

# INTERNATIONAL LAW AND HUMAN EMPOWERMENT: MOVING BEYOND A PARADIGM OF SUBORDINATION

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## I. INTRODUCTION

It is a privilege to reflect on some of the work of Professor Henry Richardson III, a doyen in the field of international law. Richardson approaches the subject of international law from a critical perspective—looking at the way global power is configured and the way international law in critical areas serves the interests of dominant factions. His writings delve into all facets of international law, be it the relations between states, international human rights, or the work of international organizations.<sup>1</sup> By talking to some of the many generations of lawyers he has mentored, it is clear that Richardson’s passion and insights continue into his well-received classes in international law.

Richardson’s work raises provocative questions. He challenges legal orthodoxy and questions the norms that underpin international law and its formalistic modes of interpretation. In his article *The Danger of the New Legal Colonialism*, he deconstructs the idea of formalistic legal consent by subordinated parties such as in the occupation of Iraq and the self-determination of Palestine in a compromised sovereignty.<sup>2</sup> In regard to the second invasion of Iraq, Richardson offers insight into the formalistic consent of the United States (U.S.) occupation which was validated through the imprimatur of the United Nations Security Council, which offers a dangerous precedent for military intervention in the “war on terror” and against “failed states”.<sup>3</sup> He cogently challenges those whose interests are being served by these formalistic rationalizations.

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1. For a sample of his body of work, *see generally* Henry J. Richardson III, *The Danger of the New Legal Colonialism*, 104 AM. SOC’Y INT’L L. PROC. 393, 394 (2010) [hereinafter Richardson, *The Danger of the New Legal Colonialism*]; Mark P. Fancher et al., *Government Land Acquisition in Zimbabwe: An Essential Element of the Right to Self-Determination*, 59 GUILD PRAC. 186, 187–89 (2002) [hereinafter Fancher and Richardson, *Government Land Acquisition*]; Henry J. Richardson III, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The Danger of Oligarchy Within the Pan-Africanist Authority of the African Union*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 255, 257 (2003) [hereinafter Richardson, *The African Union and the New Pan-Africanism*]; Henry J. Richardson III, *Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court’s Contributions to International Justice*, 9 AFR. STUD. 72 (2007) [hereinafter Richardson, *Patrolling the Resource Transfer Frontier*]; Henry J. Richardson III, *African Regional Integration and Human Rights: Potential Problems*, 89 AM. SOC’Y OF INT’L L. PROC. 500 (1995) [hereinafter Richardson, *ASIL Proceedings*].

2. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 394.

3. *Id.* at 397.

Richardson challenges and deconstructs cherished notions of international law, such as sovereignty and the limited conception of human rights to show how powerful countries abuse these concepts to validate subordination of the vulnerable. Richardson refers to this abuse by powerful countries as a modern form of colonialism to highlight the disparate power relationships between powerful and subjugated states—a disjunction between the theory and reality of international law. The victims continue to be largely people of color.

Richardson's body of work is not merely a critique of imperialism or distorted power relationships in the interest of powerful states. Richardson advances a theory of international law which posits that international law has to serve the interests of the marginalized. Moreover, his scholarship offers thoughtful insight for court-based strategies that provide equality and opportunities for the marginalized. His work highlights the struggles of people of color, women and other marginalized groups around the globe, and offers a value-based perspective of what international law should represent. He applauds the concept of *ubuntu*, a humanistic idea, expressed by the Constitutional Court of South Africa,<sup>4</sup> which integrates the well-being of the community with that of the individual.<sup>5</sup> His vision of human rights challenges the U.S.'s perspective that socio-economic rights are not fundamental human rights. He looks at international human rights, as incorporated in the Constitution of The Republic of South Africa and interpreted by the Constitutional Court using the standard of reasonableness, as offering valuable lessons to courts in the U.S. and other parts of the world about how to give meaning to socio-economic rights towards the realization of substantive equality.<sup>6</sup>

Richardson offers a forward-thinking vision of institution-building to channel state and human behavior in directions that lead to positive results for human rights. Consistent with his idea that law has to serve the interests of the ordinary person, Richardson argues that the principle value of economic integration and free trade, be it the North American Free Trade Agreement (NAFTA) or African integration, should be the advancement of the rights of workers, as opposed to the interests of big business and the economic elites.<sup>7</sup>

## II. INTERNATIONAL LAW AND THE INTERPLAY BETWEEN LAW AND POLITICS

International law is a product of the past 450 years, growing out of the practices and usages of European states in their intercourse and communications with one another.<sup>8</sup> Richardson demonstrates that in practice, international law involves a profound interplay between law and politics. Powerful political actors can and indeed do influence substantive outcomes to serve their parochial

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4. See, e.g., *S. v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

5. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 83.

6. *Id.* at 101–02.

7. Richardson, *ASIL Proceedings*, *supra* note 1, at 502.

8. *What is International Law*, U. OF MIAMI SCH. OF LAW (May 13, 2003, 4:39 PM), <http://osaka.law.miami.edu/~froomkin/intl03/Chapter1>.

interests.<sup>9</sup> International law is greatly shaped by political actors, through procedures which are political for political ends.<sup>10</sup> Political forces shape the law that emerges and “the influences of law on state behavior are also determined by political forces,”<sup>11</sup> which Richardson demonstrates are not benign, even in the modern era. For a long time, the interests of powerful western nations influenced important concepts such as the right to self-determination,<sup>12</sup> the right to property,<sup>13</sup> and state responsibility in the area of state succession.<sup>14</sup>

For many decades, the western world denied that the right to self-determination was owed to the colonies. After World War I, U.S. President Woodrow Wilson was emphatic that self-determination would not apply to the colonies, because the interests of the colonial powers had to be taken into account.<sup>15</sup> During the periods between World War I and World War II, the League of Nations implemented the mandate system for the colonies, largely consisting of people of color.<sup>16</sup> Richardson labels the mandate system as a racist and colonial-based view of international law.<sup>17</sup> At the time of the drawing up of the United Nations (U.N.) Charter, United Kingdom (U.K.) Prime Minister Winston Churchill stated that self-determination did not apply to the colonies.<sup>18</sup>

With the help of socialist states and newly independent states from Asia and Africa, we witnessed a challenge to the racist and colonial interpretation of self-determination at the U.N. Within two decades after the adoption of the U.N. Charter, a stream of General Assembly resolutions transformed the concept of self-determination, resulting in the affirmation of the rights of the people under colonial rule to be free of foreign domination and transforming the right into what Richardson recognizes as a *jus cogens* norm of international law.<sup>19</sup>

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9. See Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 395–396 (describing the U.S.’s invasion and occupation of Iraq as a colonial conquest); Richardson, *ASIL Proceedings*, *supra* note 1, at 502 (arguing that the Abuja Treaty in Africa furthers the interests of big business and economic elites as opposed to the rights of workers).

10. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 2 (6<sup>TH</sup> ed. 2014).

11. *Id.*

12. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 394.

13. Fancher and Richardson, *Government Land Acquisition*, *supra* note 1, at 187–89.

14. *Intervention and Nonintervention – The Practice of Intervention*, *ENCYCLOPEDIA OF THE NEW AM. NATION* (2016), <http://www.americanforeignrelations.com/E-N/Intervention-and-Nonintervention-The-practice-of-intervention.html> (last visited Feb. 5, 2017).

15. WOODROW WILSON, *THE PUBLIC PAPERS OF WOODROW WILSON*, AUTHORIZED EDITION: WAR AND PEACE 155–62 (Ray Stannard et al. eds., 1927).

16. DAMROSCH ET AL., *supra* note 10, at 283–84.

17. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 394.

18. REDIE BEREKETEAB ET AL., *SELF DETERMINATION AND SECESSION IN AFRICA: THE POST-COLONIAL STATE* 182 (Redie Bereketeab ed., 2014).

19. See *generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 994 U.N.T.S. 3 [hereinafter ICESCR]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human

Subsequently, in the realm of state succession, the question arose whether the newly independent states were responsible for the obligations imposed on them by the departing colonial power.<sup>20</sup> Newly independent countries pushed back and argued that they should not be bound by obligations assumed on their behalf by the colonial powers—a *tabula rasa* (“clean slate”) view that was subsequently incorporated in part III of the 1978 Vienna Convention on Succession of States in respect of Treaties.<sup>21</sup> Richardson extends the idea of *tabula rasa* to the unequal property relationships between the colonial settlers and the indigenous population.<sup>22</sup>

### III. FORMALISTIC NOTIONS OF INTERNATIONAL LAW

Despite the changing doctrines in important areas of international law and other positive contributions in the post-colonial era, Richardson highlights the retreat to a colonial paradigm, particularly in the unipolar world following the collapse of the Soviet Union. He shows how the U.S., with the assistance of the Security Council, has transformed the important concept of sovereignty into a means of maintaining hegemony over other states.<sup>23</sup> He references the literature which characterizes these as colonial strategies, which remain “embedded in post-Charter and post-colonial international law.”<sup>24</sup> In addition to the invasion of Iraq, Richardson references the quest for self-determination in Palestine among his case studies. In Palestine, international law and the complicity of the Security Council legitimize faux sovereignty that is in reality domination, which reflects colonial strategies.<sup>25</sup>

The U.S.’s second invasion of Iraq resulted in “a complete and total military conquest by one state over the entire territory of another” in a manner which resulted in the removal of “the sovereignty of the conquered state and [gave] it to the conqueror.”<sup>26</sup> The government of Iraq was non-existent once the invasion was completed and sovereignty was exercised by the U.S. and later the U.N.<sup>27</sup> The invasion of Iraq constituted a violation of the U.N. Charter, as the Security Council did not at the time approve the invasion.<sup>28</sup> Despite the complete occupation and removal of the sovereignty of Iraq, the U.N. Security Council *ex-post facto* gave its imprimatur to the fiction that Iraq’s sovereignty was preserved.<sup>29</sup> Richardson characterizes the preservation of Iraq’s sovereignty as a fiction, because in reality

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Rights]. *Jus cogens* are rules of general international law “from which no derogation is permissible.” DAMROSCH ET AL., *supra* note 10, at 105.

20. BEREKETEAB ET AL., *supra* note 18, at 182–84.

21. Vienna Convention on Succession of States in respect of Treaties art. 16, Aug. 23, 1978, 1946 U.N.T.S. 3.

22. Fancher and Richardson, *Government Land Acquisition*, *supra* note 1, at 188.

23. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 394.

24. *Id.*

25. *Id.* at 398.

26. *Id.* at 394.

27. *Id.*

28. *Id.*

29. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 394.

the Security Council gave its imprimatur to a colonial conquest.<sup>30</sup>

The Security Council *ex-post facto* aided the American invasion and perpetuated the fiction of Iraqi sovereignty by shielding the invading military force of the U.S. and converting it into the Multi-National Force, ostensibly working with the joint authority of the government of Iraq.<sup>31</sup> The reality was that the shell government of Iraq was under the complete control of the U.S.<sup>32</sup> The invasion of Iraq was not only an illegal war but also a subsequent validation of colonial conquest based on fictional consent of the government in Iraq, which in reality was under complete U.S. control. Richardson labels the validation of this fiction of sovereign consent by the Security Council as a “post-Charter ‘defensive imperialism.’”<sup>33</sup>

The Security Council’s actions, although it did not validate the U.S.’s invasion, absolved the U.S. from moral and legal liability for the illegal war in Iraq. It established a dangerous precedent to be used as a “basis of a new legal colonialism” and a rights-violative precedent by an authoritative decision maker.<sup>34</sup> It is interesting to note the nomenclature Richardson employs. One would think that he would use the label of “neo-colonialism,” which represents a more sophisticated form of hegemony over the former colonies using economic levers of control. His metaphor of colonial control is deliberate to signify complete and total control, including military occupation and a usurpation of the sovereignty of the state.<sup>35</sup> His ominous warning is that precedent for military intervention can be used in the “War on Terror” or against “failed states.”<sup>36</sup>

Richardson’s prophecy has sadly been validated by events in Yemen, Somalia and Libya.<sup>37</sup> He further cautions that events in the Middle East have reached a point where any idea of a two-state solution and sovereignty for the Palestinians will be based on formalistic notions, given that Israel will be able to dominate any Palestinian entity and the form of self-determination it would exercise.<sup>38</sup> This dynamic, like the U.S.’s invasion of Iraq, presents a distorted notion of sovereignty

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30. *Id.*

31. *Id.* at 396.

32. *Id.*

33. *Id.* at 395.

34. *Id.* at 396–397.

35. See Richardson, *The Danger of New Legal Colonialism*, *supra* note 1, at 393 (comparing western intervention to colonization).

36. *Id.* at 397.

37. See *id.* at 396–397 (discussing United States intervention in Somalia against “terrorists”). See also Jack Watling & Namir Shabibi, *How the War on Terror Failed Yemen*, FOREIGN POL’Y GROUP (May 18, 2016), <http://foreignpolicy.com/2016/05/18/how-the-war-on-terror-failed-yemen/> (discussing United States intervention in Yemen as part of the “War on Terror” and its status as a “failed state”); Allan J. Kuperman, *Obama’s Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFF. (Mar./Apr. 2015), <https://www.foreignaffairs.com/articles/libya/obamas-libya-debacle> (discussing U.S.’s intervention in Libya as part of the “War on Terror” and Libya’s status as a “failed state”).

38. Richardson, *The Danger of the New Legal Colonialism*, *supra* note 1, at 398.

by maintaining the hegemony of the powerful.

#### IV. THE RIGHT TO PROPERTY AND INTERNATIONAL LAW

A cardinal emphasis in Richardson's writing is his call for economic justice for colonized and victimized populations. Prior to the decolonization movement and the emergence of socialist countries, the right to property was regarded as a fundamental norm of international law.<sup>39</sup> The prevailing view required prompt and adequate compensation based on market value in the event of nationalization.<sup>40</sup> Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) codify the right of all peoples to dispose of their natural wealth and resources.<sup>41</sup> The ICESCR further affirms the right of all peoples to "utilize fully and freely their natural wealth and resources."<sup>42</sup> Significantly, neither of the two covenants mention anything with respect to the right to property as a fundamental individual right under international law.<sup>43</sup> Subsequent resolutions of the U.N. General Assembly such as the 1974 Resolution on Permanent Sovereignty over Natural Resources,<sup>44</sup> the 1974 Declaration on the Establishment of a New International Economic Order,<sup>45</sup> and the 1974 Charter of Economic Rights and Duties of States,<sup>46</sup> all affirm that compensation to be awarded must be in terms of the domestic law of the state.

The traditional African conception of human rights is viewed from a communal perspective.<sup>47</sup> In traditional African society, the individual was not viewed as alienated from society, but the rights were enjoyed through the group and derived from the relation with the group.<sup>48</sup> Similarly, while western countries view property in individual terms, African customary law views it in communal terms.<sup>49</sup> Property is conceived as a communal possession for the enjoyment of the

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39. Kevin Smith, *The Law of Compensation for Expropriated Companies and the Valuation Methods Used to Achieve That Compensation* (Spring 2001), [https://users.wfu.edu/palmitar/Law & Valuation/Papers/2001/Smith.htm](https://users.wfu.edu/palmitar/Law&Valuation/Papers/2001/Smith.htm).

40. *Id.*

41. ICCPR, *supra* note 19, art. 1; ICESCR, *supra* note 19, art. 1.

42. ICESCR, *supra* note 19, art. 25.

43. *See* ICCPR, *supra* note 19 (lacking any language with respect to a fundamental individual right to property).

44. G.A. Res. 3336 (S-XXIX), ¶ 3 (Dec. 17, 1974); *see also* Smith, *supra* note 39 (discussing the role of each states' law in settling compensation disputes under the 1974 resolution).

45. G.A. Res. 3201 (S-VI), ¶ 4(f) (May 1, 1974).

46. G.A. Res. 3281 (XXIX), art. 2, ¶ 2(c) (Dec. 12, 1974).

47. Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L & COMP. L. REV. 373, 380 (1989).

48. *Id.* at 381.

49. *See* John H. M. Beattie, *Checks on the Abuse of Political Power in Some African States: A Preliminary Framework For Analysis*, in COMPARATIVE POLITICAL SYSTEMS 361-73 (R. Cohen & J. Middleton eds., 1967). African customary law had a remarkable sense of justice and a deep sense of human rights. *See id.* at 357-59 (discussing communal moral and legal norms as a basis for politics).

entire community.<sup>50</sup>

Despite the evolution and recognition of the right to self-determination, seizure of private property by newly independent states, to put it mildly, is not well received by the Western world.<sup>51</sup> Richardson questions the legitimacy of colonial land conquests and the dispossession of the indigenous population of their land and the concentration of property in the hands of the colonial population. He extols the right of indigenous people to acquire land from colonial settlers as part of their right to self-determination, whether articulated by Patrice Lumumba in Congo, Kwame Nkrumah in Ghana, or Robert Mugabe in Zimbabwe.<sup>52</sup> While not defending the human rights abuses of the Zimbabwe strong-man, President Mugabe, Richardson chides the West for its failure to recognize the legitimacy of claims for land redistribution in Zimbabwe and the characterization by the West of Mugabe's actions as criminal without recognizing the criminal manner whereby the settlers dispossessed the indigenous population of their property.<sup>53</sup>

#### V. THE INTERDEPENDENCE OF CIVIL AND POLITICAL RIGHTS WITH ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Richardson rejects the idea that civil and political rights are superior to economic, social and cultural rights.<sup>54</sup> He chides human rights organizations in the West for their failure to focus on the conduct of Western countries in the violation of social and economic rights in domestic economic policies, which lead to violations of the socio-economic rights of the developing world.<sup>55</sup> The U.S. remains an outlier with regard to its non-recognition of socio-economic rights as fundamental human rights. In the U.S., courts do not venture into the realm of holding the state responsible for the provision of socio-economic rights. When a claim is cast in the form that requires the government to provide educational services, health care, police protection, and the like based on any notion of a constitutional obligation, its dismissal by the courts is a near certainty.<sup>56</sup>

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50. *See id.* at 364 (noting prohibition of “personal property-holding” as a categorical norm).

51. *See* Fancher and Richardson, *Government Land Acquisition*, *supra* note 1, at 186–87 (discussing the negative reactions by Western media and governments to land acquisitions in Zimbabwe after the liberation war).

52. *Id.* at 189.

53. *Id.*

54. Richardson, *ASIL Proceedings*, *supra* note 1, at 500.

55. *Id.* at 500–01.

56. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that minority students attending public schools in areas with low tax bases do not have a right to equal education opportunities under the Equal Protection Clause); *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989) (holding that a state constitutional amendment regulating abortion procedures did not violate the Court's decision in *Roe v. Wade*); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750–53, 768–69 (2005) (holding that a wife's restraining order against her husband did not constitute a property interest in police protection under the Due Process Clause); *Deshaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189 (1989) (holding that a social worker's failure to act in preventing child abuse did not deprive the victim of liberty without due process under the Due Process Clause).

Under U.S. jurisprudence, the government is held responsible only for negative rights. The U.S. Supreme Court, under its substantive due process fundamental rights interpretation, has recognized a panoply of rights including abortion, procreation, the right to travel, and personal autonomy, which are not explicitly mentioned in the Constitution.<sup>57</sup> On the other hand, the U.S. Supreme Court assiduously maintains that socio-economic rights are not fundamental, as they are not recognized in the Bill of Rights.<sup>58</sup>

The obligation to provide social welfare rights is required under international law. The U.N. Charter, in article 55, requires the U.N. to promote “higher standards of living, full employment, and conditions of economic and social progress and development.”<sup>59</sup> The Charter further requires the promotion of “solutions of international economic, social, health, and related problems; and international cultural and educational co-operation.”<sup>60</sup> The Charter implores member states to achieve these goals both individually and in co-operation with the U.N.<sup>61</sup> Social welfare rights are also contained in the Universal Declaration of Human Rights, which protects, among other rights, economic, social, and cultural rights;<sup>62</sup> social security;<sup>63</sup> the right to work and join trade unions,<sup>64</sup> the right to an adequate standard of living including food, health care, clothing, and housing;<sup>65</sup> unemployment security;<sup>66</sup> and the right to education.<sup>67</sup> More detailed protections of welfare rights and cultural rights are contained in the ICESCR,<sup>68</sup> which spells out the duties and responsibilities of state parties in the furtherance of these rights.

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57. See *Roe v. Wade*, 410 U.S. 113, 152, 154 (1973) (holding that a woman’s right to abortion is protected by the constitutional right to privacy, even though the Constitution does not explicitly mention any right of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 482–86 (1965) (holding that the right to marital privacy is protected by the constitutional right to privacy, even though the Constitution does not explicitly mention privacy); *Shapiro v. Thompson*, 394 U.S. 618, 621–22, 630–31 (1969) (holding that the right to travel is protected by the Constitution, even though the Constitution does not explicitly mention a right to travel); *Lawrence v. Texas*, 539 U.S. 558, 564, 578–79 (2003) (holding that the right to individual autonomy of consenting adults is protected by the constitutional right to liberty, even though the Constitution does not mention a right to individual autonomy).

58. See *Rodriguez*, 411 U.S. at 44 (holding that education is not a fundamental right under the Constitution and therefore Texas’ public school system is not a good candidate for strict judicial scrutiny); *Webster*, 492 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part) (“[T]he fundamental constitutional right of women to decide whether to terminate a pregnancy, survive[s] but [is] not secure”).

59. U.N. Charter art. 55(a).

60. *Id.* art. 55(b).

61. *Id.* art. 56.

62. Universal Declaration of Human Rights, *supra* note 19, art. 22.

63. *Id.*

64. *Id.* art. 23(1).

65. *Id.* art. 25(1).

66. *Id.*

67. *Id.* art. 22

68. See ICESCR, *supra* note 19, art. 6 (finding that the Covenant presents “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”)



The interdependence between all facets of human rights is now recognized as mainstream international law. In a conference on human rights organized under the auspices of the U.N., the centrality of economic, social, and cultural rights was affirmed by a communiqué which stated “[i]n our day political rights without social rights, justice under law without social justice, and political democracy without economic democracy no longer have any true meaning.”<sup>69</sup> Human rights should be viewed holistically, and the traditional balancing should be maintained. In the words of Professor Vojin Dimitrijevic,

There can be no either or thinking in this realm. The moment one human right, or group of rights, is sacrificed for the attainment of some other, more ‘important’ or ‘essential’ human right, whenever freedom is opposed to equality or material well-being, the structure of universal values is undermined: at the end there is neither bread nor liberty.<sup>70</sup>

Consistent with not recognizing socio-economic rights as fundamental, courts in the United States assume that they lack the institutional capacity to hold the government accountable for rights that implicate control of the purse strings.<sup>71</sup> In a nutshell, demands for courts to recognize basic levels of economic well-being beyond those selected by the political organs are rejected based on notions that these rights are either not contained in the Constitution or are not justiciable. The conventional reasoning posits that budgetary and policy choices reside within the legislature and the executive and not with unelected judges.<sup>72</sup> Richardson sees an important role for the judiciary in giving expression to socio-economic rights.<sup>73</sup> Otherwise, Richardson argues, this establishes a “global fault line between haves and have-nots — a frontier patrolled by those interests able and willing to use all means, including violence, to prevent any meaningful transfer of wealth and resources.”<sup>74</sup>

#### VI. THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE USE OF REASONABLENESS AS A STANDARD FOR THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

The socio-economic rights in international human rights instruments remain largely aspirational. It is not surprising that Richardson finds inspiration in the post-apartheid Constitution of South Africa, which he characterizes as the most

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69. Proclamation of Teheran, *Final Act of the International Conference on Human Rights, Teheran*, U.N. Doc. A/CONF.32/41 (1968).

70. Vojin Dimitrijevic, *Development as a Right*, in CONSTITUTIONAL LAW: ANALYSIS AND CASES 395 (2002).

71. See *Webster*, 492 U.S. at 494 (“The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not.”); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33 (“Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”).

72. See *Webster*, 492 U.S. at 494 (detailing the role of the judiciary).

73. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 86.

74. *Id.* at 74.

rights-protective Constitution in the world.<sup>75</sup> The South African example has to be particularly gratifying to Richardson, given his decades-long involvement in the anti-apartheid struggle.<sup>76</sup> Richardson calls on the judiciary in other parts of the world to give expression to a holistic approach to human rights.<sup>77</sup> He applauds the holistic approach of unity and interdependence, which finds judicial sanction in a litany of decisions of the Constitutional Court of South Africa.<sup>78</sup> The jurisprudence developed by the Constitutional Court of South Africa in areas such as the death penalty,<sup>79</sup> and its willingness to use the reasonableness standard as a criterion to intervene in holding the government responsible for socio-economic rights including the right to housing,<sup>80</sup> healthcare,<sup>81</sup> and property,<sup>82</sup> reflects judicial intervention in the enforcement of socio-economic rights, which Richardson applauds as globally significant.<sup>83</sup>

In *Government of the Republic of South Africa v. Grootboom*, Justice Zakeria Yacoob affirmed that the South African Constitution entrenches both civil and political rights as well as social and economic rights. Justice Yacoob proclaimed that all the rights in the Bill of Rights are inter-related and mutually supporting.<sup>84</sup> Justice Yacoob goes on to state that:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined. . . . The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.<sup>85</sup>

Courts in other western countries such as Germany have also recognized the importance of socio-economic rights. The German Constitutional Court has stated

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75. *Id.* at 83.

76. *See id.* (noting that the 1996 South African Constitution and the Constitutional Court of the country are trying to rectify the embedded continuing problem of economic apartheid). Professor Richardson was part of several anti-apartheid groups during his career. *Henry J. Richardson III: Professor of Law*, TEMPLE UNIV. BEASLEY SCH. OF LAW, <https://www.law.temple.edu/contact/henry-j-richardson-iii/> (last visited Feb. 11, 2017).

77. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 83.

78. *Id.*

79. *See State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.) (deciding whether defendants should receive the death penalty).

80. *Gov't of the Rep. of S. Africa v. Grootboom* 2001 (1) SA 46 (CC) at para. 93 (S. Afr.).

81. *See Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 135(2)(a) (S. Afr.) (holding that the Constitution requires the government to provide access to health services for pregnant women); *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) at para. 44 (S. Afr.) (holding that the Constitution does not require the state to provide renal dialysis facilities for all persons suffering from chronic renal failure).

82. *Jaftha v. Schoeman and Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC) at para. 67(1)(1.1) (S. Afr.).

83. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 72.

84. *Grootboom* 2001 (1) SA 46 at para. 23.

85. *Id.*

that civil and political rights are interconnected with economic and social rights.<sup>86</sup> A minimum of material welfare is as sure to aid the realization of freedom as a complete welfare state is sure to destroy freedom.<sup>87</sup> The *Grootboom* decision in the U.S. context would represent a radical example of judicial overreaching.

In *Grootboom*, the Court was faced with a question: what were the state's obligations in relation to housing? The respondents in *Grootboom* were a group of indigent people who were rendered homeless as a result of successive evictions and were in a situation where they had nowhere else to go.<sup>88</sup> The Court found that there was no government-housing program in place to deal with the desperate situation that the respondents were facing.<sup>89</sup> Not having a housing program at all was found to be unreasonable and a violation of the state's obligation to provide housing.<sup>90</sup>

First, the court in interpreting socio-economic rights and the right to housing held that the obligation is one of progressive realization.<sup>91</sup> Second, the obligation is also based on the means of the state. The state cannot be forced to do more than its available resources allow.<sup>92</sup> The court stated that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources."<sup>93</sup> What this means is that individuals cannot claim socio-economic rights such as housing and shelter on demand. However, the state is obligated to devise and implement a coherent and coordinated program to meet its obligations.<sup>94</sup> In this instance, the court found the state did not have any program in place to address the needs of the most vulnerable.<sup>95</sup> Where the state does not have any program, the court will not hesitate in holding the state in breach of its social-welfare obligations.<sup>96</sup>

Even by the standards of the European welfare constitutions, such as Germany, *Grootboom* and subsequent decisions by the Constitutional Court of South Africa represent a "radical" progression in the furtherance of social-welfare rights. *Grootboom* signifies the first time that a court has found a government to be in breach of its social-welfare obligations under the Constitution. From the

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86. Georg Ress, *The Constitution and the Requirements of Democracy in Germany*, in NEW CHALLENGES TO THE GERMAN BASIC LAW: THE GERMAN CONTRIBUTION TO THE THIRD WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 138 (Christian Starck ed. 1991).

87. *Id.*

88. *Grootboom*, 2001 (1) SA 46 at para. 4.

89. *Id.* para. 52.

90. *Id.* paras. 68–69.

91. *Id.* para. 34.

92. *Id.* para. 46.

93. *Id.*

94. *Grootboom*, 2001 (1) SA 46 at para. 95.

95. *See id.* (holding that the government failed to provide relief to those "desperately in need").

96. *Id.*

perspective of the Constitutional Court of South Africa, the state cannot be neutral in the realization of socio-economic rights.<sup>97</sup> The state, the court held, is obligated to take positive steps to meet the needs of those living in extreme conditions of poverty or lack of housing. The court has a role by using the reasonableness standard in ensuring that the state fulfills its obligations.<sup>98</sup> This represents an unqualified good, and perhaps for this reason, Richardson characterizes the South African Constitution as the most rights-protective in the world.<sup>99</sup>

Richardson applauds the South African Constitutional Court's use of the "reasonableness" standard as a vehicle that enables a judicial tribunal to be actively involved in empowering historically disadvantaged communities, particularly people of color, to achieve a more just allocation of resources.<sup>100</sup> The South African courts' use of reasonableness signifies judicial intervention to accomplish socio-economic redress, using cogent legality standards firmly embedded in the rule of law.<sup>101</sup> In *Grootboom*, the court recognized its limitations on controlling the purse strings.<sup>102</sup> On the other hand, it also found that a housing program that excludes a significant part of the population cannot be reasonable.<sup>103</sup> The reasonableness standard has to take into account the needs of the most vulnerable.<sup>104</sup>

In *Soobramoney*, the Constitutional Court had to decide whether the lawmaker was reasonable in its implementation and allocation of scarce dialyses machines in the context of the right to health care.<sup>105</sup> This time the court held that it was reluctant to interfere with decisions made by the political organs as to how to allocate scarce medical resources.<sup>106</sup> In *Soobramoney*, the applicant requested the Court to issue an order directing the health authorities to make renal dialysis treatment available to him.<sup>107</sup> The applicant based his claim on several provisions of the Constitution, particularly the right to emergency treatment contained in § 27(3).<sup>108</sup> The Court held that all of the social welfare provisions, be it the right to housing, health care, food, water, or social security, were resource driven.<sup>109</sup> The state had to manage its limited resources, which could mean that particular individuals may not receive lifesaving treatment.<sup>110</sup> In this instance, the state had put into place a program to apportion access to dialysis treatment only to patients

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97. *See id.* para. 96 (holding that the Constitution creates an obligation to devise, fund, implement, and supervise measures to provide relief to those in desperate need).

98. *See id.* para. 24 (discussing the relationship between adequate housing and socio-economic rights).

99. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 81.

100. *Id.*

101. *Id.*

102. *Grootboom*, 2001 (1) SA 46 at para. 95.

103. *Id.* para. 43.

104. *Id.* para. 47.

105. *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) at para. 29 (S. Afr.).

106. *Id.* para. 29.

107. *Id.* para 44.

108. *Id.*

109. *Id.* para. 11.

110. *Id.* para. 31.

who suffer acute renal failure.<sup>111</sup> The applicant was not covered under the existing program.<sup>112</sup> The Court concluded that the program was created and implemented in a rational manner, taking into account the needs of the broader society.<sup>113</sup> Therefore, the Court was not going to order the state to provide the treatment to the plaintiff.<sup>114</sup>

On the other hand, in *Minister of Health v. Treatment Action Campaign*, the Constitutional Court found that the failure to offer the drug Nevirapine, which was found to reduce the transmission of HIV from a pregnant woman to the child,<sup>115</sup> to pregnant HIV women except at designated pilot sites even though pharmaceutical companies offered the drug to the government for free, was unreasonable.<sup>116</sup> So the cost of the drug itself was not of any consideration.<sup>117</sup> The cost of counseling and monitoring the effect of the drugs was of concern to the government, and this counseling and monitoring was done only at a few designated facilities.<sup>118</sup> The issue before the Court was whether it was reasonable to exclude Nevirapine for the treatment of mother to child transmission at the sites where it was not being offered, given that a single dose of Nevirapine would result in a drastic reduction in the transmission of mother-to-child HIV.<sup>119</sup> The Court held that it was unreasonable to withhold the drug from other facilities pending the research and monitoring that was ongoing in the designated facilities.<sup>120</sup> The government's approach was not balanced and flexible, and a program that excludes a large segment of society cannot be held to be reasonable.<sup>121</sup> Poor people outside the catchment area of the Nevirapine sites will be affected by the government's unreasonable policy.<sup>122</sup> Given that there are no cost implications to the provisions of the drug and the tremendous benefits that accrue from a single administration of the drug, the court found the government's program unreasonable.<sup>123</sup> The court went further and also held that the government must take reasonable measures to extend the counseling and testing beyond the designated test sites.<sup>124</sup> This is an

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111. *Soobramoney*, 1998 (1) SA 765 at para. 3.

112. *See id.* para. 3–4 (describing how the program accepted those with chronic renal failure only if they were eligible for kidney transplant, but applicants had other complications that prevented them from being a candidate for kidney transplant).

113. *See id.* para 31 (holding that the state has to manage limited resources and put the needs of society ahead of particular individuals).

114. *Id.* para. 36.

115. *Id.* para. 12.

116. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 135(2)(a) (S. Afr.).

117. *Id.* para. 48.

118. *Id.* para. 49.

119. *Id.* para. 47.

120. *Id.* para. 81.

121. *Treatment Action Campaign* 2002 at paras. 68, 80.

122. *Id.* para. 70.

123. *Id.* para. 72–73.

124. *Id.* para. 95.

example of the court issuing a remedy that had consequences on the purse strings. The ruling was propelled by the reality that the alternative, namely, HIV positive children born from mother-to-child transmission, was too drastic a consequence, which could be prevented by the administering of a single dose of the drug.

The approach of the Constitutional Court of South Africa in the social-welfare cases finds congruence in the dissenting judgment of United State Supreme Court Justice Thurgood Marshall in *Dandridge v. Williams*.<sup>125</sup> In *Dandridge*, the petitioner challenged a Maryland statute that imposed limits on the amount of welfare a family could receive regardless of the family size.<sup>126</sup> The majority decision of Justice Stewart characterized the law as one pertaining to economics and social welfare, and assessed the law based on the rational basis standard.<sup>127</sup> This meant the lawmaker was accorded maximum deference in the design and implementation of the program.<sup>128</sup> Justice Marshall, in dissent, argued that mere rationality was not an appropriate standard because the interests involved were not business or economic matters.<sup>129</sup> Instead, welfare affects the “vital interests of a powerless minority.”<sup>130</sup> The reasoning of Justice Marshall has never been sanctioned by a majority of the United States Supreme Court.

The increased scrutiny, where the interests involved affect the vital interests of a powerless minority, is highlighted in the South African *Jaftha* case. In *Jaftha*, the Constitutional Court dealt with a law that permitted the sale in execution of debtor’s homes for failure to pay their debts.<sup>131</sup> The court was confronted with the question whether the removal of security of tenure violates the constitutional protection of the right to housing.<sup>132</sup> The applicants in this case were two indigent women who were granted homes by the state.<sup>133</sup> The first applicant was in failing health.<sup>134</sup> Both applicants borrowed a small sum of money (one less than \$30 and the other less than \$15), which they were subsequently unable to pay.<sup>135</sup> The creditors took out judgments against both debtors and followed up with a sale of execution of their properties.<sup>136</sup>

The court once again affirmed that any deprivation of socio-economic rights including food, housing, and healthcare implicates the right to dignity.<sup>137</sup> Richardson highlights the fascinating aspect of the *Jaftha* case in that socio-

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125. *Dandridge v. Williams*, 397 U.S. 471 (1970).

126. *Id.* at 472.

127. *Id.* at 487.

128. *See id.* at 503 (finding that if Congress had meant to restrict the design of the program it could have done so).

129. *See id.* at 522 (Marshall, J., dissenting) (noting that stricter constitutional standards are required when the benefit received is necessary to sustain life).

130. *Id.* at 520.

131. *Jaftha v. Schoeman Van Rooyen v. Stoltz*, 2005 (2) SA 140 (CC) at para. 1 (S. Afr.).

132. *Id.*

133. *Id.* paras. 3–5.

134. *Id.* para. 3.

135. *Id.* paras. 4–5.

136. *Id.* paras. 4–5.

137. *Jaftha*, 2005 at para. 21.

economic rights usually implicate a positive right.<sup>138</sup> In *Jaftha*, the court recognized a negative right to not have measures that deprive a person of access to housing, unless the measures can be justified by the limitations section of the Bill of Rights.<sup>139</sup> The court ruled that depriving indigent persons of their homes for a trifling debt, rendering them homeless in circumstances where the state will never help them again to acquire a home, and where such persons will never be able to restore the condition of human dignity, was unreasonable and could not survive the limitations clause.<sup>140</sup> The collection of a trifling debt in this case was not sufficiently compelling. *Jaftha* is an example of the court engaging in categorical balancing, weighing the interests of the creditor against the human dignity of an indigent debtor.

The court's holding did not mean that every sale in execution to satisfy a trifling debt will be unreasonable and unjustifiable.<sup>141</sup> As Richardson notes, the court offers a number of factors to be considered, including the circumstances under which the debt was incurred, any attempts made by the debtor to pay off the debts, the financial situation of both parties, whether the debtor is employed and can pay off the debt, and any other factors relevant to the facts of the case.<sup>142</sup> These factors must be applied with judicial oversight.<sup>143</sup> Richardson applauds this flexible and judicially protected doctrine of reasonableness.<sup>144</sup> One would venture to guess that Richardson would applaud court based strategies that advocate the use of the reasonableness standard to scrutinize the executive decisions of the Donald Trump administration (i.e. in the realm of immigration policy, which has targeted vulnerable groups in society).

## VII. TOWARDS A DYNAMIC CONCEPT OF THE RULE OF LAW

Richardson's idea of the rule of law embraces a dynamic concept that requires social justice; the rule of law is not viewed as independent from social justice.<sup>145</sup> The idea reflects a recognition that minimum material conditions are important for the rule of law.<sup>146</sup> Under this dynamic conception of the rule of law, courts have an

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138. Richardson, *Patrolling the Resource Transfer*, *supra* note 1, at 81.

139. *Jaftha*, 2005 at para. 34. *See also* S. AFR. CONST. art. 36, 1996 (explaining all rights in the Bill of Rights are limited in terms of law of general application and that these limitations must be reasonable and justifiable).

140. *Jaftha*, 2005 at para. 39.

141. *Id.* para. 53.

142. Richardson, *Patrolling the Resource Transfer*, *supra* note 1, at 82.

143. *Jaftha*, 2005 at para. 61.

144. Richardson, *Patrolling the Resource Transfer*, *supra* note 1, at 90.

145. For this idea of the rule of law, see JACQUES-YVAN MORIN, THE RULE OF LAW AND THE RECHTSSTAAT CONCEPT IN FEDERALISM IN THE MAKING 78 (Edward McWhinney et al. ed., 1992) (discussing that the Rechtsstaat has to be understood in conjunction with the Socialprinzip).

146. Ulrich Karpen, *The Constitution in the Face of Economic and Social Progress*, in NEW CHALLENGES TO THE GERMAN BASIC LAW: THE GERMAN CONTRIBUTIONS TO THE THIRD WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 89 (C. Starck ed., 1991).

important role to play in ensuring that the classical idea of the passive state is no longer tenable. The methodology of the Constitutional Court of South Africa allows, through the use of reasonableness as a standard, for courts “to control the flow of resource-transfers to poor people of color, under the particular national and global right, across the fault line.”<sup>147</sup> Not content with what he calls the most rights-protective Constitution in the world, Richardson prods the South African court to pivot towards a willingness to mandate that the government provide a minimum core of socio-economic rights to the needy under the rule of law.<sup>148</sup> This is vintage Richardson, as the journey towards empowerment never ends.

### VIII. UBUNTU

Richardson finds that the South African example of *ubuntu*, and the country’s approach to fundamental rights offers a laboratory for the world as to how to get along equitably and to deal with racial challenges.<sup>149</sup> He applauds the Constitutional Court’s embrace of the African concept of *ubuntu*,<sup>150</sup> an ethical concept that recognizes the humanity of everyone, represented in a collective bond and caring for the other.<sup>151</sup> *Ubuntu* is a philosophy that further represents the idea that individuals are not isolated beings,<sup>152</sup> instead, they live in a community and the individual well-being is intrinsically linked to the well-being of the community.<sup>153</sup> *Ubuntu* was described by Justice Yvonne Mokgoro in the *Makwanyane* decision as humanness, personhood, and morality, which flows out of group solidarity.<sup>154</sup>

*Ubuntu* represents a central justification for the truth and reconciliation program, initiated by President Nelson Mandela to deal with perpetrators of apartheid crimes.<sup>155</sup> In *Makwanyane*, Justice Mokgoro proclaimed that *ubuntu* reflects a shift from confrontation to reconciliation.<sup>156</sup> For Richardson, the South African example and use of *ubuntu* is not only instructive in the way individuals relate to the group, but also offers clarity on international relations and getting along with adversaries.<sup>157</sup> South Africa, beginning with President Mandela, urged the United States to deal more justly with Cuba.<sup>158</sup> Richardson must take great delight in the current thawing of relations between the U.S. and Cuba.<sup>159</sup>

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147. Richardson, *Patrolling the Resource Transfer*, *supra* note 1, at 85.

148. *Id.* at 90.

149. *Id.* at 83.

150. *See id.* at 84–85.

151. William E. Flippin, Jr., *Ubuntu: Applying African Philosophy in Building Community*, HUFFINGTON POST (Feb. 5, 2012, 8:29 AM), [http://www.huffingtonpost.com/reverend-william-e-flippin-jr/ubuntu-applying-african-p\\_b\\_1243904.html](http://www.huffingtonpost.com/reverend-william-e-flippin-jr/ubuntu-applying-african-p_b_1243904.html).

152. *Id.*

153. *Id.*

154. *See S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 308 (S. Afr.) (describing *ubuntu* as “humaneness”).

155. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 83.

156. *Makwanyane*, 1995 at para. 308.

157. Richardson, *Patrolling the Resource Transfer Frontier*, *supra* note 1, at 83.

158. *Id.* at 84.

159. For discussion of thawing relations see Russell Goldman & Damien Cave, *The Last*



### IX. INSTITUTION BUILDING AND AFRICAN INTEGRATION

The foregoing illustrates that Richardson's body of work is not merely a critique of imperialism and distorted power relationships in the interest of the powerful. His scholarship offers a thoughtful and progressive vision that extends to institution building. He is passionate about the transformation and institution building in Africa that will channel human behavior in positive directions to achieve progress for the continent. Richardson is an ardent proponent of Pan-Africanism and African political and economic integration.<sup>160</sup> He applauds the African Economic Community, or African Union, in its attempts to promote cooperation in the utilization of human resources, the free movement of persons across African states, and balanced economic development.<sup>161</sup>

Richardson must take comfort in the ambitious initiative of The Tripartite Free Trade Area (TFTA) agreed to by African countries in Egypt in June 2015.<sup>162</sup> Africans trade more with one another in manufactured goods than they do with the developed world.<sup>163</sup> TFTA seeks to create a free trade zone across the entire African continent.<sup>164</sup> It envisions bringing together all three of Africa's regional trading blocs to create what would be the largest trading bloc in terms of population.<sup>165</sup> The full potential of the deal is dependent on the development of proper physical and institutional infrastructure in many parts of the continent.<sup>166</sup> As in any trade agreement, there is the potential problem of smaller economies in Africa having to compete against larger economies. The converse is also true, namely that some countries have better rights protections for workers than others, which increases the costs of doing business.

In the calibration of investment and trade, human rights considerations have

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*Thaw: U.S.-Cuban Relations in Pictures*, NEW YORK TIMES (Mar. 21, 2016), <https://www.nytimes.com/interactive/2016/03/21/world/americas/cuba-united-states-timeline-pictures.html> (discussing how former President Obama was the first American president to visit Cuba in two generations while sitting in office).

160. Henry J. Richardson III, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The Danger of Oligarchy Within the pan-Africanist Authority of the African Union*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 255, 257 (2003).

161. Richardson, *ASIL Proceedings*, *supra* note 1, at 501.

162. Sindiso Nqwenya, *Tripartite Free Trade Area: An Opportunity not a Threat*, THE CITIZEN (Nov. 15, 2013), <http://www.thecitizen.co.tz/oped/Tripartite-Free-Trade-Area—An-opportunity-not-a-threat/1840568-2073160-n30mkmz/index.html>.

163. WORLD TRADE ORGANIZATION, *INTERNATIONAL TRADE STATISTICS* 41 (2015), [https://www.wto.org/english/res\\_e/statis\\_e/its2015\\_e/its2015\\_e.pdf](https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf).

164. *Africa Creates TFTA – Cape to Cairo free-trade-zone*, BBC NEWS (June 10, 2015), <http://www.bbc.com/news/world-africa-33076917>.

165. David Luke & Zodwa Mabuza, *The Tripartite Free Trade Area Agreement: A milestone for Africa's Regional Integration Process*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (June 23, 2015), <http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa>.

166. Soamiely Andriamananjara, *Understanding the Importance of the Tripartite Free Trade Area*, BROOKINGS (June 17, 2015), <http://www.brookings.edu/blogs/africa-in-focus/posts/2015/06/17-tripartite-free-trade-area-andriamananjara>.

to be reconciled with business imperatives. For Richardson, trade and investment law must be subject to human rights, particularly the rights of workers.<sup>167</sup> Richardson proclaims that protection for the rights of workers is critical for any Pan-African vision.<sup>168</sup> In contrast to the orthodox theory of free trade, for Richardson, integration strategies must be evaluated by certain core substantive values, notably, the interests of the workers.<sup>169</sup> He rejects any notion of African economic unity, such as the unity that NAFTA creates in North America with its dark underside, where individual workers are sacrificed at the altar of corporate profits.<sup>170</sup> He laments the lack of sufficient protection for worker rights in Pan-African initiatives.<sup>171</sup> He finds inspiration in the South African Constitution and its extensive protection of worker rights, which he hopes will serve as an impetus in any integration negotiations.<sup>172</sup> Hopefully, these concerns will be taken into account as the African countries work out the technical details of the TFTA agreement before the 2017 deadline.<sup>173</sup>

## X. CONCLUSION

International law consists of an indispensable body of rules and conduct, which states feel obligated to observe in their interactions with one another, with international organizations, and in their relations with persons, whether natural or personal.<sup>174</sup> Professor Richardson has, over many decades, engaged the entire corpus of international law in a thoughtful and critical manner, be it in the relations between states, the relations between states and international organizations, international trade, or the implementation of human rights—in all its facets: civil, political, economic, and cultural. He offers a value-based perspective on international law. His starting point for evaluating international law is whether it advances the well-being of the vulnerable, be it states or the neediest in society. Many people might believe in this. But few have engaged and analyzed the corpus of international law and the consequences of critical decisions made by powerful state actors with the sophistication and precision of Richardson.

Even in the present era, Richardson remains ever so vigilant in highlighting the events surrounding the invasion of Iraq or land distribution for people subject to previous colonial rule to demonstrate the work of powerful and self-interested states, at times acting with the *ex-post facto* endorsement of the Security Council, to provide a veneer of international legitimacy to actions violative of self-

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167. Richardson, *ASIL Proceedings*, supra note 1, at 501.

168. See *id.* at 502 (discussing the importance of questioning the establishment of a workers' rights regime in Africa).

169. *Id.* at 501.

170. *Id.* at 502.

171. *Id.*

172. *Id.* at 502–03.

173. *High Level Event: The Continental Free Trade Area Within the Context of the First 10-Year Implementation Plan of Agenda 2063*, UNITED NATIONS ECON. COMM'N FOR AFRICA (Oct. 12, 2015 9:30 AM–1:00 PM), <http://www.un.org/en/africa/osaa/pdf/events/20151012/freetrade-report.pdf>.

174. JG STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 3 (9th ed. 1989).

determination and sovereignty. Richardson's guidance in international law, his cogency of reasoning, and depth of study moved and continues to move international law doctrines forward in the interest of the global community. His work has enriched the academy, for which we are all the better off.