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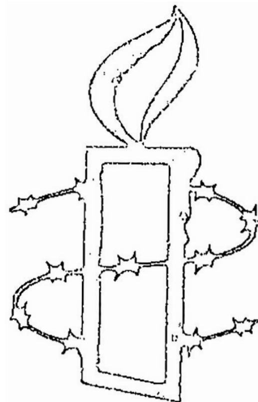
EUROPE

Human rights and the need for a fair asylum policy



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Human rights and the need for a fair asylum policy

1. Introduction

Governments in Europe are increasingly taking a restrictive approach towards asylum-seekers; this threatens to undermine universal standards for the protection of people who are fleeing serious human rights violations. These increasingly strict policies and practices have taken place in the context of an increase in the number of people seeking asylum in Europe in the late 1980s. However, despite the fact that so many thousands of asylum-seekers arriving in Europe come from countries where there are serious and widespread human rights violations, the restrictive approach has not been accompanied by any significant or sustained attempt by European governments to make full use of international human rights mechanisms to bring pressure to bear to effectively address the human rights violations in these countries.

The restrictive approach towards asylum-seekers has been manifested in a number of ways. For example, governments have imposed visa requirements on the nationals of an increasing number of countries, and in some cases, enforce such requirements by imposing 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 an asylum procedure where they can state their reasons for seeking protection and can have their asylum claim examined. Governments have also increasingly sent 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 asylum procedure in that other country or will be afforded protection there. There are also indications that in recent years governments have tended to more strictly apply the criteria used in deciding whether a particular person is granted asylum.

Furthermore, international standards which establish certain fundamental safeguards for asylum procedures, but which even now are not followed by several European states, are being undermined by attempts to accelerate the procedures when dealing with certain types of claims or asylum-seekers from certain countries. While measures taken to speed up asylum procedures are in some respects to be welcomed (as they reduce the lengthy delays and consequent uncertainty for many asylum-seekers),

some reforms have been made or proposed without properly respecting these fundamental safeguards.

Most governments taking a restrictive approach 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, although some governments have also explicitly stated that they intend these measures to reduce the number of asylum-seekers. Whatever governments' intentions may be, it is clear that the effect of many of these measures is to make it more difficult for asylum-seekers to obtain effective protection from being returned to a country where they are at risk of serious human rights violations.

Since the early 1980s, governments have been working in cooperation with each other in various forums in establishing and applying restrictive measures. Among governments in Europe such cooperation is now becoming systematic and set out in formal treaty arrangements. There are also indications that the agreements reached in Europe are being followed closely by governments outside Europe which are considering similar cooperation agreements, so it seems likely that agreements dealing with asylum which are negotiated in Europe will have a decisive influence on asylum policies worldwide.

A renewed European commitment to and strengthening of the international standards for the protection of refugees and asylum-seekers is now urgently needed. The obligation on governments to provide protection for people who are fleeing serious human rights violations may not be subject to limitation or compromise.

Amnesty International's concern for asylum-seekers 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 such as those set out in the International Covenant on Civil and Political Rights and the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It opposes any person being sent against her or his will to a country where she or he risks being imprisoned as a prisoner of conscience[1], 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 such human rights violations, or to a third country where they would not be afforded effective and durable protection against such return.

[1] People who are imprisoned, detained or otherwise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour or language, provided that they have not used or advocated violence.

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 UN 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 customary norm of international law binding on all states, irrespective of whether they are party to the 1951 Convention itself.

The *non-refoulement* principle is a counterpart of the internationally recognized standards on human rights set out in the Universal Declaration of Human Rights and other instruments, which prescribe a universal standard of state conduct. If governments ignore or violate that standard, putting people at risk of serious human rights violations, those people have a right to call upon other states of the international community for protection, and governments are obliged under international law to provide that protection. Governments must also recognize that if they are to solve the "problem" of refugees the international community must take action to prevent serious human rights violations in countries from which refugees flee. If the international community takes no effective action against governments which violate international human rights standards, refugees will continue to flee those countries and ask for protection in other states.

2. Coordination among European Community (EC) member states on matters affecting asylum-seekers

Since the signing in 1986 of the Single European Act the twelve European Community (EC) member states have been working on measures aimed at achieving the single internal market and the abolition of checks at internal borders within the EC by the end of 1992. Among the measures so far agreed, and which are of concern to AI because they affect the protection of asylum-seekers, are those dealing with external border controls and entry into the territories of EC member states, and those establishing criteria to determine which member state is responsible, in any particular case, for examining a request for asylum. More recently there have been indications that the member states are considering proposals to harmonize their procedures for examining asylum claims, and possibly the criteria used to decide whether asylum should be granted in any particular case.

In June 1985 the European Commission issued a White Paper setting out plans for the completion of the internal market. However, by the end of 1988 several of the measures proposed in it - including plans for a directive coordinating member states' provisions on the right of asylum and refugee status - ran into technical and procedural difficulties. The member states then decided to follow a different approach, drawing up several intergovernmental conventions for signature by the member states, rather than using EC legal instruments. Two of these conventions have a particular bearing on the protection of asylum-seekers and so are of concern to Amnesty International:

◇ A **Convention determining the state responsible for examining an asylum request** ("The Dublin Convention")[2]. This Convention provides that an asylum application lodged in any one of the EC member states will be examined by only one contracting state, and sets out criteria to determine which state that shall be. It also provides for contracting states to exchange information about particular asylum-seekers to assist in determining which contracting state is responsible[3].

◇ A **Convention on the crossing of external borders**[4]. This Convention provides for contracting states to adopt common procedures to control their external borders, and to cooperate in imposing visa requirements on nationals of the same countries and to impose sanctions on transport operators which carry people without visas.

Separately from this framework, but involving many of the same states, another intergovernmental group of five EC member states in June 1990 signed the **Schengen Supplementary Agreement**, putting effect to their initial agreement reached in principle in 1985 to dismantle controls at their common borders. The agreement (to which three more EC member states have acceded since) includes provisions affecting asylum-seekers which are very similar to those in the two conventions of the twelve EC member states.[5]

[2] This Convention was signed by 11 member states in June 1990; Denmark, the twelfth member state, signed and ratified the Convention in June 1991 (see Appendix) .

[3] Amnesty International is concerned that this provision may allow for information about an asylum-seeker to leak back to the authorities in his or her country of origin. For further details see Appendix.

[4] This Convention could be signed by the member states in December 1991.

[5] Further details about these three treaties, and Amnesty International's concerns relating to each of them, are set out in the Appendix.

Most recently, the proposed treaty on European Political Union, due to be signed at the European Council in Maastricht in December 1991, would extend the competency of the EC to cover many of the areas where it has up to now been in dispute. This would enable EC institutions to take over responsibility for matters relating to immigration and asylum which since 1988 have been dealt with at an intergovernmental level. The member states have also expressed a wish to develop common procedures for dealing with asylum claims, in particular focusing on the questions of returning asylum-seekers to "safe" countries of first asylum and of accelerated procedures for dealing with so-called "manifestly-unfounded" claims for asylum, including claims from asylum-seekers whose countries of origin are considered "safe".

3. The protection of asylum-seekers in Europe: Amnesty International's concerns

The treaties described in §2 are of concern to Amnesty International in the following respects:

1. By providing for coordination among the contracting states in imposing visas and sanctions on transporters who carry passengers without the correct travel documents, they broaden and intensify the obstructive effects of such measures on access to asylum procedures by people fleeing human rights violations.

2. They allow for the sending of asylum-seekers to third countries (i.e. not one of the contracting states) without also explicitly requiring the state sending them there to ensure that they will be granted effective and durable protection in the third country against forcible return to their country of origin.

3. They set out criteria for determining the state responsible for dealing with an asylum request (so that an asylum-seeker can present an asylum request in only one contracting state and a negative decision made on that request will therefore be effective in other contracting states), without taking into account that asylum procedures vary considerably among the contracting states and in some states fall short of international standards.

Amnesty International's concerns on these points are described in more detail in §3.1 to §3.3 below.

The agreements made so far have been limited to issues of access to asylum procedures, and have not addressed the question of whether the procedures themselves are satisfactory. However, since mid-1990 some EC member states, in particular the

German Government and the Dutch Government in its capacity as EC president, and the EC Commission itself, have indicated a wish to develop common procedures for dealing with asylum claims. Amnesty International welcomes this insofar as it could provide an opportunity to reach an agreement on minimum procedural standards for the examination of asylum claims which meets the fundamental standards required by international law. However, at the same time the organization is concerned that, with governments focusing as much as they are on establishing accelerated procedures to deal with so-called "manifestly unfounded" claims and on possibilities for sending asylum-seekers to "safe" countries, any common procedures may not provide sufficient safeguards to ensure that asylum-seekers are not sent to countries where they risk serious human rights violations. Amnesty International's recommendations for essential principles and safeguards which should be included in any common standard for asylum procedures in Europe are set out in §4.

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

The draft Convention on the crossing of external borders[6] is understood to contain provision for uniform measures of control at the external borders of the contracting states, such as the establishment and staffing of official crossing points and the imposition of sanctions for unauthorized crossing of the borders. In addition, under Article 3.2 of the Schengen Supplementary Agreement the contracting states undertake to establish penalties for unauthorized entry. While Section 7 of that 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 relating to the Status of Refugees, Amnesty International is concerned 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."

[6] This is still in draft and the text has not yet been made public.

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 visa requirements, 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 who 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 who are seeking protection. 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 from gaining access to asylum procedures.

Indeed, it is difficult to see how a country's visa requirements do not, in controlling immigration, also obstruct access to the asylum procedures in that country by people in need of protection. Amnesty International knows of cases where asylum-seekers have been refused entry because 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 to flee persecution because they have no visa. Government officials of countries imposing visa requirements have reportedly 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 requiring the visa[7].

The obstructive effect of visa requirements is likely to be intensified when they are enforced by sanctions on transport operators which carry people without visas. In some countries such sanctions include heavy fines: for example, in the United Kingdom (UK) transport operators are now fined £2,000 per passenger[8]. In order to avoid a fine, transport operators are likely to prevent people embarking if they have no visa. Asylum-seekers who have managed to travel have reportedly 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. The same month, also in the UK, six Sri Lankans were forced back on to an Egypt Air aircraft at Heathrow by immigration officers and airline personnel, without any consideration of their asylum claim. It seems likely that the airline staff acted as they did, sometimes together with immigration officers, in order to avoid the imposition of a fine for allowing the asylum-seekers to travel without visas.

Even if transport operators 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 passing the task of assessing asylum claims to transport operator personnel, who are not trained or qualified to determine who is a refugee, and moreover who would be attempting to make such a judgment on the spot in circumstances which have none of the essential safeguards for a fair refugee determination procedure[9].

While governments may assert that people who wish to seek protection can apply for and obtain a visa, in practice it is often not possible for them to do so. As is noted in the *Handbook on Procedures and Criteria for Determining Refugee Status* issued by the Office of the United Nations High Commissioner for Refugees (UNHCR), "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

[7] Legislation currently proposed in the UK would specifically allow for such a practice.

[8] Until August 1991 the fine was £1,000 per passenger.

[9] Airline personnel in several countries have themselves expressed concern on this point.

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. Amnesty International is concerned about this stipulation because people fleeing human rights violations may find it difficult or even impossible to obtain a travel document or passport from the authorities in their own country.

In view of these concerns, and in order to ensure that people 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 asylum procedure. If the government cannot adequately demonstrate that the restriction on entry will not obstruct asylum-seekers, Amnesty International opposes that restriction.

In many of the countries whose nationals will require a visa before being allowed to enter the contracting states, there are serious, widespread and systematic, human rights violations. It is understood that these countries include, for example, Sri Lanka, Iran, China and Iraq. Indeed, the EC governments themselves have recognized the risks that people may face in these countries by allowing asylum-seekers from these countries, in many cases, to remain on humanitarian grounds, even if they are not formally recognized as refugees.

The potentially obstructive effects on asylum-seekers of visas and sanctions on transport operators are intensified where several states cooperate in imposing visa requirements on nationals of the same countries. Amnesty International is therefore seriously concerned that the proposals for the EC member states to act together in imposing visa requirements and sanctions on transport operators will obstruct people at risk of serious human rights violations from seeking asylum in any of the contracting states, which may in some cases be their only practical means of obtaining protection. Accordingly, Amnesty International calls on the governments involved in these agreements to, at the very least, 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 will 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.

3.2 Sending asylum-seekers to third countries

Amnesty International opposes governments sending asylum-seekers to a third country, unless they have ensured that in that third 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 Dublin Convention (Article 3.5) both permit the contracting states to deny access to their asylum procedures and send asylum-seekers to third countries[10]. Although the provisions in these two agreements are the first at an international level to explicitly allow for asylum-seekers to be sent to third countries,[11] they do not explicitly require states who return an asylum-seeker in this way to establish whether the third country will provide that person with effective and durable protection against *refoulement* to a country where they risk serious human rights violations. While in both treaties it is stated that sending asylum-seekers to third countries should be on the basis of the contracting states' national laws and in conformity with their international obligations, these provisions could nevertheless 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 serious human rights violations. The organization is aware of many cases where states, subject to the same national laws and international obligations referred to in the relevant provisions of these treaties, have sent asylum-seekers to third countries and where the people concerned have then been returned to countries where they risk serious human rights violations.

For example, in March 1991 seventeen Sri Lankan Tamils who arrived at Vienna's Schwechat Airport and claimed asylum were returned to Rome, through which they had passed in transit on their way to Austria. In Vienna, they were held in the transit lounge and denied access to a representative of the Office of the United Nations High Commissioner for Refugees (UNHCR). According to UNHCR, "clear grounds for asylum" were presented by at least some of the Sri Lankans in interviews with Austrian authorities at the airport. Nevertheless, the Austrian authorities returned them to Italy, as they considered it was the country in which their asylum claims should have been presented. The UNHCR office in Rome was contacted but was unable to act on the case because it was a weekend. The Italian authorities returned them direct to Sri Lanka,

[10] That is, countries which are not party to these agreements.

[11] The 1951 Convention does not explicitly provide that people who seek asylum in a particular country may be sent to a third country which they passed through or spent time in after leaving their country of origin. Article 33 of the Convention, however, prohibits the return of refugees "in any manner whatsoever" to their country of origin, which could include return *via* a third country.

apparently refusing to treat them as asylum-seekers because, as asylum-seekers returned by Austria, they were considered to be "deportees in transit".

Such an incident demonstrates the risk of sending asylum-seekers to third countries without first ensuring that in that country they will have effective and durable protection against *refoulement*. If there is a danger that in the third country they will not have access to an asylum procedure, or if they will be granted access but the procedure is not full and fair in the sense of being able to effectively identify all those in need of protection, states should not be permitted to send asylum-seekers to that country. The need for a state in such circumstances to establish whether a procedure in a third country is full and fair is a further reason for some form of international agreement which clearly establishes minimum procedural standards (in §4 below Amnesty International sets out the essential principles and safeguards which should be included in such an agreement).

3.3 *The state responsible for examining an asylum request: inadequate procedural safeguards*

One of the stated intentions of the governments which are party to the Dublin Convention and the Schengen Supplementary Agreement is to 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 state, it is not clear which state is responsible. They have also stated that they aim to prevent any person simultaneously or consecutively applying for asylum in several member states. While Amnesty International welcomes the stated intention of the contracting states to agree on which party is responsible for examining a particular asylum request, and to avoid asylum-seekers becoming so-called "refugees in orbit", it is concerned that, under these arrangements, a particular state could refuse to hear an asylum request, and instead send the asylum-seeker to another contracting state which is determined to be responsible for examining the request but where the asylum procedures lack certain essential safeguards. This would increase the risk that a person may be returned to a country where he or she risks serious human rights violations.

Article 33 of the 1951 Convention states that refugees may not be returned "**in any manner whatsoever**" to a country where their life or freedom is threatened. However, if one state passes to another the responsibility to examine an asylum request (for example, under an international agreement like the Dublin Convention), and procedures in the latter state are inadequate to identify and protect a person at risk, there is a risk that *refoulement* may result and both states will have violated their obligations under the 1951 Convention.

Both the Dublin Convention 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 described below, some of the EC member states or states who have applied for EC membership, in spite of their existing commitments as parties to the 1951 Convention and 1967 Protocol, currently have asylum 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. As a result of these deficiencies some asylum-seekers who have been refused entry or whose requests for asylum have been rejected have been returned to countries where Amnesty International believes they are at risk. In some such cases the people concerned are known to have suffered serious human rights violations after their return. Amnesty International is therefore concerned that governments could, in applying the terms of these agreements, in effect pass the responsibility of examining asylum claims to another government whose procedures may not in practice include sufficient and fully effective safeguards, possibly leading to *refoulement.*

Concerns such as these are also reflected in an opinion of the Dutch Council of State, the highest administrative court in the Netherlands. In April 1991 the Council of State recommended that the Dutch Government should not ratify the Schengen Agreement because, among other things, the transfer of responsibility for examining an asylum request, in the absence of agreement between contracting states on the basic procedures and criteria for examining and deciding on an application, could lead to a violation of the Netherlands' obligations under the 1951 Convention.

3.3.1 Some examples of deficiencies in asylum procedures

Amnesty International is concerned about deficiencies in asylum procedures in a number of European states which are party to the agreements made among the EC member states, or are likely to become parties in the future. Some examples are described below:

In **Ireland** asylum-seekers who make a claim upon arrival at a port of entry are interviewed, often on the same day they arrive, by an immigration officer who receives no special training in international refugee law or the special situation of asylum-seekers. Asylum-seekers at a port of entry are not usually told of their right to legal counsel or their right to contact UNHCR. Moreover, the decision on their case is usually made by officials in the Department of Justice on the basis of the immigration officers' notes of the interview. These officials, too, have no special knowledge of international refugee law or of conditions in the asylum-seeker's country of origin.

Furthermore, opportunities for review of a negative decision are very limited. The Minister of Justice has a written agreement with UNHCR which provides that, at the first stage of the procedure, in all cases where the Minister proposes to refuse asylum UNHCR will be notified and given an opportunity to comment on the case. However, as the Representative of UNHCR for Ireland is based in London, it is not clear whether in all cases UNHCR receives all the relevant documents on the case, including the notes made by the immigration officer, or just an oral summary of the case over the telephone. The agreement between the Minister of Justice and UNHCR provides also for rejected asylum-seekers to be given an opportunity to have their case reviewed, but asylum-seekers are rarely informed of this right. In any case, a review would not provide for oral representations to be made, and would be conducted by the same department that made the original negative decision; moreover, the Minister of Justice does not usually provide rejected asylum-seekers with written reasons setting out the grounds for refusing the application, which makes it very difficult in practice to present an effective appeal against refusal. As a last resort, if asylum-seekers are able to engage a lawyer they can seek judicial review of the refusal of asylum, but as there is no legislation which incorporates into Irish law the definition of a refugee as set out in the 1951 Convention, nor any legislation setting out the procedures to be followed in examining asylum claims, it is impossible to make any substantive arguments on these matters to the court.

Amnesty International believes that the asylum procedures in Ireland are entirely inadequate to identify all those in need of protection. The fact that in practice few asylum-seekers actually seek protection in Ireland, compared with the numbers seeking asylum in other EC member states, does not diminish the need for the deficiencies in the asylum procedures to be addressed without delay.

In **Italy** there is no comprehensive asylum law that clearly establishes the rights of asylum-seekers, and as a result they are often effectively unable to pursue their claim. Amnesty International is seriously concerned that the police at the border are allowed an inappropriate amount of discretion in deciding which asylum-seekers are allowed to "enter" Italian territory to pursue an asylum claim. Under Italian law, the border police may refuse an asylum-seeker "entry" to Italy for a number of reasons, including that she or he has stayed for a "period of time" in another state which "adheres" to the 1951 Convention, or that she or he falls under one of the exclusion clauses set out in Article 1F of the 1951 Convention[12]. The border police make such a decision on the basis of an interview with the asylum-seeker. Asylum-seekers are not allowed access to legal counsel or UNHCR during this time.

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[12] If there are serious reasons for considering that a person has committed war crimes, crimes against humanity, or a serious non-political crime, he or she may be excluded from claiming the benefits of the Convention.

Any decision as to whether a country "adheres" to the 1951 Convention (which seems to imply more than merely being a contracting state) requires a careful assessment of detailed and current information on asylum policy and practice in that country (which may, for example, offer protection to asylum-seekers of only certain nationalities). Also, any decision as to whether a person falls within one of the exclusion clauses set out in Article 1F of the 1951 Convention (including criminality) demands a complex legal analysis which weighs the seriousness of the offence giving rise to exclusion against the risks faced in the country of origin. Yet these decisions are taken by border police who have no special training in international refugee law or international human rights law and who have no specialized knowledge of the situation in countries to which asylum-seekers are to be returned. While the law does provide for a right of appeal against the decision of the border police to deny "entry", in practice it is severely constrained as asylum-seekers are not told of this right nor are they given any effective opportunity prior to their expulsion to initiate an appeal or to obtain legal advice.

Those asylum-seekers who are allowed to "enter" Italian territory to pursue an asylum claim have the right to have their claim heard by the Central Commission[13]. However, there is no requirement that the members of the Commission have an expertise in international refugee law or international human rights law, nor do they necessarily have a specialized knowledge of the situation in the asylum-seeker's country of origin[14]. Furthermore, there is no right to counsel in proceedings before the Commission and the absence of this and other procedural safeguards often results in arbitrary decisions. While there is provision for a judicial review of a negative decision, the courts do not examine the substance of the asylum claim.

In **Austria**, which has applied to join the EC and would presumably thereby become party to these agreements, there are serious deficiencies in the asylum procedures. For example, asylum-seekers crossing into Austria from Hungary are dealt with according to a special "informal understanding" reached in June 1990 between Austria and Hungary, whereby all "illegal immigrants", including asylum-seekers, who have passed through Hungary are immediately returned to Hungary when apprehended at or near the border. The understanding reportedly only applies to "illegal immigrants" from European countries, and UNHCR has been assured by the Austrian authorities that if any of those about to be returned indicate a wish to seek asylum in Austria, the UNHCR office in Vienna will be notified. However, in the nine months to March 1991

[13] The Central Commission is chaired by a prefect (a high-ranking official of the Ministry of the Interior) and comprises two officials from the Ministry of the Interior, one official from the Ministry of Foreign Affairs and one official from the Presidency of the Council of Ministers.

[14] A UNHCR representative does sit on the Commission but only has consultative status.

the UNHCR had not been notified of a single such case, although prior to the agreement in June 1990 many hundreds of people had applied for asylum in Austria after crossing "illegally" from Hungary. Moreover, there have reportedly been instances where asylum-seekers from countries outside Europe who arrive in Austria from Hungary have also been returned to Hungary, although Hungary is one of the very few countries which limits its obligations under the 1951 Convention so that it only recognizes refugees from countries in Europe.

In addition, Austrian law provides for a pre-expulsion detention (*Schubhaft*) for "illegal immigrants", including people who cross the borders "illegally" or without proper documents. It is estimated that at any particular time over 1,000 people are held in *Schubhaft*. Amnesty International has visited people held in *Schubhaft* in Vienna and has found that many of those detained are in fact asylum-seekers who would be at risk of serious human rights violations if returned to their country of origin, but, because they were detained, they had no effective opportunity to lodge an application for asylum.

It is often said that asylum procedures must be both fair and expeditious: that is, that procedural rights should not unnecessarily prolong a procedure (which is alleged to encourage spurious asylum claims), but also that the procedures must be sufficiently thorough and with satisfactory safeguards to ensure that those at risk if returned are identified and afforded protection. Governments do not readily admit to the deficiencies in the procedures in their countries, and they often resist instituting the necessary procedural safeguards by arguing that the procedures must be expeditious. In the apparent pursuit of both fairness and expeditiousness, many European governments have amended their asylum procedures over the past decade, in some countries several times, but serious deficiencies persist.

3.3.2 Accelerated procedures and the notion of "safe countries"

Notwithstanding the deficiencies in the regular asylum procedures in many European countries, many of these countries have passed or proposed reforms to their asylum procedures with the aim of separating from the regular procedures certain types of claims, or asylum-seekers from certain countries, and dealing with these in an expedited or "accelerated" procedure.

Some recent initiatives to establish quicker procedures have focused on the notion of so-called "safe countries", which is understood to refer to countries where governments believe asylum-seekers can be returned without being put at risk. The "safe country" could be the asylum-seeker's country of origin, or a third country through which he or she passed or spent time on the way to the country where the asylum claim

is made. UNHCR's intergovernmental Executive Committee, at its annual meeting in October 1991, decided that the notion of a "safe country" should be considered in depth by its Sub-Committee on International Protection throughout the coming year; the Council of Europe has also undertaken to study the notion of "safe country"[15].

There seems to be a widespread belief among governments that applying the notion of "safe country" will enable them to exclude large numbers of asylum-seekers from the normal asylum procedures, thereby reducing backlogs and making the procedures more expeditious. There is a danger, however, that in applying the "safe country" notion, asylum countries will establish a list of such countries and in so doing may be subject to influences (such as foreign policy considerations) or factors (such as the number of asylum-seekers from a particular country) that are not necessarily consonant with the ultimate goal of an asylum procedure - the identification and protection of people at risk. Amnesty International has documented serious human rights violations in countries throughout the world, and such violations may occur in any country. People coming from countries considered "safe" may be forced to overcome an unreasonable presumption against the validity of their claim, and will have to do so in a procedure which, because it is intended to screen out cases from the regular procedures, may not offer sufficient safeguards. Furthermore, the decision as to whether a third country is "safe" is a complex one: often, third countries may only be "safe" for asylum-seekers from particular countries, and in any case the situation for asylum-seekers in third countries may change rapidly.

In **Switzerland**, an urgent Federal Decree in June 1990 revised Swiss asylum procedures so that asylum-seekers coming from "safe countries" may be subject to a decision by the Federal Office for Refugees "not to enter into the matter" (*décision de non entrée en matière*). This decision is made after a short interview, often without the benefit of legal counsel. The list of "safe countries" is drawn up by the Swiss Federal Council, and currently includes India, a country where there are serious and widespread human rights violations, and Algeria, which was not removed from the list when a state of emergency was declared in June 1991 and over 1,000 members of an opposition political party were detained[16]. Amnesty International is concerned that asylum-seekers coming from these so-called "safe countries" have to overcome a presumption that their claims are not valid, and that the only opportunity they are given to do this is in a truncated procedure that provides for an appeal but which does not allow them automatically to remain in the country while appealing.

[15] This study is being made by the Council of Europe's Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)

[16] The state of emergency was lifted in October 1991

Similarly, in the **Federal Republic of Germany** the government recently announced plans to introduce accelerated asylum procedures for "manifestly unfounded" cases, which would include asylum-seekers coming from particular "safe countries". The German Government has not yet indicated precisely how the list of such countries will be compiled, but in each of the options so far discussed the Foreign Ministry would play a significant role.

The **United Kingdom** has also recently announced proposals to accelerate asylum procedures. The draft legislation aims to speed up procedures by placing strict time limits on the appeal against a refusal of asylum. All appeals will have to be lodged within two days of a refusal of asylum by means of a written appeal to a Special Adjudicator who will have five days in which to decide whether an "arguable" case exists and, if so, leave for an oral hearing will be given. It will be extremely difficult in practice for an asylum-seeker to establish that she or he has an arguable case, because the two-day period does not provide sufficient time to have the effective assistance of legal counsel. Such assistance could be crucial since the decision by the Special Adjudicator as to whether there is an arguable case will be based solely on written material, and within the two-day period asylum-seekers may not be in a position to articulate in a clear and satisfactory way that theirs is an arguable case (a test that requires some understanding of both UK and international refugee law). This appeals procedure applies in all cases. Moreover, the officials who decide on the application when it is first made are not obliged to interview the asylum-seeker personally, so he or she may be expelled without ever having the chance to present her or his case in person to the decision-maker.

In **Belgium**, new legislation provides that asylum-seekers who come from countries which account for more than five per cent of all asylum-seekers in Belgium in the previous year, and less than five per cent of whose nationals have been recognized as refugees, are considered inadmissible and are excluded from having their cases dealt with through the normal procedures (the so-called "double five per cent rule"). Such people are subject to immediate expulsion and can challenge this decision only by putting forward to the Minister of Justice, within 24 hours, individual reasons relating to a threat to their life or freedom as defined by the 1951 Convention. If these individual reasons are not accepted by the Minister of Justice, such people can appeal for an urgent re-examination of their case to the *Commissariat général aux réfugiés et aux apatrides* (CGRA), but the Minister of Justice retains the power to order removal even if the CGRA advises otherwise.

Amnesty International is concerned that under this rule a decision on admissibility is made on the basis of group-derived statistics, in what should be an individual assessment of each particular claim. The effect of this provision is that an individual

asylum-seeker who would be at risk of serious human rights violations if returned to a particular country has to overcome a presumption that he or she is not in need of protection, which has been made simply because many other asylum-seekers from the same country have been denied protection. Moreover, this decision on admissibility is based on statistics from the previous year, whereas human rights violations which cause people to flee are not constant and it is therefore inappropriate to make an assessment of present risk on the basis of the previous year's disposition and number of claims from any particular country.

4. Essential principles and safeguards for fair and satisfactory asylum procedures

Amnesty International believes that the current crisis in asylum procedures in Europe is largely a result of governments' failure to recognize the unique character of asylum-seekers and the special obligations owed to them. Governments appear to be preoccupied with treating asylum applicants in a manner similar to immigrants or people who enter "illegally", and as a result various police and immigration authorities are involved in complex and time-consuming procedures. As these procedures create a backlog of applicants, and as new asylum-seekers arrive, governments come under pressure to "streamline" or "accelerate" the procedures. This leads to their creating various devices to "screen out" or separate certain types of claims from the normal procedures, but these devices often have the effect of both diminishing procedural safeguards and creating further backlogs.

Amnesty International calls on governments to acknowledge that the examination of asylum claims is best left to a fully independent body to which all asylum-seekers have access. If that body is truly independent and is composed of expert decision-makers who have special knowledge of current conditions in asylum-seekers' countries of origin, its decisions can be made promptly. Similarly, if each applicant appears in person, with legal counsel, before the decision-makers her or his credibility (which is often a determining factor in asylum claims) can be fairly assessed. In short, if there is a full and satisfactory examination of every case at the first stage of the procedure (at first instance), the necessity of correcting mistakes through time-consuming review procedures is diminished, and the process can be both fair and expeditious.

An independent body is necessary to ensure that the decision-makers are not subject to influences or factors that are inappropriate to the task of identifying those in need of protection. They should decide asylum claims on the merits of each case and not be influenced by, for example, considerations of foreign policy or immigration

control. The decision-makers should be thoroughly trained in international refugee law and international human rights law so that they are able to perform this task competently.

In order to ensure that the asylum-seeker's claim can be accurately assessed, the decision-makers should also have access to complete, impartial and reliable information on conditions in countries of origin, particularly information on human rights violations. In many countries such information is not readily available to decision-makers, or, if available, is often provided by the foreign affairs department or ministry. Experience in some countries has shown that material supplied by government officials, whose primary interest may not be an objective and impartial assessment of the extent to which human rights are respected in other countries, may result in an asylum procedure that discriminates against applicants from particular countries. Therefore, it is essential that information be gathered from the widest possible range of independent sources.

If the body is independent, expert and knowledgeable, then the public, lawyers, agencies working with asylum-seekers and, above all, the asylum-seekers themselves, will have some confidence in the integrity of the asylum procedure.

Since mid-1990 there has been a developing recognition in Europe that issues relating to access to asylum procedures cannot be "harmonized" without some consideration being given to common standards on the form of the actual asylum procedures. At their meeting in Dublin in June 1990 the EC ministers concerned with immigration stated their intention that work should continue on an inventory of member states' asylum policies with a view to harmonization. Following the June 1991 EC Luxembourg summit, the Intergovernmental Conference on Political Union is working on a revision of the EC Treaty which, in its revised form, might include provisions for coordination of member states' visa and asylum policies. The Dutch EC Presidency has reportedly stated its firm commitment to the aim of harmonizing certain fundamental aspects of member states' asylum procedures, and the EC Commission, in a communication transmitted to the EC Council of Ministers and to the European Parliament in October 1991, called for a coordinated EC policy on immigration and the right of asylum, which would include harmonization of procedures for examining asylum requests and criteria to be used in deciding when to grant asylum.

Amnesty International welcomes these proposals insofar as, in its view, an international agreement that provides a minimum procedural standard for the determination of asylum claims, and meets the fundamental standards required by international law, is the most effective way of ensuring that agreements like the Dublin Convention are implemented in a manner consistent with the protection of refugees. If a convention or similar agreement on minimum standards for asylum procedures could be concluded among EC member states, then states which were involved in transferring

responsibility for examining an asylum claim would have a clear international standard against which to measure national procedures in other countries. The transferring state should be obliged to ensure that procedures in the other state met the minimum international standard, and if that was not the case a transfer could not take place. Moreover, such an agreement, provided it was fully implemented, would provide asylum-seekers with an assurance that they would be more likely to have the benefit of fair and satisfactory asylum procedures regardless of the state in which they made their claim. This in turn would allay the concerns of some states which have at present relatively fair and satisfactory procedures that they will attract a disproportionately large number of claims, and could reduce any pressure there might be on those states to adopt more restrictive procedures.

While there are some existing international instruments which prescribe certain minimum standards for procedures to examine asylum claims, they have proved inadequate to effectively limit individual states' discretion in this matter, as there are deficient procedures in a number of countries. Further, states have shown a reluctance to accept that some provisions of international human rights treaties relating to a fair hearing apply to asylum procedures, and there is a danger that these procedures will be left outside the development of fair hearing standards in international law.

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There are certain **essential principles** which form the **minimum standard** for a fair and satisfactory asylum procedure. These principles prescribe a model for asylum procedures in which every effort is made to improve the examination of asylum claims when they are first considered (at first instance). They are based on the internationally recognized principle of *non-refoulement*, and on international standards such as are set out in the International Covenant on Civil and Political Rights, relevant Conclusions adopted by the intergovernmental Executive Committee of the Programme of the United Nations High Commissioner for Refugees, and Recommendation R(81)16 of the Committee of Ministers of the Council of Europe dealing with the harmonization of national procedures relating to asylum.

These essential principles must form the basis of any convention or similar agreement on minimum standards for asylum procedures:

1. The fundamental principle of *non-refoulement* demands that national asylum procedures are adequate to effectively identify all those in need of protection.

2. All asylum-seekers, in whatever manner they arrive within the jurisdiction of a state, must be referred to the body responsible for deciding on claims for asylum.

3. The body responsible for deciding on claims for asylum must be an independent and specialized authority whose sole and exclusive responsibility is examining and making decisions on asylum claims.

4. The decision-makers of that independent body must have expertise in international refugee law and international human rights law. Their status and tenure should afford the strongest possible guarantees of their competence, impartiality and independence.

5. In examining asylum claims, the decision-makers of that independent body must be provided with the services of a documentation office whose task should be to impartially collect and provide them with objective and independent information on the human rights situation in asylum-seekers' countries of origin or any country to which they might be sent.

6. All asylum-seekers, at all stages of the procedure, must benefit from the right to legal counsel and interpreters, and the right to contact and to have access to UNHCR.

7. Asylum claims should be examined at first instance through a personal appearance by every asylum-seeker before the decision-makers of the independent body, where there is a thorough examination of the circumstances of each case.

8. All asylum-seekers must receive written reasons if their asylum claim is rejected, and have the right to appeal against a negative decision. The appeal must normally be of a judicial nature although, in the event that the asylum claim falls into one of the categories that warrant exceptional treatment as set out in Principle 9, the appeal may be expedited. The appeal must in all cases have suspensive effect[17].

[17] That is, the asylum-seeker must be allowed to remain in the country until the review is concluded.

9. Special circumstances may warrant the exceptional treatment of an asylum claim or a group of claims from persons in a similar situation. Such exceptional treatment would only permit that the appeal of the decision at first instance be expedited. These circumstances may include, for example, a determination that an asylum claim is "manifestly unfounded" in the sense that it is clearly fraudulent or not related in any way to the criteria for granting refugee status set out in Article 1A of the 1951 Convention or to criteria for defining other categories of persons who are protected from *refoulement*.

10. A committee of experts should be established to monitor the implementation of an international agreement on asylum procedures. UNHCR should be represented on the committee. States should be obliged to report regularly to the committee on their national asylum procedures[18].

It must be stressed that these essential principles form a **minimum** procedural standard, and an international agreement on minimum standards must not be interpreted in a manner which would permit states to restrict or diminish more favourable procedural rights in their national laws.

In addition to these essential principles, an international agreement on asylum procedures should ensure that the procedures include certain essential **safeguards** which address the unique situation of the asylum-seeker and would ensure that the essential principles are followed in practice. For example:

◇ Border officials should be properly trained to identify and to refer to the independent body anyone who may not expressly ask for asylum but who may be at risk if turned away.

◇ The asylum-seeker should be given, in a language that she or he fully understands, the necessary guidance about the procedure to be followed and full information about her or his procedural rights.

◇ The asylum-seeker should be allowed access to appropriate non-governmental agencies providing advice and assistance to asylum-seekers, and the active role of these agencies in assisting asylum-seekers should be encouraged.

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[18] The obligation to report to the committee of experts should not detract from other international obligations to report on issues relating to asylum procedures.

◇ All officials involved in questioning or interviewing the asylum-seeker and in making a decision on her or his application should be instructed and trained to follow the procedural guidance given in §195-§219 of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*. All such officials, including border officials, should take into consideration the special situation of the asylum-seeker, who might experience language or other difficulties in expressing or presenting a request for asylum, who may have had to flee without personal documents, and whose past experience may have caused her or him to be apprehensive of authority, to be afraid to speak freely, and to have difficulty giving a full and accurate account of her or his case.

APPENDIX: Provisions and current status of relevant agreements among EC member states, and points about which Amnesty International is concerned

◊ *Convention determining the state responsible for examining an asylum request (the "Dublin Convention")*

The Convention determining the state responsible for examining an asylum request (the Dublin Convention)[19] provides that an asylum application lodged in any one of the contracting states will be examined by one particular contracting state, and sets out criteria to define 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 with an entry visa and family links, are also taken into account. The Convention also provides for contracting states to exchange information about individual asylum-seekers in order to help determine the state responsible or to help in the actual examination of the claim.

The Convention was signed by all EC member states except Denmark at a ministerial meeting in Dublin in June 1990. Denmark did not sign at the time, stating that first the Danish Aliens Law needed to be amended to be consistent with its provisions. In June 1991 Denmark signed and ratified the Convention, the first (and so far only) member state to ratify it. The Convention will come into force three months after ratification by the twelfth member state.

Amnesty International is concerned that, in view of the current variations in asylum procedures in different EC member states, and the fact that in some of the member states asylum procedures currently fall short of the standards which Amnesty International regards as essential for the protection of asylum-seekers, the arrangements set out in the Convention could in practice mean that a person seeking asylum in a member state may be compelled to lodge his or her application in a country whose procedures lack certain essential safeguards: that is, an asylum-seeker may be prevented from applying for asylum in the particular EC member state where there was the best chance of obtaining protection.

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[19] This Convention is sometimes also referred to as the Convention on Asylum or the Asylum Convention.

Amnesty International is also concerned that, despite the safeguards in the Convention dealing with the exchange of personal data on asylum-seekers, it might be possible for information about an individual asylum-seeker to leak back to the authorities in the country of origin. It is understood that some time in 1992 the EC member states will draft an agreement on the protection of personal data. Until such an agreement is reached, and adequate and effective safeguards are established in each member state, Amnesty International urges that such exchange is permitted to take place only among member states which are party to the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[20] and which have adequate national legislation and procedures to ensure effective protection of such personal data.

◇ *Draft Convention on the crossing of external borders*

The draft Convention on the crossing of external borders is still under discussion and has not been made public. It is understood to provide for uniform measures of control 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. Government officials have stated that it does not contain any provision actually to impose visas on nationals of any countries. So far as is known, the draft makes provision for states to allow on humanitarian grounds those without visas to enter one member state only, but does not explicitly mention asylum-seekers in this context.

The Convention was originally expected to be signed before the end of 1990, but there have been delays in reaching agreement on its provisions - for example because some member states wished to agree on procedures for the abolition of controls at internal borders before proceeding to discuss measures for the control of external borders and, most recently, because of a disagreement between the UK and Spanish Governments over the application of the Convention in the territory of Gibraltar. The Convention might now be signed at the Ministerial Council meeting on immigration and asylum to be held in December 1991.

Amnesty International is concerned that immigration controls, whether border controls or measures such as visa requirements and sanctions on carriers, can obstruct people fleeing serious human rights violations from obtaining access to asylum

[20] A recommendation on this point was made in 1987 by the Committee of Ministers of the Council of Europe, in its Recommendation R(87)15. Some EC member states have not yet ratified the Convention.

procedures. This concern is heightened if governments cooperate with each other in imposing such restrictions on nationals of the same countries. In this instance, Amnesty International is concerned that the controls envisaged in the draft Convention on the crossing of external borders might obstruct people seeking asylum in any of the EC member states, when this could be their only means of obtaining protection.

◇ *Schengen Agreement*

The Schengen Supplementary Agreement puts effect to an initial agreement reached in principle in 1985 between five EC member states[21] to dismantle controls at their common borders. It contains provisions similar to those of the Dublin Convention and the draft Convention on the crossing of external borders: it sets out uniform principles to be applied by the contracting states in controlling external borders; provides for the standardization of conditions of entry and visa requirements and for the imposition of sanctions on transport operators which carry passengers without visas; sets out criteria to determine the country responsible for examining an asylum request; and provides for the exchange of information on asylum-seekers[22]. Amnesty International's concerns on these points are similar to those on the two conventions of the twelve EC member states.

The original five members of the Schengen Group signed the Schengen Supplementary Agreement on 19 June 1990. Since then Italy, Spain and Portugal have signed, bringing the total number of signatories to eight.

By the end of October 1991 only France has ratified the Agreement (in June 1991). It is likely that other states will have ratified the Agreement by the end of 1992.

[21] Belgium, France, FRG, the Netherlands and Luxembourg

[22] 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.