Excluding Those Worthy of Protection:

Restrictive Procedures and Interpretations that *Refoule* Bona Fide Refugees

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US Ratification and Implementation

- US not party to 1951 Convention, ratified 1967 Protocol in 1968
- Does not implement until 1980 with enactment of Refugee Act
- Argued that was no need for new legislation because in compliance, but prior procedures and protections not in alignment with Convention/Protocol
Commitment to Compliance, but inconsistent with International Norms

- Limited access to the territory; prohibition on *refoulement* does not apply outside the territory
- Not all refugees entitled to *nonrefoulement*
- “On account of” requires proof of persecutor’s motivation
- Severely limited interpretation of the Convention ground “particular social group”
Limiting Access to the Territory – Refoulement of Refugees

• Under the 1980 Act, there are two means to access refugee protection – a) Overseas Refugee Program and refugee resettlement; b) accessing the territory and applying for protection

• Shortly after 1980 Act, Pres. Reagan enters into agreement with “Baby Doc” Duvalier allowing interdiction; commits to screening

• Sept. 1981 to Sept. 1991 – 23,000 interdicted, 28 permitted to enter the US to apply
Policy after 1991 Coup against Jean Bertrand Aristide in Haiti

- Sept. 1991 coup
- Extreme and pervasive violations of human rights
- Numbers screened in increased
- Brought to Guantanamo, which quickly filled up
- May 23, 1992 Bush Exec. Order
- Could bring to US or stop screening and simply return; decided to return without screening
Sale v. Haitian Centers Council

- Forcible repatriation challenged; case went to US Supreme Court
- Court recognized that since the coup ousting Aristide “hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs”
Sale v. Haitian Centers Council

• Court held that the interdiction and forcible return violated neither the Refugee Protocol or US law (1980 Refugee Act)
• Since then US has said it has gone back to screening
• However, Haitians interdicted are not told can express fear (Cubans are), and there is no requirement of Creole interpreter – so-called “shout test”
• Recent article by Eleanor Acer and Tara Magner, Restoring America’s Commitment to Refugees and Humanitarian Protection in Georgetown Immigration Review, reported that in Jan. 2013, 180 Haitians interdicted, almost all sent back, noting that of those who make it to the US, approximately half are granted asylum
US “legitimized” limiting access to the territory

- Australia and its “Pacific Solution” – interdiction and agreements with other countries/territories for detention of asylum seekers
- Throughout the E.U. use of remote facilities/islands for detention: Lampedusa (Sicily), Canary Islands (Spain), etc.
Additional US measures to limit access

• 1996 Illegal Immigration Reform and Immigrant Responsibility Act – expedited removal –

• Drastic change in procedure – not all who reach territory can apply

• Must pass credible screening – many screened in

• Recent outcry – change in directives to asylum officers – already seeing effect
Interpretations that are inconsistent with international norms

• Two Supreme Court decisions, taken together, *INS v. Stevic*, and *INS v. Cardoza Fonseca*: not all refugees are entitled to *nonrefoulement* (only Convention/Protocol party to so hold)

• *INS v. Zacarias* – interpretation of “on account of” which requires proof of the persecutor’s intent or motivation in relation to the Convention grounds – drastic limitation – example of gender persecution
Interpretations that are inconsistent with international norms

• Interpretation of “particular social group”
• Importance of PSG – evolving protection for those not covered by other four grounds
• Category used to protect women, children, LGBT persons, etc.
• Began with interpretation widely praised – “immutable and fundamental”
Particular Social Group

• As gender and other claims began to be raised, Board of Immigration Appeals (highest immigration tribunal) imposed additional requirements – so that now it has become virtually impossible for many individuals who should be protected to access protection.

• February 2014 – two new BIA decisions intended to address “surge” of unaccompanied child migrants and to limit protection.