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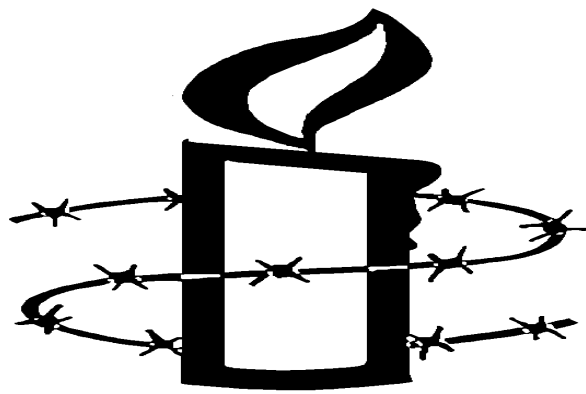
No Flights to Safety

Carrier Sanctions;

**Airline Employees
and the
Rights of Refugees**

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NO FLIGHTS TO SAFETY

Carrier Sanctions; Airline Employees and the Rights of Refugees

INTRODUCTION

Amnesty International is an international human rights organization with around 1,000,000 members worldwide. Amnesty International refugee work is based on its human rights mandate and on principles of international law.

Amnesty International opposes the return of any person to a country where he or she might face serious human rights violations such as torture or execution. This principle of international law, known as *non-refoulement*, is widely recognized to be binding on all states. In order to comply with this principle, countries must ensure that all persons seeking asylum have access to fair procedures to determine whether or not they are in need of protection.

In recent years, many countries have witnessed a growth in the number of asylum-seekers arriving by air. Increasingly, these countries have responded by introducing carrier liability acts, also known as carrier sanctions into their law. Under these laws, carriers which transport an insufficiently documented passenger (a passenger who does not have a proper passport or authorization to enter that country) have to pay a fine, and also have to assume responsibility for accommodation, repatriation and other related costs.

However, international standards of refugee protection recognize that people genuinely fleeing human rights violations are often not in a position to obtain the proper documentation required to leave the country. Sometimes they are in hiding from an oppressive government and must leave clandestinely. Sometimes the situation is too urgent for them to go through the proper procedures. In other cases, the functions of the state have broken down through armed conflict and obtaining documents is impossible. It is well established that it is unreasonable to demand that refugees have proper documentation. These carrier liability laws have the effect of obstructing people genuinely at risk from arriving in a safe country and seeking protection as a refugee.

Not only are carrier liability laws troubling from the point of view of refugee rights, they also pose serious problems for the carrier who wishes to avoid fines. Airlines now require employees such as check-in staff and cabin crew to make decisions on the legality of passengers' travel arrangements.

Airline employees should not be expected to act as an immigration police force, making decisions which might put people's lives in danger; that is the duty of governments. In practical terms, liability acts often lead companies to act in a discriminatory manner, singling out "suspicious" persons on criteria such as the passenger's race.

Finally, carrier liability laws and the imposition of more restrictive visa regulations, have not necessarily had the effect of preventing people from travelling. If anything, they seem to have forced people to resort increasingly to the use of false documents and other irregular practices. This has created a vicious cycle, with airlines being called upon more and more to police countries' borders.

Trade unions have recognized their responsibility to campaign against this situation and challenge these laws. It has been the policy of the International Transport Worker's Federation (ITF) since 1992 that civil aviation workers should not be required to play the role of immigration officers (see Appendix 2).

Amnesty International recognizes that every state has the right to regulate the entry of foreign nationals into its territory. However, this right should not be exercised in a way that contravenes the country's obligations under international human rights law. Amnesty International is concerned that carrier liability laws are being applied in a manner which obstructs people at risk of serious human rights violations from fleeing to safety. The way many of these laws are applied is frequently incompatible with the spirit of the 1951 Convention relating to the Status of Refugees. This states clearly that refugees should not be penalized because they have entered the country of asylum without authorization.

In addition Annex 9, Note 2 to the Chicago Convention on International Civil Aviation which governs international aviation rules states: "Nothing in this provision or in Note 1 is to be construed so as to allow the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." (see Appendix 1). The strict application of carrier liability laws contravenes these provisions in many cases.

What airline employees can do:

- Airline staff should remember that refugees should not be treated like criminals. Often they are very vulnerable and need assistance.
- If airline employees are asked by their company to check travel papers, they should explain that they are not qualified to do this, and that they do not wish to perform these duties.

- If the company demands that airline employees detain a passenger on board, they should insist that an immigration officer meets the aircraft on landing. Airline staff should inform the passenger that this request has been made, and that this will provide them with an opportunity to claim asylum.
- If such an incident occurs, airline employees should inform their trade union representative as soon as possible and also pass the information to a local Amnesty International group or other organization concerned with the welfare of refugees, who will try to ensure that the rights of any refugee are respected.

COUNTRIES IMPOSING FINES OR OTHERWISE IMPLICATING INTERNATIONAL CARRIERS IN THE EXCLUSION OF ASYLUM SEEKERS

The contents, interpretation and application of carriers' liability acts vary widely from country to country. This chapter covers briefly the procedures in each European Union Member State, the USA and Canada; it is not an exhaustive survey.

Fining of Carriers by EU Member States

Austria

In Austria provisions on carriers' liability were introduced in 1991. According to the provisions, a carrier has to immediately provide the authorities with personal data on the "inadmissible passenger"¹ and provide for his or her immediate departure. If the carrier fails to provide the required information it is liable to pay *Kostenersatz* (cost compensation) of ATS 20,000 (US\$ 1,600). Although not formally a fine, in practice it is. If the carrier ensures the immediate departure of an "inadmissible passenger" no "compensation" has to be paid.

Belgium

The current law in Belgium came into existence in 1987. According to this law, a carrier can only be fined if at least five "inadmissible passengers" are on the same flight/voyage

¹a passenger deemed inadmissible by the receiving state

(not including first degree blood relatives - children, spouse - who accompany the "inadmissible passenger(s)". As the burden of proof of negligence rests with the authorities, and as carriers have taken measures to ensure that passengers are in possession of valid travel documents, no carrier has yet been fined. The initial fine is BF 150,000 (US\$ 4,500) per "inadmissible passenger". Subsequently the following fines/charges can be added: the cost of court procedures, medical costs, repatriation costs, accommodation costs and others.

Germany

The provisions concerning carriers' liability are part of the *Ausländergesetz* (foreigners act). The current law, in force since 1987, states that carriers are not allowed to transport insufficiently documented foreigners to Germany. The Minister of Interior may set the carriers, under penalty of a fine (*Zwangsgeld*), the task not to bring undocumented foreigners to Germany. If the carrier does not comply with the order (to be issued for each carrier individually) it is liable to a minimum fine of DM 500 (US\$ 280) and DM 5,000 (US\$ 2,800) as a maximum, per "inadmissible passenger". (If the carrier has transported the insufficiently documented foreigner by plane or ship the minimum fine is DM 2,000/US\$ 1,100). If the carrier is considered to be negligent in complying with the above-mentioned order, it can be subject to another fine (*Geldbuße*) up to DM 20,000 (US\$ 11,000). The fine is levied by the Minister of the Interior or his delegated representative and will not be cancelled even if the undocumented foreigner is granted refugee status at a later stage. If the asylum application is rejected, the carrier is also obliged to pay for the passenger's return ticket and any other related expense (including detention expenses if the asylum-seeker is jailed before being sent back).

Denmark

Art.59a of the Danish Aliens Act came into existence in 1986 and entered into force in 1989. According to the Act, the airline is fined if the passenger does not have the required entry document. The intention of this article is to ensure that flight personnel make a thorough examination of the passenger's documents prior to embarkation. The Danish Supreme Court has ruled that the airline is required to provide evidence that everything possible was done to prevent the arrival of the undocumented passenger. The fine amounts to Dkr 8,000 (US\$ 1,200) per undocumented passenger. The Danish authorities (*Advokatur*, Department of the Public Prosecutor) do not take into consideration whether an insufficiently documented passenger is an asylum-seeker. The Scandinavian Airline Service (SAS) has published a "suspicion list" with 15 "danger signs" where the flight personnel's suspicion should be aroused. For example, if the passenger is only in possession of a one-way ticket, the passenger appears poor, but

makes an expensive journey or the passenger does not speak any English or any other international language. With the entry into force of the Schengen agreement, not only airlines will be fined for transporting insufficiently documented passengers, but also bus and shipping companies.

Greece

Greek legislation provides that any carrier (including the airplane pilot, ship captain, lorry driver or taxi driver) who carries foreigners who do not have the right to enter Greek territory, or whose entry is forbidden for any reason, is liable to a prison term of at least one year and a fine ranging from Drachmas 100,000 (US\$ 350) to 1,000,000 Drachmas (US\$ 3,500) for each illegal entrant. Each person involved, including the illegal entrant, is subject to the same penalties. If the offence is repeated or the carrier is profiting from the transport, the minimum penalty is two years imprisonment and a fine ranging from Drachmas 500,000 (US\$ 1,750) to 5,000,000 Drachmas (US\$ 17,500). All means of transportation are confiscated unless the owner neither instigated nor participated in the crime.

France

Air and sea carriers can be fined an administrative fee of a maximum of FF 10,000 (US\$ 1,600) per undocumented passenger according to the law which has been in force since 1993. There are two important exceptions. The carrier will not be fined:

- 1) if the person who has asked for asylum is accepted or when his or her asylum claim is not classified as clearly unfounded;
- 2) if the carrier establishes that the necessary documents were presented at embarkation or the documents were not manifestly irregular.

Italy

In Italy the law prescribes administrative fines on carriers if it can be proved that the carrier was negligent. The fine is between 200,000 and 250,000 Lire (110 to 140 US\$).

Netherlands

In the Netherlands, carriers can be fined Dfl 5,000 (US\$ 2,500) or imprisoned for up to 6 months if they have failed to fulfil the requirement of Article 6 of the Aliens Act, which obliges carriers to photocopy the essential pages of the passports of passengers boarding in or coming from countries from which so called 'risk flights' depart. Article 197a of the Penal Code which deals with smuggling of people is also relevant. The penalty is one year's imprisonment. Neither provision has yet been applied in the Netherlands, although the provisions relating to carrier sanctions came into force on 1 January 1994.

Portugal

Portuguese law prescribes that a carrier can be fined Esc 200,000 to 250,000 (US\$ 1,100 to 1,400) per "inadmissible passenger". Only sea and air carriers are affected, since Portugal borders Spain, a Schengen Member State. The fines are applied by the administrative authorities of the Aliens and Border Service within the Interior Ministry. The Portuguese airline TAP has on several occasions been accused of discrimination against non-white passengers when carrying out visa checks prior to embarkation.

UK

The Immigration (Carriers' Liability) Act 1987 provides for the imposition of a fine, currently £ 2,000 (US\$ 3,200) per passenger, on any transport operator bringing passengers lacking valid travel documents or a valid visa where one is required. The law is very strictly applied. Since the Act came into force in March 1987, fines totalling over £ 89 million (US\$ 140 million) have been imposed on airlines and shipping companies.

Fining of Carriers by Canada and the USA

Canada

In Canada airlines are required to pay fines or administration fees to cover expenses incurred by the Canadian authorities for each inadequately documented passenger brought in. The fines amount to CAN\$ 6,000 (US\$ 4,300) for each deserting crew member and CAN\$ 3,200 (US\$ 2,300) for any other person. If, however, the airline agrees to enter into a "memorandum of understanding" with the Canadian immigration authorities the fee can be reduced. If performance standards related to violation rates are included, and the carrier is successful in achieving those standards, the fine can be further reduced or even repealed.

The memorandum of understanding (MOU) entered into by the airline and the Canadian immigration authorities puts the airline under an obligation to:

- carry out document screening as specified by the Canadian immigration authorities;
- make use of technological equipment provided by the Canadian immigration authorities to detect forged documents;
- make photocopies of documents which the airline suspects may be forged;
- allow the immigration authorities to carry out additional passenger screening;
- accept the terms of the MOU and agree to pay the fine if the terms are not met.

Airlines which have complied with the MOU requirements have generally had their administration fines significantly reduced.

USA

In the USA, the provision for fining a carrier for transporting insufficiently documented passengers has been present in the American Immigration Law for 40 years. Airlines are fined from 1,000 US\$ to 3,000 US\$ per "inadmissible passenger" and, in addition, must send the passenger back immediately.

According to Antonio Cruz², the US authorities are very interested in the Canadian MOU and it is possible that they will to introduce a similar system.

APPENDIX 1

²Cruz, Antonio, *Shifting Responsibility*, Trentham Books Limited, 1995

Annex 9 to the Convention on International Civil Aviation (Chicago 1944) ; “Standards and Recommended Practices - Facilitation” as revised at the Tenth Session of the Facilitation Division in Montreal in September 1988. This Ninth Edition of Annex 9 became effective on 30 July 1990 and applicable on 15 November 1990.

CHAPTER 3. ENTRY AND DEPARTURE OF PERSONS AND THEIR BAGGAGE

E. Custody and Care of Passengers and Crew and Their Baggage

1. Passengers and Crew

B. Particular Provisions

Inadmissible Persons

3.36 Each Contracting State shall ensure that a person found inadmissible is transferred back into the custody of the operator(s) who shall be responsible for prompt removal to:

- the point where the person commenced his journey; or
- to any other place where the person is admissible.

Note.-The public authorities shall without delay inform the operator(s) when a person is found inadmissible and consult the operator(s) regarding the possibilities of departure.

3.36.1 Contracting States shall accept for examination a person being returned from his point of disembarkation after having been found inadmissible if this person previously stayed in their territory before embarkation, other than in direct transit. Contracting States shall not return such a person to the country where he was earlier found to be admissible.

Note 1.- This provision is not intended to prevent public authorities from further examining a returned inadmissible person to determine his eventual acceptability in the State or make arrangements for his transfer, removal or deportation to a State of which he is a national or where he is otherwise acceptable. Where a person who has been found to be inadmissible has lost or destroyed his travel document, a Contracting State will accept instead a document attesting to the circumstances of embarkation and arrival

issued by the public authorities of the Contracting State where the person was found to be inadmissible.

Note 2. - Nothing in this provision or in Note 1 is to be construed so as to allow the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

3.36.2 The obligation of a carrier to transport any person away from the territory of a Contracting State shall terminate from the moment such person has been definitely admitted into that State.

3.36.3 When a person is found inadmissible and is returned to the operator for transport away from the territory of the State, the operator shall not be precluded from recovering from such person any transportation costs arising from his inadmissibility.

3.37 Operators shall take precautions at the point of embarkation to the end that passengers are in possession of any control documents prescribed by Contracting States.

3.37.1 Contracting States shall not fine operators in the event that passengers are found inadmissible unless there is evidence to suggest that the carrier was negligent in taking precautions to the end that the passengers complied with the documentary requirements for entry into the receiving State.

3.37.2 Contracting States and operators shall co-operate, where practicable, in establishing the validity and authenticity of passports and visas.

3.38 Each Contracting State shall ensure that the public authorities seize fraudulent, falsified or counterfeit travel documents of inadmissible persons. Such documents shall be removed from circulation and returned to the appropriate authorities when practicable. In place of a seized document, a covering letter shall be issued by the removing State and attached to it will be a photocopy of the forged travel documents (if available) as well as any important information. The covering letter and its attachments shall be handed over to the operator responsible for the removal of the inadmissible person. It will serve to give information to the authorities at the transit and/or the original point of embarkation.

APPENDIX 2

Trade unions organising civil aviation workers oppose airline staff being involved in any form of immigration policing. In 1992 the Civil Aviation Section of the International Transport Workers Federation (ITF) passed the resolution below. The ITF has followed up this resolution with campaign activities in support of refugees' and migrants' right of access to the proper judicial processes to determine their rights according to national laws and international conventions.

RESOLUTION CONCERNING THE IMPROPER INVOLVEMENT OF AVIATION EMPLOYEES BY THEIR EMPLOYERS IN VIOLATIONS OF THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS.

The ITF NOTES that many governments are taking an increasingly restrictive approach towards asylum seekers which, according to Amnesty International, threatens to undermine universal standards dealing with the protection of people, at risk from serious human rights violations. It is noted that many of those forced to seek asylum are trade unionists fleeing persecution for legitimate trade union activities. It is noted that many governments have imposed carrier's liability fines upon airlines carrying refugees.

The ITF NOTES that government policies and airline practices are improperly pushing aviation employees into the role of policing immigration. Aviation employees are not trained for such duties, nor should aviation employees be involved in any measures which jeopardise the international rights of asylum seekers.

The ITF CONDEMNS the practice by governments of imposing carriers liability penalties against airlines, and CONDEMNS all practices of airline managements which use aviation staff in immigration control duties which are clearly beyond their proper employment duties.

The ITF URGES affiliates to increase membership awareness on this human rights issue.

The ITF URGES all affiliates to call on their governments to:

- ensure that all existing international standards and rights for asylum seekers are upheld.
- repeal all "carrier's liability" laws and other unjust penalties against airlines for carrying refugees.
- work towards an international agreement on asylum procedures which should be established by a committee of experts which should include the UNHCR.