words, no Charter rights language would produce in its implementation through U.N. organs any binding legal duty on any State Member. On July 9, 1945, two days be-

40. See Lewis, *supra* n. 16, at 502–510.

41. Address of Harry S. Truman on the Ratification of the United Nations Charter, S. Doc. No. 79-70, at 2 (1st Sess. 1945).

42. President Harry S. Truman, Address in Final Session of United Nations Conference, San Francisco (June 26, 1945).

43. Report on United Nations Conference Before the Senate, 79th Cong. 5 (June 28, 1945) (statement of Sen. Thomas Connally, Chairman, Comm. on Foreign Relations).

fore DuBois' testimony before the same Senate Committee, Secretary of State Stettinus in his testimony regarding the Charter's rights provisions and the authority of the Economic and Social Council, confirmed their relegation from legal duties on Member States to "humanitarian aspirations" creating no present legal duties.<sup>44</sup>

Thus Truman cut an implicit deal, and he did so for a number of objectives: to exclude all linkage between Charter rights obligations and both national and international racial equality and freedom; to create a discourse about rights which did not re-incorporate that linkage, but did not leave the international discourse on these issues totally to the Soviet Union, their allies and all others considered dangerously 'left'; to neutralize and deflect the issues and challenges to national and global racism framed by DuBois in his testimony; and thus to sanitize sufficiently these rights issues so that key southern Senators could accept the Charter in its entirety in the ratification process. Truman's deal was for ratification through the Senate, using the old distinction in international legal doctrine between *lex lata*, law as it currently is, and *de lege ferenda*, law as it (perhaps) should be in the future. Ratification was produced in return for the Executive pushing, with its considerable influence, a U.S. interpretation of international treaty law to remove the present legal duties on Member States to implement Charter rights provisions in their territories, in favor of the sovereign, autonomous interpretation of those rights and obligations according to their governments' self-perceptions of their interests.

The DuBois story here illustrates, in part, that not all African Americans made or were in a position to make claims to outside law, including to a better international law to confirm their rights. For those who pushed to do so, they were frequently opposed by other African-American persons and interests who sought to confine Black rights discourse and rights protection to domestic American law and policy, sometimes in subtle league regarding other imperatives with governmental and other white-dominated interests. Here, Cold War fears and doctrine, and the threat of the NAACP and other civil rights organizations being slathered with accusations of 'communism' and thus attracting national security governmental opposition and attention, was a powerfully divisive concern in the Black community. DuBois refused to cave in to it. This story of his battling the NAACP leadership, seeing clearly the relationship regarding African Americans between the national and international stages at the opening of the decolonization era, and his daring and his energy at age 75 is all a testament to his great leadership in the 20th century in framing African-American claims to outside law—a better international law—and trying to insert them into the very frameworks of a new emerging world order and the post-war African-American community. The government's response to his efforts shows the dangers often facing African Americans who frame and push claims to better outside law to replace local racist law. It shows the determination in official U.S. circles to ensure that the protection of racial equality is not defined as a global legal issue and that American racism against African Americans is not linked thereto. It shows that to do so, other policy objectives will be brought forward in neutral language and advocated as superseding all current progress and movement towards racial equality, here, U.S. foreign policy objectives to undercut the Soviet Union. Lastly this book explores what the

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44. "Like the General Assembly, the Economic and Social Council has no power to impose its recommendations on the member states. But ... this "power to study and report and recommend—and the power to call conferences and prepare draft conventions and require reports of progress—is a power which can be counted on to go a long way towards translating humanitarian aspirations into human gains." United Nations Charter and Statute of the International Court of Justice: Hearing Before the S. Comm. on Foreign Relations, 79th Cong. (July 9, 1945) (statement of Edwin Stettinius, Secretary of State).

white-dominated official and classic scholarly precincts of international legal discourse in the United States and elsewhere would label ‘*de lege ferenda*,’ but which African Americans have always taken seriously as a way to finding the best path in action and doctrine towards freedom and the end to racism.

At the risk of understatement, the DuBois episode illustrates the strong interest that African Americans have in international law, and the extreme American sensitivities, unease, and ultimate opposition to the very existence of such an interest. It is, in other words, anathema to American policymakers that African Americans would have rights to be treated fairly, or any other benefits that are confirmed under international law which is binding on the United States, but denied to them under American domestic law. If there is a strong legal basis for African Americans to claim such international rights, the United States government and other interests tend to undermine that basis, even if this requires changing American law through novel doctrine.<sup>45</sup> Such American opposition highlights, but does not encompass nor fully explain, the stake of African Americans in international law.

Race and racism against African-heritage people (and others) in the United States form a direct link back through history on these issues from 1619 until the present day. A major aim in this book is to understand the originating conditions which first created these issues—those involved in African-American persistence in making claims to outside law and their stake in doing so and those giving rise to white fears that such claims would be normatively accurate. In exploring these questions, we must uncover the origins of African Americans’ own jurisprudence about international law.

As an area of scholarship, most legal history is written in terms of the development of particular institutions, principles, judicial decisions, and legislation which were, or came to be authoritative as “law” in a particular community or jurisdiction. The development of, or functioning of this “law” or issues under it are explored in historical context, most often in respect to major power, wealth, loyalty-pattern, and rights trends and hierarchies of the community at that time. The scholarly focus tends to be to identify why and how those principles, decisions, and actors who *prevailed* by having their actions and enactments rendered authoritative and enforceable in the community did indeed prevail. International legal history is generally of the same piece in examining the history of international law: how and why, under the push of what historical forces, did certain principles, doctrines, and jurisprudence evolve so as to prevail in the international community over time as “international law”?

In this book I mean to narrate a portion of legal history from a somewhat different perspective: the notion of the stake that African Americans have in international law, and how this stake evolved. Thus I focus in these pages on the actions and perspectives of a non-sovereign, mostly enslaved people or group, as a category of historical actors in international legal process who did not ‘prevail.’ They did not have their invocations, claims, and principled demands become “law” in the territory (s) where they lived from 1619 (and before) to about 1820. They were mostly denied even access, much less community authority, to the prevailing international and national legal arenas of the time.

These African-heritage people through their actions demanded certain results from international legal process without getting them in any conventional sense. They made these demands out of their own developing lives and history as a people during this period and

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45. See *Sei Fujii v. State of California*, 38 Cal. 2d 718 (Cal. 1952) (finding that a Japanese national could purchase and own property in his name).

out of their struggles for survival and liberation. Their very presence on the North American territory and in the 'New World' hemisphere impacted those who did prevail in making "law." These people of European heritage, in turn, were generally the same elites and decision makers trying to perpetually control African-heritage people throughout the New World and trying to some degree to use international law to do so. In this sense, the question of how African-Americans 'fit' into the international legal process of the time is an important one, but not conclusive.

Included in this last notion are interpretations of the rights African-Americans might have more conventionally claimed as a matter of law if they had been so permitted, had had access to important legal arenas, and had available the expertise of legal counsel. This book discusses those rights as being 'unconventionally' but quite validly, invoked and authentically demanded by the actions and other demands of these black folks in their particular circumstances as historically understood. Finally, the history of African-Americans' interests under international law is part of the *present experience* of African-Americans in the United States about international legal questions and, in this globally interdependent world, about African Americans' relationships to the international community.