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Book Review of David Weissbrodt's 'The Human Rights of Non-Citizens'

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Book Review of David Weissbrodt's 'The Human Rights of Non-Citizens'

Caroline Bettinger-Lopez and Bassina Farbenblum

Abstract

David Weissbrodt, professor of international human rights law at the University of Minnesota and the United Nations Special Rapporteur on the rights of noncitizens from 2000-03, begins The Human Rights of Non-citizens with a provocative thesis: the human rights of noncitizens should be viewed "not as an amalgamation of the rights of various non-citizen subgroups (refugees, asylum seekers, migrant workers, etc.), but rather as a unified domain" (p. 5). Weissbrodt makes a strong case for (1) new international standards governing the rights of all noncitizens, as well as states' implementation of these rights, and (2) a unified movement to protect all noncitizens.

After discussing the content and structure of a number of Weissbrodt's eloquently written chapters, this review unpacks several aspects of the book's thesis. All groups of noncitizens are, no doubt, subjected to many of the same social, political, and legal perils associated with being a foreigner in a world defined by nation states and their boundaries. Amalgamating the advocacy strategies and resources of disparate noncitizen groups may therefore sometimes be advantageous. But this is not always the case. On other issues, different groups of noncitizens may obtain greater social and political support (and in turn, great protection of rights) by focusing on their particular, distinct attributes that are likely to attract public sympathy. For example, the recent trend toward the treatment of migration as a law-and-order issue has, in many countries, resulted in the strong social privileging of "legal" noncitizens and the demonizing of "illegal" noncitizens. Similarly, refugees or victims of trafficking have on occasion attracted greater sympathy (and rights-protection) by differentiating themselves from other noncitizens.

The review concludes that the Human Rights of Non-citizens provides a useful

starting point for thinking about noncitizens' rights issues in the post-9/11 world - an area of legal scholarship that, like the advocacy community itself, is siloed into the same categories as the diverse groups of noncitizens that populate Weissbrodt's discussion. But despite its strengths, the book stops short of offering the reader a nuanced analysis of the law or of possible solutions to the most difficult law and policy quandaries related to noncitizens' human rights in our contemporary world – for example, how to balance national security, policing of migration, and human rights; how to guarantee economic and social rights to noncitizens, both in developed and developing countries, in times of global financial crisis; how to distinguish discrimination and xenophobia from legitimate concerns relating to citizenship and state sovereignty; and, more broadly, the extent to which the international community has collective responsibility for improving country conditions, and thus promoting human rights, in migrant-sending countries in the developing world. The strengths of the book ultimately lie elsewhere: in breaking down the distinctions between noncitizen groups and in challenging the reader to see what is common in the efforts of all such groups to protect and promote their rights.

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The Human Rights of Non-Citizens: A New Unified Domain?

David Weissbrodt begins *The Human Rights of Non-citizens* with a provocative thesis: the human rights of non-citizens should be viewed "not as an amalgamation of the rights of various non-citizen subgroups (refugees, asylum seekers, migrant workers, etc.), but rather as a unified domain" (5). While a number of human rights treaties exist for the protection of discrete subgroups, Weissbrodt contends, little has been done by policymakers or advocates "to identify the common plights, needs, and approaches for redress of marginalized non-citizen groups" (36). As a result, some non-citizens fall through the cracks, and broader advocacy goals suffer. Weissbrodt concludes that while the current international law and thematic mechanisms relating to non-citizens – including specialized treaties and special rapporteurs – are essential, continued legal and social exclusion of, and discrimination against, non-citizens as a whole demonstrates the need for (1) new standards governing the rights of non-citizens, and states' implementation of these rights, and (2) a unified movement for non-citizens' protection (37).

Weissbrodt, a distinguished professor of international human rights law at the University of Minnesota and the U.N. Special Rapporteur on the rights of non-citizens from 2000-03, is one of the leading experts in the field of non-citizens' human rights. His strong position in favor of comprehensive human rights protections for all non-citizens, regardless of citizenship status, is clear throughout this book.

The Human Rights of Non-citizens is eloquently written and traverses a wide range of legal, political, historical, and sociological issues within its slim 250 pages. Clearly intended to serve as a primer rather than a textbook, the book provides a useful starting point for thinking about non-citizens' rights issues as a whole in the post-9/11 world. It offers an all-encompassing

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approach in an area of legal scholarship that, like the advocacy community, is frequently siloed along the subgroup categories of non-citizens that Weissbrodt delineates.

However, the book stops short of offering a nuanced analysis of the law or of possible solutions to the most difficult law and policy quandaries related to non-citizens' human rights in our contemporary world – e.g., how to balance national security, policing of migration, and human rights; guaranteeing economic and social rights to non-citizens in developed and developing countries in times of global financial crisis; distinguishing discrimination and xenophobia from legal frameworks addressing citizenship and state sovereignty; the fortification of borders and increased dangers of border crossings; the utility and limitations of specialized human rights treaties; and the extent to which the international community has collective responsibility for improving country conditions, and thus promoting human rights, in the developing world. Weissbrodt's impressive array of other publications in this area and the bibliographies he provides at the end of each chapter (which are useful but, even at the time he wrote the book, were always up to date) no doubt address a number of these issues and leave the reader with guidance for further exploration.

The Human Rights of Non-citizens begins with an analysis of the history of the rights of non-citizens in the Western world (Chapter 2). In a highly enjoyable chapter, Weissbrodt takes the reader from the days of ancient Greece to the modern era and argues persuasively that "[t]he international law of state responsibility originated from issues concerning the treatment of non-citizens, and the rights of non-citizens developed as a precursor to the present-day international human rights regime" (18). Weissbrodt traces the development of the modern notion of non-citizen rights from its origins in the Middle Ages, as mercantile communities began to collectively engage for the first time in business and trade negotiations with foreign governments

that sought exotic goods often unavailable at home (22). Over time, Weissbrodt writes, the rights that merchants and other privileged classes gained *vis a vis* foreign governments became recognized for all classes of non-citizens, most notably in the creation of the United Nations and the modern-day human rights regime.

Weissbrodt skillfully weaves this historical narrative with his overarching thesis that non-citizen rights are not, but should be, viewed as a unified domain today. Because "the history of the rights of non-citizens began as a history of the rights of the privileged" (36), the law of state responsibility was not established with an eye toward non-citizens as a group. Lamentably, in Weissbrodt's view, non-citizen advocacy groups have embraced the distinctions between non-citizen subgroups, and have focused their advocacy in these separate spheres, rather than acting in concert (37).

Despite the evolution of these distinctions in the legal doctrine and advocacy framework, Weissbrodt observes, national and international bodies have taken important initial steps in recent years toward a unified approach rooted in an anti-discrimination model. For instance, in 2000 the United Nations appointed a special rapporteur on the rights of non-citizens (Weissbrodt occupied this post during its first three years); in 2004 the Committee on the Elimination of Racial Discrimination (CERD) adopted General Recommendation (GR) 30, concerning Discrimination Against Non-Citizens; and in the same year, the United Kingdom's House of Lords condemned indefinite detention of non-citizens suspected of terrorism as discrimination in contravention of CERD GR 30 and other human rights instruments. Anti-discrimination and non-citizens' rights came together again in 2005 when the Inter-American Court of Human Rights issued the landmark decision of *Yean & Bosico v. Dominican Republic*, forbidding racial discrimination in the granting of citizenship (37-38).

Weissbrodt follows his discussion of these specific recent developments with a summary overview of how the core human rights law corpus can be interpreted and applied to non-citizens, with a view to limiting any distinctions based on citizenship status (Chapter 3). After considering the general principle of equality for non-citizens, he groups basic human rights into several categories, including freedom from torture and arbitrary detention; liberty of movement; equal protection before the law; minority rights; privacy rights and freedom of association; gender equality; and social and economic rights such as rights to health, education, housing and social security. He also addresses rights that distinctly apply to non-citizens as non-citizens, including protection from *refoulement* and arbitrary expulsion, as well as rights to acquire, maintain and transmit citizenship. The chapter concludes with brief summaries of rights that apply to individuals as members of particular groups of non-citizens – stateless persons; non-citizen workers and their families; refugees, asylum seekers and trafficking victims; and children – which he revisits in subsequent chapters that focus on these particular subgroups in more detail.

In condensing what could be a treatise several thousand pages in length to a 33-page overview, Weissbrodt necessarily avoids detailed discussion of the law on any particular right. Instead, he provides the reader with a helpful starting point for further research – usually a single reference to a treaty provision, to jurisprudence of an international tribunal, or to a statement or legal clarification by a UN treaty body, regional human rights body or other international institution – that supports each assertion of a particular right or state obligation. Some further detail is interspersed throughout the subsequent six chapters addressing the rights of various categories of non-citizens, though those chapters are largely concerned with the gap between the rights identified in Chapter 3 and the more bleak reality for many non-citizens. The penultimate

chapter on international humanitarian law and non-citizens (Chapter 10) also contains further elaboration on protections afforded to non-citizens by the Geneva Conventions and their additional protocols, as well as customary international law.

The brevity of this pivotal chapter is a natural limitation. It would have been particularly helpful to the book's various potential audiences (advocates, policy-makers, scholars, students) if Weissbrodt had provided a more detailed analysis of some of the legal issues raised. For example, such analysis might have included an assessment of the comparative levels of jurisprudential support for and entrenchment of particular rights, specifically identifying and addressing any gaps between the book's thesis that "in general, international human rights law requires the equal treatment of citizens and non-citizens" (5) and the current state of international law and its application in domestic contexts.

However, from an advocacy perspective, Weissbrodt's conclusions as to the existence of particular rights lend strong weight to arguments for the recognition of those rights in domestic contexts – including the campaigning for enactment of specific domestic legislation prohibiting discrimination and effective remedies for violations, which, as Weissbrodt points out, are required under human rights law's equality obligations (50). Had Chapter 3 been longer, Weissbrodt might also have elucidated the legal and policy considerations underlying his choice of rights groupings, elaborating on his prudent assessment that "[a]ny approach to combating discrimination against non-citizens should take into account the varying State interests at stake in regard to categories of rights" (45).

Most significantly, the book would have benefited from further analysis of how particular rights or categories of rights apply comparatively to the various groups of non-citizens that the book considers in Chapters 4 through 9. Weissbrodt deliberately leaves this task to the reader

(16), but it is a particularly important consideration in light of the book's challenging thesis that non-citizens can and should be viewed as a unified domain. The chapters dedicated to the distinct subgroups of non-citizens – asylum seekers; rejected asylum seekers; refugees; stateless persons; migrants; and trafficked persons – highlight the difficulties with this argument. At the same time, these chapters provide a good platform for Weissbrodt's concise overviews of the legal systems and frameworks defining and affecting each group, and some of the legal and practical challenges that each group faces – summaries which may enable readers to identify new commonalities between groups, as Weissbrodt encourages.

The chapters on statelessness (Chapter 4) and rejected asylum seekers (Chapter 6) contain particularly thoughtful explorations of the complex policy issues at play in these domains. Chapter 4 delves into the dynamics and mechanisms of *de jure* and *de facto* statelessness, along with the legal and political obstacles that stateless people often face (83-102). It offers compelling case examples, such as the Rohingya in Myanmar and the Roma in Slovenia, and briefly discusses the particular vulnerability of multiply-marginalized groups, such as stateless women. Chapter 6 thoughtfully considers the myriad legal and policy challenges presented by rejected asylum seekers who can no longer claim the Refugee Convention's legal protections but who may nevertheless have protection needs, or whose removal is stymied by uncooperative countries of origin (143-46).

Weissbrodt also intersperses some helpful practice tips for advocates throughout these chapters, such as Chapter 4's discussion of the important role that NGOs play in shaping the inquiries and responses of the UN treaty bodies to alleged rights violations. However, given the author's depth of experience and expertise in this area, we wish these central chapters had gone into greater depth regarding what may be the paramount challenge in international human rights

advocacy today: the implementation of well-established human rights norms. For instance, Weissbrodt notes in Chapter 4 that the two fundamental weaknesses of the comprehensive 1954 and 1961 conventions related to statelessness are that very few states are parties to these treaties, and that there is no monitoring mechanism (104). If, from Weissbrodt's perspective, the principal challenge for advocates and scholars today "is one of implementation, not elaboration [of international standards]" (244), the book might have addressed this issue in greater depth.

The strongest advice that Weissbrodt consistently gives to advocates throughout the book is that their efforts would be better served if they could overcome the tendency of each non-citizen group to view its problems as unique, "despite similar goals and common circumstances" (36). The primary common circumstances that Weissbrodt identifies are discriminatory treatment and social vilification (37). Continued discriminatory treatment, he argues, demonstrates the need for a unified movement for the protection of non-citizens.

There can be no doubt that all groups of non-citizens are subjected to many of the same social, political and legal perils associated with being a foreigner in a world defined by nation states and their boundaries. But it does not necessarily follow that the goals and circumstances of each group are sufficiently common that a unified *domestic* non-citizen advocacy approach, or even a unified legal approach, will always achieve the best outcome for all non-citizen groups.

There are certainly instances in which amalgamating advocacy strategies and resources of disparate non-citizen groups may be advantageous, such as in combating racism, or, to use Weissbrodt's example, focusing debate on the true causes for economic instability at times of economic downturn when non-citizens are inappropriately scapegoated (37). But on other issues, different groups of non-citizens may obtain greater social and political support (and in turn, rights protection) by focusing on the distinct attributes of their group that attract public

sympathy. For example, taking a unified approach may in some circumstances dilute the legal entitlements and public support for more vulnerable groups of non-citizens such as refugees or victims of trafficking. Indeed, refugees and their advocates frequently go to great lengths to distinguish themselves from economic migrants in order to garner stronger rights entitlements and public sympathy¹ – a strategy that is often successful.

Similarly, the recent trend towards the treatment of migration as a law-and-order issue has resulted in the strong social privileging of "legal" non-citizens and the demonizing of "illegal" non-citizens in many countries. The perceived legal/illegal distinction is frequently a greater determinant of social stigmatization or political support than the actual legal category into which the individual falls. In Australia, for example, asylum seekers arriving by boat are commonly described as illegal immigrants – individuals whose entry to the country must be stopped and who are the source of daily media attention – compared with the far greater numbers of asylum seekers who arrive by plane and are not perceived as a threat. In the U.S., discrimination against Latino communities is often justified when it takes the form of "crackdowns" against illegal immigration, such as recent laws expanding police powers with respect to "suspected" illegal immigrants in Arizona.² In some instances, it may be advantageous to migrant workers – authorized or unauthorized – to emphasize their possession of labor or professional skills that are beneficial or demanded by the host country as a basis for greater rights entitlements. And on other issues, some groups of non-citizens may have more in common with citizen groups than other non-citizens. Indeed, the social and political vilification

¹ For example, on its Frequently Asked Question web page (http://www.refugeecouncil.org.au/arp/faqs.html#difrm), the Refugee Council of Australia, a leading national refugee organization, answers the question "What is the difference between a refugee and a migrant?" (second only to "What is a refugee?") by explaining that refugees do not have a choice to come to Australia or to leave, and arguing that "[b]ecause refugees and migrants are different groups of people, with different prearrival experiences, it is important that the distinction be made in the services provided."

Randal C. Archibold, "Arizona Enacts Stringent Law on Immigration," N.Y. Times, Apr. 23, 2010.

of certain groups of non-citizens is often indistinguishable from attitudes toward minority communities in general – regardless of citizenship status.

In addition to proposing a unified advocacy strategy, Weissbrodt also argues that common discriminatory treatment necessitates new legal standards governing the rights of all non-citizens. He suggests that one approach to addressing this challenge would be to explicitly codify non-citizen rights in a specialized human rights instrument, expanding to non-citizens more broadly the protections articulated in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Inter-American Court's 2003 Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants.³

The debate over whether rights of marginalized groups are best protected through the development of specialized human rights treaties or through implementation of existing general human rights instruments is not a new one. It has surfaced most prominently in the women's rights arena, where advocates have vigorously debated whether the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention Belem do Para") have promoted women's rights or further marginalized gender from the mainstream human rights movement. Weissbrodt refers to this debate in the context of non-citizen rights (38) but appears to vacillate on the potential utility of specialized instruments and ultimately does not offer a resolution.

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³ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, (Sep. 27, 2003).

⁴ See Bunch, C. (1990). Women's Rights as Human Rights: Toward a Re-Vision of Human Rights. *Human Rights Quarterly*, 12 (4), 486-498; Charlesworth, H., & Chinkin, C. (2000). *The Boundaries of International Law: A Feminist Analysis*. Manchester, UK: Manchester University Press; Reanda, L. (1981). Human Rights and Women's Rights: The United Nations Approach. *Human Rights Quarterly*, 3 (2), 11-31; Zuloaga, P. P. (2008). The Path to Gender Justice in the Inter-American Court of Human Rights. *Texas Journal of Women and the Law*, 17 (2), 227-295.

Weissbrodt concludes by articulating an important and achievable first step along the path to better securing protection for the human rights of all non-citizens. He calls for the UN treaty bodies that oversee the principal human rights treaties to "jointly prepare general comments or recommendations that would establish a consistent, structured approach to the protection of the rights of non-citizens," (241) and that at a minimum, those treaty bodies that do not have any specific standards should issue such standards, and bodies that already have such standards should consider updating them. Regardless of the merits of a unified advocacy approach at the domestic level, advocates on behalf of all non-citizens would do well to heed this international call.

