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Book Review of The Human Rights of Aliens in Contemporary International Law, by Richard B. Lillich

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BOOK REVIEW

THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW. By Richard Lillich. Manchester, United Kingdom: Manchester University Press, 1984. Pp. 1, 177. $38.00.

Professor Lillich's recent book, *The Human Rights of Aliens in Contemporary International Law* (hereinafter *Human Rights of Aliens*), presents an exciting vision of developing human rights for noncitizens. Traditionally, aliens had to rely on their state of nationality to protect their rights. If the state chose not to intercede, the alien was left without remedy. Lillich proposes that there have been substantial changes in the way aliens' rights are protected; international legal protections now allow redress for individual aliens independent of state efforts.

Lillich's thesis is that a new body of international law bearing on the rights of individual aliens can be created by piecing together various sources. Once assembled, this "juridical puzzle"[1] represents a breakthrough in international law because it reveals new methods by which some aliens can protect their individual rights without having to rely on their home state's intervention. Moreover, Lillich asserts that states' traditional freedom over aliens has gradually begun to erode.[2] In support of his argument, Lillich marshalls many international agreements and reviews various state practices

1. R. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 2-3 (1984).

2. In Lillich's words, the "logic of the traditional international law system protecting the rights of aliens exclusively (if at all) through the medium of the nation-State must give way in contemporary international law—and, in fact, has already begun to do so—to the direct protection of the rights of individual aliens as such." *Id.* at 2. According to the author, "what the international community is witnessing today is a major change—the significance of which cannot be overstated—in the way in which the rights of aliens are protected." The change, furthermore, is not "mere[ly] procedural" but "involves a serious restriction—though . . . a much needed one—on the broad autonomy which States have traditionally enjoyed in their dealings with aliens." *Id.* at 3.

pertaining to aliens. But a close examination of the evidence in *Human Rights of Aliens* more readily suggests the opposite conclusion: states remain the arbiters for defining and protecting individual rights even as they expand protections for aliens.

While Lillich's optimism is appealing and his scholarship is impressive, *Human Rights of Aliens* raises false hopes. The book's thesis, like that of much current human rights literature[3] and advocacy,[4] overstates its claim to a basis in international law. The book, however, presents an opportunity to reexamine debates between positivists and naturalists that continue to enliven human rights discussions.[5] Naturalist models of international human rights law dominate the stage at this time; that they are superior is by no means a foregone conclusion.[6] This book inadvertently supports a

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3. For a listing and critique of some currently advocated human rights, see Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

4. Few current human rights works take the time to rigorously analyze how sources of international law affirm the existence of particular rights. In some cases, a right will be described as part of "soft law" when it appears in documents of international organizations that do not have a binding effect. *See* M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985). Fewer works acknowledge the differences of opinion among scholars regarding how sources of international law are identified and applied. For different interpretations of how to identify customary international law, see A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) and Akehurst, *Custom as a Source of International Law*, 1974-1975 BRIT. Y.B. INT'L L. 17. For a critique of Akehurst's critique, see D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1135-44 (1982). On the relationship between treaties and custom see generally M. VILLIGER, *supra*, at 34-6; Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 1966 BRIT. Y.B. INT'L L. 275; Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25 (1970).

5. Classic examples of this debate in a non-international law context are found in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). In the international law context, a summary of the debate can be found in M. BOS, A METHODOLOGY OF INTERNATIONAL LAW 33-35 (1984). Bos not only analyzes the natural and positive paradigms of international law but also rejects them in favor of a third model of international law.

6. *See* Sinha, *Freeing Human Rights from National Rights*, 70 ARCHIV FÜR RECHTS-UND SOZIAL PHILOSOPHIE 342 (1984).

positivist framework to analyze and advance human rights law.

Understanding this book requires a basic knowledge of the distinctions between positivist and naturalist conceptions of international law.[7] Professor Lillich's model of the international legal world adheres to a naturalist conception. According to this view, assembling the "international law" of aliens is considered a matter of "revealing" rather than "creating" international law.[8] The naturalist jurist "finds the law," which corresponds to notions of what is moral. Consequently, advances in alien protection are considered results of an inexorable process in which the rights of states must "give way" to the rights of individuals.[9]

While Lillich's normative emphasis simply assumes that a consensus about international law exists, debate still rages about the legal effect of some international and regional instruments[10] and the identification of customary international law. In Lillich's view, states unwittingly set off processes that lead to the creation of law that binds all states. This model of international law demonstrates an impatience with the "Westphalian" framework, the scheme of law deriving its powers and legitimacy solely from the consent of states.[11]

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7. On the distinction between legal positivism and naturalism, see L. LLOYD, INTRODUCTION TO JURISPRUDENCE (3d ed. 1972). For a summary of the distinctions between the two theories, see Note, *Dualistic Legal Phenomena and the Limitations of Positivism*, 86 COLUM. L. REV. 823, 824-25 (1986). On their distinction in international law, see Gross, *Family Planning as a Human Right: Some Jurisprudential Reflections on Natural Rights and Positive Law*, in ESSAYS IN INTERNATIONAL LAW AND ORGANIZATION 227-31 (L. Gross ed. 1984).

8. R. LILLICH, *supra* note 1, at 3.

9. *See* sources cited *supra* note 5.

10. *See, e.g.*, Sohn & Buergenthal, *Note on the Legal Effect of the Universal Declaration*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-22 (1973); *see also supra* note 4.

11. For seminal description of the Westphalian legal order, see Gross, *The Peace of Westphalia: 1648-1948*, 42 AM. J. INT'L L. 20 (1948). For further discussion of consent's role in international law, see Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485 (R. MacDonald & D. Johnston eds. 1983); O. SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE: GENERAL COURSE IN PUBLIC INTERNATIONAL LAW 32-39 (1985). For other examples of impatience with the Westphalian legal order, see Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984) and Sohn, *The New International Law:*

Contrary to naturalists, positivists have a more restrictive view of international law, for they insist that international law arises from those bodies endowed by states with law-creating powers, or state actions intended to have legal effect.[12] Where state consent is absent, the positivist predicts the law will be ineffective.[13] Under a positivist analysis, what is "right" is not necessarily embodied in law. The tension between the two positions is often stated as the difference between "is" and "ought." It is the difference between description and prescription.

State treatment of aliens was and remains a sovereign's perogative. Even in the post-colonial world, states remain convinced that only territorial jurisdiction should be the basis for the rules governing behavior toward those persons located within their borders. And where states have effectively conceded their sovereignty, as in Europe, it is through treaty, the touchstone of positive law.[14] Even treaties based on naturalist norms constitute the basis of positivist international analysis because they unambiguously represent legal obligations undertaken by state consent. Apart from treaty law, assertions of customary law protection for aliens remain weak.[15]

Lillich's approach implies that the international law re-

Protection of the Rights of Individuals Rather than States, 32 AM. U.L. REV. 1 (1982).

12. Consensual state practices that demonstrate a legal intent include diplomatic correspondences, actions accompanied by an articulated legal rationale, and entrance into agreements which are intended to have legal effect. For a critique of naturalist human rights law-making that ignores the role of consent in international law, see Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250 (1983).

13. *See* Gross, *The United Nations and the Role of Law*, 19 INT'L ORG. 537, 558 (1965); *see also* Gross, *supra* note 11.

14. On the ability of a state to compromise its sovereignty through treaty, see Austro-German Customs Union Case (Aus. v. Ger.), 1931 P.C.I.J. (ser. A/B) No. 41, *briefed in* H. BRIGGS, THE LAW OF NATIONS 72-74 (2d ed. 1952).

15. These assertions remain weak even in a regional context. On the lack of regional customary law, see Asylum Case, 1950 I.C.J. 266,. *digested in* N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 836-40 (1973). Where states in a region are signatories to a treaty, local non-signatory states are not bound. North Sea Continental Shelf Cases (Den. v. W. Ger.; Neth. v. W. Ger.), 1969 I.C.J. 118, *digested in* 63 AM. J. INT'L L. 591-636 (1969).

garding aliens has progressed gradually, with the greatest advancement following World War II. He assumes that a consensus concerning the legal status of aliens has recently emerged in the international community. His historical approach fails for two reasons. First, the detailed historical overview surveys economic and civil rights in the pre-World War I period, but confines its post-World War I review only to civil rights. Yet economic and civil rights for aliens are rarely neatly separable or inapposite.[16] Lillich, however, admits that traditional doctrines of protection of aliens are not his primary concern; nor does he claim that his book is an exhaustive review of past or contemporary law regarding protection of aliens.[17] Nevertheless, he provides an excellent overview of how, through several epochs, concerns for the protection of aliens were manifested in legal doctrines and state behavior.

The book examines the pre-twentieth century forms and doctrines of legal protections for aliens. Among the legal devices and doctrines discussed are the legal arsenals of colonialists, merchants, and host countries, which include concessions, diplomatic protection, minimum standards arguments versus national treatment, the Calvo doctrine, capitulations, and Friendship, Commerce, and Navigation treaties.

The second analytical flaw is that past and current state practices regarding aliens are not as disjointed as the book would have its readers believe. Contemporary discussions concerning alien rights often mirror previous state behavior. Yet the book's extensive historical overview nowhere integrates past lessons with current attempts to protect aliens.

Numerous current debates can be linked to early attempts to shield national decisions from international or "civilized" standards. Lillich eschews historical parallels even though they contain continuing lessons of how states protect sovereign rights in their treatment of aliens. The seeds of many contemporary debates lie in the historical materials Lillich presents, but he never links current problems to the law on protection of aliens that developed over a four hundred year period due to the rapid growth of

16. Restrictions on work or holding of property nullifies the value of most other rights.

17. R. LILLICH, *supra* note 1, at 3.

international commerce. By failing to connect the past to the present, current developments regarding aliens appear *sui generis*.

For instance, early disagreements by states over national standards for treating aliens, as opposed to minimum international standards, are still far from resolution, with the issue currently taking on North-South dimensions.[18] If the United States and Mexico could not resolve the minimum standards versus national treatment problem, there is little reason to believe that other states are better equipped to resolve this issue or that the new law of aliens provides a solution. Unfortunately, these sorts of links are ignored even though they contain valuable lessons in how states act to protect sovereignty rights in their treatment of aliens. However, Lillich does note that the United Nations' silence about Nigeria's expulsion of Ghanaians[19] indicates that most states refuse to acknowledge the existence of alien rights under international law.

In addition, information regarding refugees and population transfers is a prime area for analysis that Lillich addresses only cursorily. Pre-World War II developments concerning refugees resulted from political change. New problems and new alignments gave rise to legal innovations regarding aliens. The period between the two World Wars saw mass exchanges of populations. Treaties, motivated by self-interest, helped solve the problem of dislocated persons. The treaties that developed to accommodate exchanges of populations and transfers of labor in the periods between the World Wars will interest any student of migration or refugee law. How and why states were able to cooperate in the orderly transfer of populations is not analyzed, even though the issue resurfaces when Lillich discusses the protections now offered by France to Algerian workers. Some parallels could have been drawn here to the treaties France entered into with Poland[20] and with Czechoslovakia,[21] the first trea-

18. Lillich acknowleges that "[t]he debate between these two schools of international law is as lively as it has ever been." R. LILLICH, *supra* note 1, at 17.

19. *Id.* at 4 n.6.

20. Convention Between France and Poland Respecting Reciprocal Emigration, Sept. 3, 1919, 1 L.N.T.S. 337.

ties dealing with migrant workers.

The ingenuity and readiness of states to create effective international agreements concerned with particular types of aliens points to another weakness in the book, namely its failure to distinguish among types of aliens. All aliens are not similarly situated, and states' willingness to compromise their sovereignty to afford aliens protections may depend on the type of alien and the particular state interest involved. For example, one of the most effective systems for protecting aliens is the international refugee system. Why this system works and why its Convention[22] and Protocol[23] have gained adherents is a basic issue not addressed in the book's historical overview.

In his discussion of the United Nations, Lillich moves from a broad historical discussion of the law concerning protection of aliens, with its primarily economic motivations, to a textual analysis of U.N. instruments. The U.N. Charter, the Universal Declaration of Human Rights, and the two Covenants on Human Rights, although considered to have the customary international law status, offer little protection to aliens. Lillich also notes that the International Law Commission (hereinafter the ILC) failed to deal with the problem of the treatment of aliens.[24] The ILC distinguishes the general law of state responsibility from the law of state responsibility for injuries to aliens.[25] By not codifying the law governing the treatment of aliens, the ILC placed the burden of advancing aliens' rights on various U.N. bodies.

Uganda's expulsion of Asians in 1972 finally catalyzed U.N. organs to take action on the issue of alien protection. The Elles Draft Declaration,[26] acknowledging that many of

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21. Convention Between France and Czechoslovakia Respecting Reciprocal Emigration, Mar. 20, 1920, 3 L.N.T.S. 139.

22. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, *reprinted in* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 180.1-.30 (1983).

23. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, *reprinted in* R. LILLICH, *supra* note 22, at 110.1-.7.

24. Lillich makes a number of trenchant comments on the ILC's handling of the treatment of aliens and concludes that the current draft articles that ILC members "have produced and continue to produce" are so abstract as to border on the ethereal. R. LILLICH, *supra* note 1, at 50.

25. *Id.*

26. According to Lillich, the United Nations response to the expulsion

the aliens' problems are unique, expressed certain international minimum protection for aliens. Regrettably, the protective standard in the Elles Draft has no legal status. Moreover, the subject of alien rights has become an extremely delicate topic in the United Nations; in fact, for a few years the term "non-citizens" replaced "aliens" to avoid political sensitivities.[27] Analysis of these sensitivities indirectly indicates what fears would have to be allayed before the Elles Draft could become a document that states would be willing to sign and ratify, as they generally have been with the 1951 Convention and 1967 Protocol concerned with refugee protections.

Lillich's treatment of multilateral instruments protecting refugees and stateless persons is brief and adds little to an already voluminous literature.[28] It does contribute, however, to the current analysis on the problem of alien protection in the treatment of migrant workers by including a brief discussion on the Draft United Nations Migrant Workers Convention. Lillich concludes that the Draft has a fatal flaw: its overbreadth renders it useless.

By conceding that international efforts to protect aliens are generally ineffective,[29] Lillich undercuts the thesis of *Human Rights of Aliens*. He acknowledges that states continue to believe that territorial jurisdiction dictates how a state

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was limited to a discussion by the Sub-Commission on Prevention of Discrimination and Protection of Minorities on whether to send a "deferentially worded telegram of remonstrance to President Amin." *Id.* at 51. The telegram was never sent. The Sub-Commission did muster the courage, however, to adopt a resolution recommending that the Commission on Human Rights (hereinafter CHR), its parent body, consider the applicability of international human rights instruments to aliens and the desirability of further measures. In 1973, the CHR requested the Economic and Social Council, its parent body, to return the matter to the Sub-Commission to study what steps should be undertaken. The matter was returned, and Baroness Elles of Great Britain ensured preparation of reports on the matter. The resulting reports concluded that existing human rights instruments do not adequately protect the rights of aliens. The Baroness also drew up a draft declaration on the human rights of noncitizens.

27. *Id.*

28. *See, e.g.*, G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (1983).

29. R. LILLICH, *supra* note 1, at 122.

treats those persons residing within its borders. Yet states do not always act contrary to the interests of aliens.

It is important to note that regional arrangements more effectively protect aliens' rights than multilateral international agreements. Lillich surveys a number of European initiatives, which, he suggests, serve as models for protecting aliens and contribute to the development of universal norms.[30] He recognizes, however, that the one of the best-known agreements, the European Convention on Establishment,[31] restrains only slightly the state's powers found in customary international law. The reason behind this arrangement's lack of force is that it is merely a codification of existing practice rather than a progressive development in the law governing aliens. Lillich shows that the European Convention on the Legal Status of Migrant Workers[32] is more progressive; it is concerned not only with employment questions, but also generally with the protection of the status of migrant workers. Since this initiative deals with all aspects of a migrant worker's life, it is considered the high-water mark in the migrant labor field.

Clearly aliens deserve protection. Defining standards for such protection, however, is an empty exercise when segregated from what Lillich calls the "cut and thrust" of international relations. Norms defined in resolutions or declarations of international organizations are often denied legal effect. Sometimes states create these standards, animated by political motives and divorced from law-generating intentions of creating law. Nations are wary of legal principles and obligations that can eventually be used against themselves. Thus, to give legal effect to U.N. documents that are

30. Examined in the book are the free movement of workers provisions of the European Economic Community, the European Convention on Establishment, the European Social Charter, and the European Migrant Workers Convention. The book's fifth chapter concludes with an evaluation of the impact of the European Convention on Human Rights, including a discussion of cases about aliens that have come before the European Commission on Human Rights. *See id.* at 94-103.

31. European Convention on Establishment, Dec. 13, 1955, 529 U.N.T.S. 141.

32. European Convention on the Legal Status of Migrant Workers, Nov. 27, 1977, Europ. T.S. No. 93, *reprinted in* 16 I.L.M. 1381-90 (1977).

not treaties overstates the sources of international law.[33] The international legal scholar's task is to examine cases where steps have actually been taken to protect aliens' rights, and to determine what moves states from aspiration to implementation. How and why states assume legal obligations toward aliens is a different question from whether such obligations should be assumed.

Towards the book's conclusion, Lillich moves from describing the law to describing states' practice regarding aliens. Here, he proves to be a sober observer. He admits that the norms have generally been ineffective. The exceptions to this bleak picture are bilateral treaties and regional arrangements. The experiences of the European Community and the Council of Europe, Lillich notes, may prove to be profitable codification ventures, for they can serve as models for similar agreements between other states, as well as contribute to the development of universal norms.

The European Community's efforts demonstrate what is possible in the realm of alien protection. No doubt aliens in the European Community have state-created rights resulting from states bargaining together, writing treaties, and providing procedures and a forum in which cases can be heard. The foundation of the European Community's approach, however, is treaty law.[34]

The European experiment illustrates that states permit aliens to protect their rights as individuals, without recourse to their home states, which may or may not take up their cause. It is uncertain what conditions make this type of agreement possible. Perhaps the answer lies in the overwhelming need to create an economic union that diffuses tensions between individuals and states, without also creating opportunities for "gunboat diplomacy" over affronts to individuals.

Specific cases of protection raised by Lillich provide examples of agreements for state protection of aliens. For ex-

33. A fairly voluminous body of works exist on this subject. *See, e.g.*, sources cited *supra* notes 4 & 10.

34. For Lillich's recitation of these treaties, see R. LILLICH, *supra* note 1, at 81-103.

ample, the French-Algerian repatriation agreements,[35] which include severance and payment clauses, may be regarded as just. The agreements provide for the professional training, or financing, of aliens who return to Algeria. In comparison, other countries have yet to create legislation designed to retrain nationals who have become unemployed due to changes in the economy. Regrettably, Lillich fails to explain why France agreed to grant rights directly to aliens. Lillich thereby misses an opportunity to provide readers with insights into France's motivations.

Glossing over these issues permits Lillich to describe in detail the few cases in which he sees headway in the universalization and improvement of aliens' rights. Unfortunately, he misses the crucial question of why states act as they do. The book's underlying premise suggests the European system of protection reflects necessity. This premise is vague and unsatisfying; it gives rise to a method of analysis that fails to elucidate the conditions conducive to protecting human rights.

Lillich suggests "the construction of a comprehensive international human rights regime protecting aliens . . . is an art as well as a science, in which the skills of imaginative advocates are as important as the work of enlightened draftsmen."[36] That Professor Lillich is both an imaginative advocate and an enlightened draftsman is familiar to all students of international law. This book represents a superb compilation of cases and legislation concerned with aliens.

The discussion of historical development and doctrines provides a helpful summary of the law protecting aliens. It is up-to-date and includes contemporary instruments currently under discussion. The appendices contain the United Nations Draft Declaration on the Human Rights of Individuals Who are not Citizens of the Country in Which They Live, the text of articles of the Draft Declaration adopted by the open-ended working of the U.N. General Assembly, and the Draft International Convention on the Protection for the Rights of all Migrant Workers and their Families. Thus, scholars and students will be saved hours of research in a U.N. repository.

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35. For a text of the agreement, see Decree No. 80-1150 of Dec. 30, 1980, 1981 Journal Officiel de la République Française 162.

36. R. LILLICH, *supra* note 1, at 98.

But Professor Lillich wants the book to be more than a mere compendium. He states "it is up to lawyers—especially human rights lawyers, who have until now shown relatively little interest in the law governing the treatment of aliens—to assess, develop and establish the legal regimes under which the rights of aliens may be more effectively protected. It has been the purpose of this volume to assist them in that grand endeavor."[37] While embracing Lillich's exhortation to act, human rights lawyers should also consider rejecting the assumptions underlying his study. Effective human rights law is created by those who understand the competing interests and values that continue to permeate the international legal order, and who remain sensitive to its limits. Innovation and advancement in international human rights law can best come from a willingness to acknowledge the "is," and not just the "ought," of international law.

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37. *Id.* at 124.

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