amnesty international

EUROPE

Harmonization of asylum policy

Amnesty International's concerns

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As part of the process for achieving the single internal market within the European Community (EC) by the end of 1992, the member states are making arrangements to cooperate systematically with each other in imposing visa requirements on nationals of the same countries and sanctions on transport operators which carry people -- including asylum-seekers -- not in possession of the required visas or travel documents. Amnesty International is concerned that visa requirements and sanctions can obstruct people fleeing the risk of imprisonment as prisoners of conscience, torture or execution from obtaining access to refugee determination procedures. This concern is heightened if governments cooperate with each other to impose such restrictions on nationals of the same countries. In this instance Amnesty International is concerned that these visa requirements and sanctions will obstruct people seeking asylum in any of the EC member states, when this may be their only practical means of obtaining protection. It calls on the governments of the member states to ensure and demonstrate that these measures will not obstruct asylum-seekers in this way. If the governments cannot demonstrate this, Amnesty International opposes the visa requirements and sanctions in question.

The EC member states are also making arrangements to coordinate their policies and practices governing the entry of asylum-seekers into the territory of the member states and their access to refugee determination procedures. Under these arrangements, people fleeing human rights violations who seek protection in any of those states will be allowed to submit their asylum claim in only one, specified, member state. Amnesty International is concerned about this because in some member states procedures at the border and refugee determination procedures lack certain essential safeguards, which has sometimes led to asylum-seekers in need of protection being returned to a country where they are at risk. In

some cases they are known to have suffered human rights violations after their return. Moreover, there are indications that determinations of refugee status are made on a basis which is not always consistent throughout the member states, so an asylum-seeker who may be likely to be recognized as a refugee in one particular member state may be unlikely to be recognized as such in another. These arrangements could therefore mean that asylum-seekers fleeing from imprisonment as prisoners of conscience, torture or execution would no longer be able to seek protection from the EC member state which they feel will provide the protection they need, and may have no choice but to lodge their asylum claim in another country which might not provide them with effective protection against return to a country where they are at risk.

These arrangements are set out in three intergovernmental treaties, two of which were signed in June 1990, and the third of which is expected to be signed in December. They are likely to be ratified in 1991. While to date the treaties which have been formally concluded on these points have been signed only by countries which are EC member states, other countries in Europe outside the EC have expressed interest in taking part in this cooperation; it is understood that arrangements for this are in hand and may be concluded in 1991.

In this context Amnesty International is calling for a full public discussion of these issues. The organization first raised its concerns on these issues with the EC Commission and the governments of the member states in 1988. In April 1990 it set out its concerns in *Harmonization of Asylum Policy in Europe - Amnesty International's concerns: April 1990* (AI Index: POL 33/03/90). In the present document it reiterates its concerns. It is calling on the governments of the EC member states to take its concerns into account before signing the draft Convention on the crossing of external borders.

These treaties are of great importance for the protection of asylum-seekers and refugees in Europe. It is therefore essential that elected parliamentary representatives and non-governmental experts and agencies concerned with the protection of the human rights of refugees and asylum-seekers should have every opportunity to be fully informed of the proposed arrangements and to have their views taken into account before they are finalized. However, while in recent months the governments of the EC member states have, in response to the concern expressed by such bodies, made available more information than previously about the proposals under discussion, they have still not provided detailed information about the proposals or put them forward for public debate. Amnesty International believes these proposals should be put forward for a full public debate, involving non-governmental agencies concerned with the protection of refugees and elected parliamentary representatives, and that effective steps should be taken to address the concerns expressed by such bodies before the treaties are ratified.

This report summarizes an 18-page document, *Harmonization of asylum policy in Europe: Amnesty International's concerns* (AI Index: EUR 01/01/90), issued by Amnesty International in November 1990. Anyone wanting further details or to take action on this issue should consult the full document.

EUROPE
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1. Introduction

Since the mid-1980s, many governments in Europe, as well as elsewhere, have adopted increasingly strict policies and practices towards asylum-seekers. For example, governments have increasingly imposed visa requirements on the nationals of certain countries, and in some cases, as a measure for enforcing such visa requirements, they have imposed sanctions or penalties on transport operators who allow people - including asylum-seekers - to travel without visas or the required travel documents. One effect of such measures is likely to be that asylum-seekers are obstructed from gaining access to a refugee determination procedure where they can state their reasons for seeking protection and can have their asylum claim examined. Governments have also strictly applied the practice of sending asylum-seekers to another country which is considered to be the "first country of asylum" without examining the person's reasons for seeking asylum, sometimes even without ascertaining whether that person will be allowed access to a fair refugee determination procedure in that other country or will be afforded protection there. There are also indications that in recent years governments have tended to apply stricter criteria in deciding which applicants are granted asylum.

Most governments taking such measures assert that they remain committed to fulfilling their obligations towards refugees and asylum-seekers, and that they simply aim to prevent those who are not "genuine" refugees from circumventing immigration controls. But the effect of many of these measures is to make it more difficult for asylum-seekers, including those fleeing the risk of imprisonment as prisoners of conscience, torture, "disappearance" or execution, to obtain effective protection from being returned to a country where they are at risk.

For some years now, governments have been working in cooperation with each other in various forums in establishing and applying such measures. Among governments in Europe such cooperation is now becoming systematic and is being set out in formal treaty agreements.

2. Cooperation in Europe

The governments of many countries in Europe are making formal arrangements to cooperate systematically with each other in imposing visa requirements on the nationals of certain countries and in establishing principles to determine, in any one case, which state should be responsible for examining an asylum claim submitted in any country in the group. Up to now the countries involved have been the twelve member states of the European Community (EC), but lately other countries also have shown interest in taking a formal part in this cooperation.

The single internal market within the EC is envisaged in the Single European Act of 1987, and entails making arrangements for the free flow of goods and people and abolishing customs and passport controls at the internal borders of the member states by the end of 1992. These arrangements have a bearing on asylum policy in the member states insofar as, with no internal passport controls, an asylum-seeker allowed entry to any member state would in principle have free access to any other member state. In an attempt to establish a coordinated system among the member states for granting asylum, the June 1985 European Commission White Paper, which set out plans for the completion of the internal market by the end of 1992, included a plan for a directive to coordinate provisions for the right of asylum and refugee status in EC member states.

At the end of 1988 the EC Council of Ministers decided, for technical and procedural reasons, not to continue work on the Commission's draft directive. The member states adopted instead an intergovernmental approach, rather than the supranational approach within the EC institutional framework. The EC Summit in Rhodes in December 1988 established a "Group of Coordinators", comprising a senior civil servant from each EC member state, to coordinate the work to be done on all matters relating to the establishment of the internal market. The work to be done was allocated to various intergovernmental forums and groups which are less rigidly structured than the institutional framework of the EC, and not subject to such strict rules of procedure; they are also not subject to public scrutiny, nor formally required to consult and cooperate with the European Parliament, to the same extent as proceedings in the institutional framework of the EC.

In the first months of 1989 the Group of Coordinators drew up proposals for a program of work relating to the free movement of persons, in order to complete arrangements for the internal market by the end of 1992. The program of work, which was approved at the EC Summit in Madrid in June 1989, distinguished between "essential" and "desirable" measures to be undertaken, set target dates for their adoption, and defined which specialized intergovernmental and EC bodies should be the forums for discussion of each proposed measure. The measures include two conventions which directly affect asylum-seekers and refugees:

2.1 Convention determining the state responsible for examining an asylum request (the Convention on Asylum)

The Convention determining the state responsible for examining an asylum request (often known simply as the "Convention on Asylum" and sometimes also as the "Dublin Convention") provides that an application for asylum lodged in any one of the contracting states will be examined by one particular contracting state, and sets out criteria to determine which state that should be in any particular case. The state determined to be responsible may be, but is not necessarily, the state where the application is submitted: other criteria, such as the state which issued the person concerned with an entry visa, are taken into account.

The Convention was signed by the ministers concerned with immigration of 11 of the EC member states at a ministerial meeting in Dublin on 15 June 1990. It is expected that Denmark, the twelfth member state, will sign by the end of 1990.

2.2 Convention on the crossing of external borders

The Convention on the crossing of external borders is currently a draft under discussion. The details of its provisions have not been made public, but it is understood to contain provisions for controls at the external borders of the contracting states, and for the contracting states to cooperate with each other in imposing visa requirements on nationals of the same countries and sanctions on transport operators who carry passengers without visas. It is expected to be signed by the governments of the EC member states at a ministerial meeting in Rome in December 1990.

Ratification of both these conventions by each contracting state is expected to start some time in 1991, in preparation for the completion of the single internal market by the end of 1992.

Countries outside the EC, notably the Nordic countries, Switzerland and Austria, have reportedly expressed interest in establishing formal legal mechanisms by which they also can be bound by these conventions. This would mean that such systematic formal cooperation would extend well beyond the twelve member states of the EC. Moreover, countries which have expressed interest in joining the EC, for example, Norway, Sweden and Austria, would, if they indeed join the EC, be expected to accede to these conventions.

2.3 Schengen Supplementary Agreement

In addition to the conventions described above, another agreement dealing with similar matters has been made by five of the EC member states. The Schengen Group was established in June 1985 by an agreement among the five participating states (Belgium, Luxembourg, Netherlands, France, and the Federal Republic of Germany [FRG]) aimed at dismantling controls at their common borders. During 1988 and 1989 the group discussed draft texts for a supplementary agreement. It was originally planned that the Schengen Supplementary Agreement would be signed on 15 December 1989, but it was postponed for further discussion because of a failure to reach firm agreement on a matter relating to cooperation in investigating tax fraud and on the methods and criteria used in making decisions on asylum requests, and because the opening of the border between what was formerly the FRG and the German Democratic Republic (GDR) called into question the arrangements for controls at the external borders of the Schengen states.

In April 1990 it was reported that discussions among the states in the Schengen Group had resumed, and the Supplementary Agreement was signed on 19 June. It includes provisions for uniform principles to be applied in controlling external borders; the harmonization of conditions of entry and visa requirements and sanctions on transport operators; criteria to determine the country responsible for examining an asylum request, and the exchange of information on asylum-seekers. Other provisions deal with cooperation on police and security matters, drug-trafficking, firearms and ammunition, and information exchange (the Schengen Information System [SIS]) and the protection of personal data.

The Schengen Supplementary Agreement is expected to be ratified in 1991. As with the Convention on Asylum and the draft Convention on the crossing of external borders, there are indications that states outside the original group will become party to the agreement. In particular, it is reported that Italy, which has been attending the group's meetings for two years as an observer, will sign the agreement at the end of November 1990, and it is understood that Spain and Portugal have also expressed an interest in participating in the group.

3. Amnesty International's concerns for asylum-seekers and refugees in the context of harmonization of asylum policy in Europe

Amnesty International's concern for asylum-seekers and refugees arises from its work for the protection of human rights, which is based on fundamental principles set out in the Universal Declaration of Human Rights and other internationally recognized standards. Its work focuses on three specific aspects of human rights which are set out in its Statute:

- It seeks the release of men and women detained anywhere for their beliefs, colour, sex, ethnic origin, language or religion, provided they have not used or advocated violence. These are termed "prisoners of conscience".

- It works for fair and prompt trials for all political prisoners and on behalf of such people detained without charge or trial.

- It opposes the death penalty and torture or other cruel, inhuman or degrading treatment or punishment of all prisoners without reservation.

Following from these concerns, Amnesty International opposes the forcible return of any person to a country where he or she may reasonably be expected to be imprisoned as a prisoner of conscience, or to be subjected to torture, "disappearance", or execution. It therefore seeks to ensure that states provide such people with effective and durable protection from being sent against their will to a country where they risk being subjected to such human rights violations, or to a third country where they would not be afforded effective and durable protection against such return. This aspect of Amnesty International's work is based also on the principle of *non-refoulement*, which, as set out in Article 33 of the 1951 Convention relating to the Status of Refugees, states:

"No Contracting State shall expel or return (`*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

This principle of *non-refoulement* is recognized by the international community as a norm of general international law, binding on all states, irrespective of whether they are party to the 1951 Convention itself.

Amnesty International has identified certain basic principles and safeguards which it regards as essential for the protection of asylum-seekers and refugees, and which it calls on all

governments to follow in order to ensure that they give to people at risk of human rights violations the protection they need. The agreements being made among states in Europe which are outlined in this paper give rise to concern about how effectively and reliably these principles and safeguards will be observed and implemented in practice.

3.1 Procedures at borders and airports, and refugee determination procedures

Amnesty International has identified specific safeguards to be included in states' refugee determination procedures and procedures at their borders and airports, which it considers to be essential in helping to prevent the *refoulement* of asylum-seekers who would be at risk of serious human rights violations if returned to the country they have come from. These safeguards are based on standards set out in relevant Conclusions adopted by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR) and in Recommendation R(81)16 of the Committee of Ministers of the Council of Europe, which deals with the harmonization of national procedures relating to asylum; they include specific measures necessary for the effective implementation in practice of the international standards.

(a) Procedures at the border: With respect to procedures at the border, these essential safeguards include the following:

- The border official should be required to refer all asylum-seekers to the refugee determination authority.

- The border official should also be properly trained to identify and to refer to the refugee determination authority anyone who may not expressly ask for asylum but who may be at risk if turned away.

- The border official should be instructed to take into consideration the particular situation of the asylum-seeker, including difficulties in articulating or presenting a request for asylum, and should bear in mind in particular that such a person may feel apprehensive of authority and be afraid to speak freely.

- The border official should be required to act in all cases in accordance with the principle of *non-refoulement*.

- The asylum-seeker should be given the necessary guidance about the procedure to be followed and full information about his or her procedural rights. He or she should be allowed access to legal counsel, UNHCR and a competent interpreter.

- A decision on a claim for refugee status, and in particular any decision that an asylum-seeker's claim is "manifestly unfounded" or "abusive", should be made only by the refugee determination authority, and not by a frontier or local authority.

In some member states the practice at borders lacks some of these safeguards, and in some cases asylum-seekers have been refused access to the refugee determination procedure and returned directly to their country of origin without any proper examination of their asylum claim or the risks they may face if returned.

For example, during May and June 1989, when over 3,500 Turkish nationals, mostly Kurds, came to the United Kingdom (UK) and applied for asylum, Amnesty International received reports that as many as one hundred Kurds -- possibly many more -- were returned to Turkey after only a cursory examination by immigration officials at the airport without their applications for asylum being referred to the central refugee determination authority. Two common features of the allegations were that the individuals concerned were not allowed to contact UNHCR or refugee agencies which might have been able to provide assistance or advice, and that their asylum applications were not passed to the refugee determination authority for proper examination and determination. Lawyers acting on behalf of 23 of those so expelled obtained a judicial review in the High Court in London; in each of the 23 cases the UK authorities subsequently conceded that the border officials acted illegally in expelling the individuals concerned without referring their cases to the central refugee determination authority.[1]

Also, in July 1990 several Somalis were refused entry into Italy and returned to Mogadishu, Somalia. On arrival there they were reportedly arrested and interrogated for four hours, then transferred to custody at the National Security Service's regional headquarters in Mogadishu, where there have been many reports of torture of political prisoners in recent years. Some weeks later it was reported that two, possibly three, of them had been released, although Amnesty International has no information about the fate of the others.

[1] Further details are given in *UNITED KINGDOM: Deficient policy and practice for the protection of asylum-seekers*, issued by the British Section of Amnesty International in November 1990

(b) Refugee determination procedures: With respect to the refugee determination procedure itself, the safeguards which Amnesty International regards as essential include the following:

- A clearly identified authority with responsibility for examining asylum claims should be established.

- The asylum-seeker should be given the necessary guidance about the procedure to be followed and full information about his or her procedural rights. Effective provision should be made for the asylum-seeker to receive legal assistance throughout the procedure. He or she should also be allowed access to UNHCR and a competent interpreter.

- The asylum-seeker should be given a complete personal interview by a fully qualified official of the refugee determination authority.

- The officials involved in interviewing the asylum-seeker and in making a decision on his or her application should be impartial and knowledgeable about international standards relating to the protection of refugees and about the human rights situation in the asylum-seeker's country of origin. They should take into account information provided by non-governmental organizations and UNHCR, as well as information from official government sources, and should seek the best possible information capable of throwing light on each application.

- The officials involved in interviewing the asylum-seeker and in making a decision on his or her application should, in particular, follow the guidance given in §195 -§219 of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, and should bear in mind the special situation of the asylum-seeker, who may have had to flee without personal documents, and whose past experience may have led to a fear of speaking freely and a difficulty in giving a full and accurate account of his or her case. If the applicant has made a genuine effort to substantiate his or her statement but evidence is still lacking for some part of it, he or she should be given the benefit of the doubt.

- If an asylum-seeker's application is rejected, a full written account of the specific reasons for a negative decision and the findings on which that decision is based should be made available to the asylum-seeker. He or she should be allowed to appeal against the decision to an independent, impartial, and competent authority. The asylum-seeker should be fully informed of this right, told of the procedures he or she should follow, allowed a reasonable time to prepare and lodge the appeal, and allowed to submit a

response to the findings of the refugee determination authority and the reasons given for its negative decision.

- In view of the potentially grave consequences of an incorrect decision, the appeal body should rigorously examine the basis on which the application has been rejected, taking full account of the asylum-seeker's response or counter-argument to the reasons for the rejection of his or her request. The asylum-seeker should be permitted to remain in the country pending the review body's final decision.

- These provisions should apply to all asylum claims, including those which are considered "manifestly unfounded" or "abusive".

Refugee determination procedures in some EC member states lack some of these essential safeguards. For example, in several member states the officials involved in interviewing asylum-seekers and making determinations do not always take full account of all the relevant information about the human rights situation and the risks that asylum-seekers may face if returned to their countries of origin, and in the UK asylum-seekers whose applications have been rejected do not necessarily have the right to remain in the country while they appeal against that decision.

3.2 The state responsible for examining an asylum request

One of the stated intentions of the governments which are party to the Convention on Asylum and the Schengen Supplementary Agreement is to establish arrangements which will ensure that asylum-seekers have their claim examined in one of the contracting states, rather than falling into a situation where, because they may have travelled through more than one member state, it cannot be agreed which state is responsible. They have also stated that the aim is to prevent multiple applications for asylum by a single person being submitted simultaneously or consecutively in several member states. However, while Amnesty International welcomes the intention of the contracting states to agree on which party is responsible for examining a particular asylum request, and so to avoid asylum-seekers becoming so-called "refugees in orbit", it is concerned that, under these arrangements, a particular state where a person asks for asylum could refuse to hear that person's request, and instead send him or her to another contracting state which is determined to be responsible for examining the request but where the border procedures or refugee determination procedures lack certain essential safeguards.

Both the Convention on Asylum and the Schengen Supplementary Agreement contain a reaffirmation of the contracting states' obligations under the 1951 Convention and 1967 Protocol relating to the Status of Refugees. Nevertheless, as noted above, some of the member states, in spite of their existing commitments as parties to the 1951 Convention and 1967 Protocol, currently have border procedures and refugee determination procedures which lack certain essential safeguards and which, in Amnesty International's view, in some respects fall short of their obligations under international standards to protect refugees. These deficiencies have led, in some cases, to asylum-seekers who have been refused entry or whose requests for asylum have been rejected being returned to countries where Amnesty International believes they are at risk. In some such cases the people concerned are known to have suffered human rights violations after their return. Amnesty International is therefore concerned that governments could, in applying the terms of this convention, in effect pass the responsibility of examining asylum claims to another government whose procedures may not in practice include sufficient and fully effective safeguards.

Moreover, there is apparently a significant variation in the way that asylum claims are treated in individual EC member states. Reliable comparisons are not possible on the basis of figures alone, because in most countries the statistics for asylum-seekers who are granted refugee status do not provide a full account of others who are given some form of permission to stay on humanitarian grounds. Moreover, each decision is made in response to the application of the particular individual concerned, so differences in refugee recognition rates cannot be conclusive. Nevertheless, there appears to be a wide divergence in the proportion of asylum seekers from particular national groups, and of asylum-seekers whose cases are apparently similar, who are recognized as refugees under the 1951 Convention in the different member states. Such a divergence could be the result of a difference in approach among the member states to the sometimes very complex combinations of criteria which are used in making a decision as to whether an asylum-seeker qualifies as a refugee in terms of the 1951 Convention, which defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". In some member states, asylum-seekers who, in Amnesty International's view, fall within that definition have, in fact, not been recognized as refugees. An asylum-seeker who is offered only one of the EC member states in which to submit his or her asylum claim could therefore be at a serious disadvantage.

Following their meeting in Dublin on 15 June 1990 the ministers concerned with immigration in the EC member states stated their intention that work should continue on an inventory of member states' asylum policies with a view to achieving harmonization, and resolved to pursue this matter further at their next meeting. If such steps are to be undertaken, given the apparent differences in practice relating to refugee recognition in the

member states, Amnesty International would be concerned that such harmonization could lead to the common adoption of some of the more restrictive policies and practices currently applied in some of the member states. Any harmonized asylum policy among the member states must include all the essential safeguards for the protection of refugees and asylum-seekers. In order to help ensure this, if governments intend to undertake discussions on this matter, they should ensure that, from the start, independent experts and non-governmental agencies concerned with human rights and the protection of refugees and asylum-seekers, as well as UNHCR, should be given a full opportunity to be involved in these discussions and to submit their views and raise points of concern, which should be fully and effectively addressed before any arrangements are finalized.

3.3 Restrictions on entry: border controls, visa requirements and sanctions on transport operators

The draft Convention on the crossing of external borders has not been made public, but is understood to contain provision to harmonize measures to control the external borders of the contracting states, such as the establishment and staffing of official crossing points. Under Article 3.2 of the Schengen Supplementary Agreement the contracting states undertake to establish penalties for unauthorized entry. Section 7 of the Agreement, which deals with establishing the state responsible for examining an asylum request, affirms the contracting states' obligations under the 1951 Convention and 1967 Protocol. Amnesty International is concerned, however, that Article 3.2 does not expressly state that asylum-seekers in need of protection will not be penalized for unauthorized entry, for example, as is specified in Article 31.1 of the 1951 Convention, which states:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

It is understood also that the draft Convention on the crossing of external borders contains provisions whereby the contracting states agree among themselves on countries whose nationals shall be subject to entry visas, and undertake not to make major amendments to their visa requirements without consulting each other; to this end, they will maintain common lists of countries whose nationals are, and are not, required to have visas. It is also understood that the contracting states will commit themselves to enforce visa requirements by adopting legislation to impose sanctions on transport operators which allow passengers to travel to those countries without the required visas or other documents such as passports. The Schengen Supplementary Agreement contains similar provisions.

Governments have an obligation to ensure that any measures they adopt to control immigration into their territories are compatible with international standards, in particular standards concerning the protection of refugees and the prevention of human rights violations. Any restriction on entry which obstructs the flight to safety of individuals in need of protection increases the danger that such people will be subjected to human rights violations, undermines the international system for protection of refugees, circumvents the object and purpose of international treaties established for the protection of refugees, and prevents effective exercise of the right to seek and enjoy asylum which is guaranteed in Article 14 of the Universal Declaration of Human Rights.

Most governments assert that such restrictions on entry do not obstruct "genuine" asylum-seekers in seeking protection, and, for example, Article 26 of the Schengen Supplementary Agreement, which contains an undertaking by the contracting states that they will introduce legislation to impose sanctions on transport operators who allow people to travel to their territory without the required travel documents, states that such legislation will be subject to states' obligations under the 1951 Convention and 1967 Protocol. However, while this undertaking is welcome, Amnesty International does not believe it is sufficient to ensure that the imposition of visa requirements and sanctions will not obstruct asylum-seekers in need of protection.

Indeed, it is difficult to see how visa requirements do not, in controlling immigration, also obstruct access to the refugee determination procedures in that country by people in need of protection. For example, in the case of the Somalis returned from Rome to Mogadishu in July 1990 (see §3.1), the reason for their being refused entry was that their travel documents were not in order. No reliable information can be obtained about how many people in need of protection are prevented from embarking on a journey because they have no visa. Allegations have been made that government officials of countries imposing visa requirements have checked the travel documents, before embarkation, of people from countries whose nationals are required to have visas, and from which asylum-seekers come, and have prevented such people from travelling to the country imposing the visa requirement.

The obstructive effect of visa requirements is likely to be intensified in instances where they are enforced by sanctions on travel operators which carry people without visas. In some countries such sanctions include heavy fines: for example, in the UK transport operators are fined £1,000 per passenger. In order to avoid a fine, transport operators are likely to prevent people embarking if they have no visa. There have also been allegations that asylum-seekers who have managed to travel have been prevented by airline staff from disembarking when it was discovered that their travel documents were invalid. For example, in April 1990 three Sri Lankans intending to seek asylum in the UK were reportedly held for three hours by airline

staff at the airport in the UK, then put back on a flight out of the country; it seems likely that the airline staff acted as they did in order to avoid the imposition of a fine for allowing the asylum-seekers to travel without visas.

Even if transport operators decide to risk a fine and allow some people to travel without a visa or the necessary travel documents because they are at risk of human rights violations, this amounts, in effect, to shifting the burden of determining asylum claims to transport operator personnel, who are not trained or qualified to determine who is a refugee, and who would be attempting to make such a judgment on the spot in circumstances which lack all the essential safeguards for a fair refugee determination procedure.

While governments may assert that people who wish to seek protection can apply for and obtain a visa, in practice this is often not so. As is noted in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, "In most cases a person fleeing from persecution will have arrived without the barest necessities and very frequently even without personal documents"(§196). Many asylum-seekers have to flee urgently and cannot wait for a visa to be issued. Also, asylum-seekers may not have been able to obtain a visa, for example, if it was dangerous for them to approach the asylum country's embassy or consulate in the country they have fled because it was under surveillance or guarded by the authorities of that country, or staffed by nationals of that country. The Schengen Supplementary Agreement (Article 13) stipulates that visas can be issued only to people in possession of a passport or travel document permitting return to the country they have come from or to another country. In view of the points noted above, Amnesty International is concerned on this point because of the difficulty that people fleeing human rights violations often face in obtaining a travel document or passport from the authorities in their own country.

In view of these concerns, and in order to ensure that individuals fleeing the risk of imprisonment as prisoners of conscience, torture, "disappearance" or execution have an opportunity to present their request for asylum and have it examined, in any case where a government imposes a visa requirement, sanctions on transport operators, or any other measure restricting entry, Amnesty International calls on that government to take practical steps to ensure and to demonstrate adequately that the measure does not obstruct asylum-seekers from gaining access to the country's refugee determination procedure. If the government cannot adequately demonstrate that the restriction on entry will not obstruct such individuals, Amnesty International opposes that restriction.

In this instance, Amnesty International's concern about the potentially obstructive effects on asylum-seekers of visas and sanctions on transport operators is heightened by the proposal for all the contracting states to require visas from the nationals of the same countries. The organization is seriously concerned that the proposals to harmonize visa requirements and sanctions on transport operators will obstruct people at risk of

imprisonment as prisoners of conscience, torture, "disappearance" or execution from seeking asylum in any of the contracting states, which in some cases may be their only practical means of obtaining protection. Amnesty International calls on the governments involved to make a clear and explicit statement that they will ensure that the visa requirements and sanctions on transport operators envisaged in the Schengen Supplementary Agreement and the draft Convention on the crossing of external borders do not obstruct asylum-seekers who need to seek protection in one of the contracting states, and to take all possible practical steps to ensure this. If the governments cannot demonstrate that they have ensured that asylum-seekers will not be obstructed in this way, Amnesty International opposes the visa requirements and sanctions in question.

3.4 Sending asylum-seekers to third countries

Amnesty International opposes asylum-seekers who are or who may be at risk of human rights violations if returned to their own country being sent to a third country unless the government sending them there has ensured that in that country they will be granted effective and durable protection against *refoulement*, which should normally include legal protection. The Schengen Supplementary Agreement (Article 29.2) and the Convention on Asylum (Article 3.5) both permit the contracting states to send asylum-seekers to third countries (that is, without first examining their asylum claim). While in both treaties this is stated to be on the basis of the contracting states' national laws and in conformity with their international obligations, Amnesty International is nevertheless concerned that this provision could result in some asylum-seekers in need of protection being sent to a country where they may not be afforded effective and durable protection against return to a country where they are at risk of human rights violations. It therefore calls on the governments which are party to these agreements to establish effective procedures and take all other measures necessary to ensure that in no case will an asylum-seeker be refused access to the refugee determination procedure and sent to a third country unless the government concerned has established beyond any reasonable doubt, and preferably by obtaining an undertaking from the authorities in that third country, that the asylum-seeker will be provided with effective and durable protection, which should normally include legal protection.

3.5 Exchange of information on asylum-seekers

The Convention on Asylum and the Schengen Supplementary Agreement provide for the exchange of information on asylum-seekers, including in particular the identity of individual applicants and their identity documents, details of their journey, and details about the submission of the person's asylum claim. They also provide for the exchange of information about the grounds on which the asylum-seeker's application for asylum is based. In the case of both treaties there are clear provisions that such information should be used only by

authorized officials and for particular purposes, and that information on the grounds for an asylum claim can be exchanged only with the asylum-seeker's approval. However, despite these safeguards, in view of the great sensitivity of such information, and the fact that some of the contracting states do not have data protection legislation in force which may help in ensuring the protection of such information, Amnesty International remains concerned about the possibility that information about a particular asylum-seeker could inadvertently leak back to the authorities in the country where he or she is at risk. Even if a person is granted asylum, it is essential that no confidential information about his or her case leaks back to the authorities in that person's country of origin, because he or she may have family or friends there who could be put at risk. Moreover, if a person is not granted asylum and is returned, the very fact that they have applied for asylum can sometimes put them at risk. For example, in recent years Amnesty International has received reports that some people who have returned to Zaire and Somalia have been arrested on return, apparently on suspicion of being government opponents because they were known or believed to have sought asylum abroad.

In view of these points, Amnesty International calls on the governments concerned to make a clear and explicit undertaking that, in particular, all possible steps will be taken to ensure that no information about individual asylum-seekers leaks back to the authorities in their countries of origin, and to establish effective procedures and take all other measures necessary to ensure this.

4. Application of the treaties in practice

The Convention on Asylum (Article 2) and the Schengen Supplementary Agreement (Article 28) both affirm the contracting states' commitment to the 1951 Convention and 1967 Protocol relating to the Status of Refugees. However, while such a commitment is welcome, the contracting states have been party to the 1951 Convention and 1967 Protocol for many years and yet Amnesty International remains concerned about the aspects of their policies and practices outlined in this paper. Amnesty International therefore believes it is essential that these governments explicitly reiterate and commit themselves to specific principles of refugee protection in relation to the particular provisions of the treaties which give rise to the concerns noted in this paper.

Amnesty International also calls on the governments of the contracting states to consult and cooperate with independent legal experts and bodies such as UNHCR and appropriate non-governmental agencies in the implementation of relevant aspects of these treaties. The Convention on Asylum and the Schengen Supplementary Agreement affirm the contracting states' commitment to cooperate with UNHCR in the application of the 1951 Convention and 1967 Protocol, and Amnesty International welcomes the statement in the preamble to the Convention on Asylum that the contracting states "[desire] to continue the dialogue with the United Nations High Commissioner for Refugees in order to achieve the [convention's] objectives". However, the articles of the Schengen Supplementary Agreement and the Convention on Asylum which deal with the Executive Committee which each treaty establishes to supervise its own application make no specific provision for those committees to consult and cooperate with independent agencies and legal experts or with UNHCR in matters affecting the protection of refugees and asylum-seekers.

5. Need for a full public discussion

These treaties deal with matters affecting the fundamental rights of asylum-seekers and refugees who seek protection against human rights violations. Amnesty International is concerned that the arrangements provided for in these treaties may be finalized without as much public consultation as is necessary in view of their implications for asylum-seekers and refugees and for the member states' international responsibilities for the protection of human rights.

In 1988 Amnesty International raised its concerns about these issues with relevant officials of the EC Commission, with the governments of the EC member states, and with members of the European Parliament. In 1990 it has been reiterating its concerns with the ministers concerned with immigration in the member states, the Group of Coordinators,

officials in the EC Commission, and members of the European Parliament and national parliaments of the EC member states[2].

In recent months government officials have provided more information than previously in response to inquiries and expressions of concern by Amnesty International and other concerned non-governmental organizations. Also, UNHCR has now been invited to take part in a dialogue with the appropriate bodies working on drafting the conventions. Following their meeting on 15 June 1990 the ministers concerned with immigration of the EC member states stated their resolve "that the fruitful contact established on asylum matters with the United Nations High Commissioner for Refugees should be maintained" and agreed upon "the importance of adequately explaining to public opinion the measures developed in this field, so as to avoid misconceptions, and of taking into account concerns expressed." On 11 October the Group of Coordinators held a meeting with UNHCR where certain aspects of the draft Convention on the crossing of external borders were examined; at this meeting UNHCR stressed the need to safeguard the protection of refugees, and emphasis was placed on the importance of increasingly close cooperation between the EC member states and UNHCR.

Amnesty International welcomes these developments and the statements of intent by the governments of the member states. However, the organization remains concerned that, so far as it is aware, non-governmental agencies have not been consulted by the bodies drafting the conventions in as systematic way as they should on issues of such fundamental importance. Moreover, no drafts of the proposals under discussion have been made available until after the treaties are signed and the texts of the treaties themselves cannot be changed.

There has also been little substantive discussion in the national parliaments of most member states, and the European Parliament is not formally required to take part in the process as it would be if the arrangements were being agreed within the institutional framework of the EC. While the Vice-President of the EC Commission took part in the European Parliament's 14 March 1990 debate on this issue, and an informal briefing has been provided by the Irish and Italian Presidency of the EC to selected members of the European Parliament, it has not been given complete or systematic information. Indeed, in its resolution of 14 June 1990, the European Parliament stated that the negotiations on the Schengen Supplementary Agreement and of the Ad Hoc Group Immigration[3] had been conducted without parliamentary scrutiny and without being made public; that the

[2] In April 1990 Amnesty International set out its concerns in *Harmonization of Asylum Policy in Europe - Amnesty International's concerns: April 1990* (POL 33/03/90)

[3] the intergovernmental body responsible for drafting the Convention on Asylum and the Convention on the crossing of external borders

information on these issues given to its Legal Affairs and Citizen's Rights Committee "is rather superficial and limited to stating the number of meetings held by the [Ad Hoc Group] Immigration"; that the EC Commission had "failed to inform Parliament of its role in the Schengen negotiations"; and that "an unknown number of bodies have been created ... to deal with these issues without Parliament being informed"; it also expressed concern about "this step taken by the twelve member states to bypass control by the European Parliament in a delicate matter concerning human rights".

Amnesty International believes there must be a full opportunity for an open and public discussion before the draft Convention on the crossing of external borders is signed by the EC member states. It regrets that there was no such opportunity for public discussion before the Convention on Asylum and the Schengen Supplementary Agreement were signed, and hopes that the issues of concern noted in this paper will be raised at the time of ratification of these instruments in the individual member states in 1991. It believes the issues should be opened for discussion and comment by non-governmental agencies with recognized competence in the protection of asylum-seekers and refugees, and would benefit from full debate in national parliaments and in the European Parliament, and that effective steps should be taken to address the concerns expressed by such bodies before the treaties are ratified.

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COUNTRY: Europe
SUBJECT TITLE: Asylum-seekers

This document updates information given in *Harmonization of Asylum Policy in Europe - AI's concerns: April 1990* (POL 33/03/90)[4], issued in April 1990.

RECOMMENDED ACTIONS

Please ensure that all relevant people in the section have received copies for their attention, and that the document is centrally filed for future reference.

In addition please undertake the recommended actions to the accompanying internal circular - *Harmonization of asylum policy in Europe: Recommended actions and background information* (EUR 01/02/90).

DISTRIBUTION BY THE IS

This document has been sent direct by the IS to:

[4] *Harmonization of Asylum Policy in Europe - AI's concerns: April 1990* was indexed as POL 33 (refugee policy) but on reflection we have decided that future papers on this subject are more appropriately indexed EUR 01 (Europe general).

Refugee Coordinators
EC Contact persons
IGO coordinators in sections in Europe
Lawyers' groups in sections in Europe