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The Human Rights of Non-citizens. By David Weissbrodt. (Book Review)

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The Human Rights of Non-citizens. By David Weissbrodt. Oxford, New York: Oxford University Press, 2008. Pp. xxiii, 257. Index. \$130, £63.00.

David Weissbrodt, professor of international human rights law at the University of Minnesota and the UN Special Rapporteur on the rights of noncitizens from 2000 to 2003, 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). While a number of human rights treaties exist for the protection of discrete subgroups, Weissbrodt contends that little has been done by policymakers or advocates “to identify the common plights, needs, and approaches for redress of marginalized non-citizen groups” (p. 36). As a result, some noncitizens fall through the cracks, and broader advocacy goals suffer. Weissbrodt concludes that while the current international law and thematic mechanisms relating to noncitizens—including specialized treaties and special rapporteurs—are essential, continued legal and social exclusion of, and discrimination against, noncitizens as a whole demonstrate the need for (1) new standards governing the rights of all noncitizens, as well as states’ implementation of these rights, and (2) a unified movement to protect all noncitizens.

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

Weissbrodt begins *The Human Rights of Non-citizens* by analyzing the history of noncitizens’ rights in the Western world (chapter 2). Weissbrodt takes the reader on an interesting journey from the days of ancient Greece to the modern era

and argues persuasively that the “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” (p. 18). More specifically, Weissbrodt traces the development of the modern notion of noncitizens’ rights from its origins in the Middle Ages, when mercantile communities began to engage collectively in business and trade negotiations with foreign governments that sought exotic goods generally unavailable at home. Over time, the rights that merchants and other privileged classes gained vis à vis foreign governments became recognized for all classes of noncitizens, ultimately leading (on Weissbrodt’s analysis) to the creation of the United Nations and the modern-day human rights regime.

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

Despite the evolution of these distinctions between different groups of noncitizens both in legal doctrine and advocacy frameworks, Weissbrodt observes that national and international bodies have recently taken initial steps toward a unified approach that is rooted in an antidiscrimination model. In 2000, for example, the United Nations appointed a Special Rapporteur on the rights of noncitizens (with Weissbrodt himself as the first to occupy the post); in 2004, the Committee on the Elimination of Racial Discrimination adopted General Recommendation 30, “Discrimination Against Non-citizens”; and in the same year, the United Kingdom’s House of Lords condemned indefinite detention of noncitizens suspected of terrorism as discrimination in contravention of both that General Recommendation

and other human rights instruments. Antidiscrimination and noncitizens' rights came together again in 2005 when the Inter-American Court of Human Rights issued the landmark decision of *Girls Yean & Bosico v. Dominican Republic*¹ that prohibited racial discrimination in the granting of citizenship.

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 noncitizens, with a view to protecting the rights of noncitizens by limiting any distinctions based on citizenship status (chapter 3: "Treaty Law and Interpretation"). After considering the general principle of equality for noncitizens, he divides basic human rights into several categories and discusses each separately. The categories include 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 (for example, to health, education, housing, and social security). He also addresses rights that distinctly apply to noncitizens as noncitizens, including protection from *refoulement* and arbitrary expulsion, and the right to acquire, maintain, and transmit citizenship. The chapter concludes with brief summaries of the rights that apply to individuals as members of particular groups of noncitizens: stateless persons; noncitizen workers and their families; refugees, asylum seekers, and trafficking victims; and children. Each of these subgroups is the subject of a later chapter.

In condensing what could have been a treatise on treaty law and the human rights of noncitizens into the 33-page overview presented in chapter 3, 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 the 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 noncitizens, though those chapters are largely concerned with the gap between the rights identified in chapter 3 and the more bleak realities of many noncitizens' circumstances. The penultimate chapter on international humanitarian law and noncitizens (chapter 10) contains further elaboration on protections afforded to noncitizens by the Geneva Conventions and their additional protocols, as well as by customary international law.

The brevity of pivotal chapter 3 limits what it can achieve. It would have been especially helpful to the book's various potential audiences (advocates, policymakers, scholars, students) if Weissbrodt had provided a more detailed analysis of some of the legal issues raised. For example, he might have assessed 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" (p. 5) and the current state of international law and its application in domestic contexts. Likewise, Weissbrodt might also have elucidated the legal and policy considerations underlying his choice of rights groupings, elaborating on his prudent assessment that any "approach to combating discrimination against non-citizens should take into account the varying State interests at stake in regard to categories of rights" (p. 45).

Notwithstanding the brevity of chapter 3, from an advocacy perspective Weissbrodt's conclusions as to the existence of particular rights lend weight to arguments that those rights should be recognized in domestic contexts—including through the enactment of specific domestic legislation prohibiting discrimination and providing effective remedies for violations. Indeed, as he points out, both of these measures are required under human rights law's equality obligations.

Most significantly, the book would have benefited from further analysis of how particular rights or categories of rights apply comparatively to the

¹ *Girls Yean & Bosico v. Dominican Republic*, Inter-Am Ct. H.R. (Ser. C) No. 130 (Sept. 8, 2005), at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.

various groups of noncitizens that the book considers in chapters 4 through 9. Weissbrodt deliberately leaves this task to the reader, but it is an especially important consideration in light of the book's challenging thesis that noncitizens can and should be viewed as part of a unified domain. The chapters dedicated to the distinct subgroups of noncitizens—*asylum seekers, rejected asylum seekers, refugees, stateless persons, migrants, and trafficked persons*—highlight the difficulties of arguing for a unified domain in the face of such diversity. Nevertheless, these chapters provide concise overviews of the legal systems and frameworks defining and affecting each group, and of the legal and practical challenges that each group faces—summaries that 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 areas. 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. 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 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.

Weissbrodt intersperses some helpful practice tips for advocates throughout these chapters, such as chapter 4's discussion of the important role that nongovernmental organizations play in shaping the inquiries and responses of UN treaty bodies to alleged rights violations. Given the author's depth of experience and expertise in this area, however, we wish these central chapters had gone into greater depth regarding what may be the paramount challenge in international human rights advocacy today (as Weissbrodt himself agrees; see page 244): 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 the conventions provide no monitoring mechanism. It would have been helpful, in this context, if Weissbrodt had tackled some of the challenges involved in implementing human rights—namely, the availability of such monitoring and reporting mechanisms, state accountability at the domestic and international levels, financing of structural remedies, separation of powers between executive, legislative, and judicial branches (an especially significant consideration in the regulation of immigration), and questions concerning the mechanics of implementation in federalist states.

The strongest advice that Weissbrodt consistently gives to advocates throughout the book is that their interests would be better served if they could overcome the tendency of each noncitizen group to view its problems as unique “despite similar goals and common circumstances” (p. 36). The primary common circumstances that Weissbrodt identifies are discriminatory treatment and social vilification. Continued discriminatory treatment, he argues, demonstrates the need for a unified movement to protect noncitizens.

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. But it does not necessarily follow that the goals and circumstances of each group are sufficiently common that a unified approach to advocacy (legal or otherwise) at the domestic or international level will achieve the best outcome for each separate group.

Amalgamating the advocacy strategies and resources of disparate noncitizen groups may sometimes be advantageous—for example, when combating racism or, to use Weissbrodt's example, the scapegoating of noncitizens during times of economic downturn (when they may be blamed as the cause of economic instability). But 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, taking a unified approach may in some circumstances dilute the legal entitlements and public support for more vulnerable groups of noncitizens, 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 public sympathy and better outcomes for themselves²—a strategy that is sometimes successful.

Similarly, 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. 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 to the far greater number of asylum seekers who arrive by plane and are not perceived as a threat. Likewise, in the United States, discrimination against Latino communities is often seen as 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.³ In some instances, in pressing for greater entitlements, it may be advantageous to migrant workers, whether 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 enti-

tlements. And some groups of noncitizens may actually have more in common with certain citizen subgroups than other noncitizens. Indeed, the social and political vilification of certain groups of noncitizens is often indistinguishable from attitudes toward minority communities in general—regardless of citizenship status.

In addition to proposing a unified advocacy strategy, Weissbrodt argues that common discriminatory treatment necessitates new legal standards governing the rights of all noncitizens. One approach to addressing this challenge, he argues, would be to explicitly codify noncitizen rights in a specialized human rights instrument, extending to all noncitizens the protections articulated in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and in the Inter-American Court of Human Rights’ 2003 advisory opinion *Juridical Condition and Rights of the Undocumented Migrants*.⁴

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 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women have promoted women’s rights or further marginalized gender from the mainstream human rights movement.⁵ Weissbrodt refers to this debate in the context of noncitizen rights (p. 38)

² For example, on its *Frequently Asked Questions* Web page (<http://www.refugeecouncil.org.au/arp/faqs.html#dif-rm>), the Refugee Council of Australia, a leading national refugee organization, answers the question “What is the difference between a refugee and a migrant?” by explaining that refugees do not have a choice to come to Australia or to leave, and by arguing that because “refugees and migrants are different groups of people, with different prearrival experiences, it is important that the distinction be made in the services provided.”

³ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1.

⁴ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 27, 2003).

⁵ See Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990); HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); Laura Reanda, *Human Rights and Women’s Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11 (1981); Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 TEX. J. WOMEN & L. 227 (2008).

but appears to vacillate on the potential utility of specialized instruments and ultimately does not offer a resolution.

Weissbrodt concludes by articulating an important and achievable first step along the path to securing protection for the human rights of 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” (p. 241); at a minimum, he says, 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, all advocates for the rights of noncitizens would do well to heed this international call.

Despite all its strengths, *The Human Rights of Non-citizens* 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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