

@REFUGEE PROTECTION AT RISK

Amnesty International's recommendations to the 44th session of the Executive Committee of UNHCR

Introduction

The international system for the protection of refugees can work effectively only if states respect their obligations towards those who seek their protection. Most fundamentally, states must abide by the principle of *non-refoulement* and not forcibly return refugees to territories where their lives or freedom are threatened. Full respect for this principle, and adherence to it in practice, is the only way to ensure people are not sent to countries where they risk arbitrary detention, torture, "disappearance" or execution.

However, it is also widely recognized that respecting this principle may create practical problems for some states. Some states, simply because of their geographic location, receive hundreds of thousands of asylum-seekers and refugees while other states receive very few. Also, some states hosting very large numbers of refugees do not have the financial means to provide for them. For reasons such as these the international system of refugee protection depends also on international solidarity. But if individual countries or small groups of countries take measures to restrict the number of refugees and asylum-seekers reaching their territory, to return asylum-seekers to so-called "safe third countries", and to revise or reinterpret established international standards designed to enhance refugee protection and international solidarity, then other states may feel compelled to follow their example and the entire system is put in jeopardy.

Over the past years, governments on the Executive Committee (Excom) of the Programme of the United Nations High Commissioner for Refugees (UNHCR) have discussed and reached conclusions on a number of issues relating to the protection of refugees. These conclusions cover such matters as the procedures for the determination of refugee status, the detention of refugees and asylum-seekers, family reunification, the protection of refugee women and children, the protection of refugees in situations of large scale influx, and voluntary repatriation. While these conclusions do not create the same sort of binding obligations on states

as provisions set out in formal treaties, they are intended to guide state practice and, having been agreed to by states, in most cases by consensus, through a formal negotiation process, they amount to authoritative international standards.

Measures taken by some powerful states now threaten to undermine the international system of refugee protection. In particular, Amnesty International believes that the United States (US) Government's policy of forcibly returning Haitian asylum-seekers intercepted at sea direct to Haiti is a clear violation of the principle of *non-refoulement* set out in Article 33 of the 1951 Convention relating to the Status of Refugees. It is also contrary to Excom conclusions which reiterate the fundamental importance of this principle, and which emphasize that it applies even in situations of large-scale influx and extends to refugees arriving at the border. As well, Amnesty International believes that restrictive measures taken by member states of the European Community (EC), in the context of "harmonizing" their asylum policies, have severely limited the possibilities for asylum-seekers to reach the territories of EC member states. Moreover, these states have agreed on a number of joint conclusions and resolutions which amount to substantive reinterpretations of Excom conclusions and in some cases are contrary to standards set out in those conclusions. That should be of concern to the Excom.

If powerful governments which receive only a relatively small proportion of the total number of refugees in the world take it on themselves, without reference to the Excom, to work out arrangements for sending asylum-seekers to "safe third countries", to systematically restrict access by asylum-seekers to their territories and to flagrantly breach international law by returning asylum-seekers direct to their country of origin, there is a real risk that other countries may feel inclined to follow that example. That, too, should be of concern to the Excom.

The US policy of forcibly returning Haitians without examining their claims and developments in the EC are not the only instances where Amnesty International is concerned about the protection of refugees and asylum-seekers. During the past year, we have been raising such issues with governments in countries throughout the world. For example, we have taken action against unfair asylum policies in Japan, in Bangladesh when Burmese Muslim refugees were being returned to Myanmar under a repatriation program which was not fully voluntary, and to ensure the full protection of Indonesian refugees in Malaysia. But we believe that among all the refugee protection issues of concern to Amnesty International, the developments in the US and EC are critically important because they not only affect the individual refugees trying to find

protection in a given situation, but also pose a serious threat to the international system for the protection of refugees.

The need for Excom to take action

For a number of reasons, the UNHCR Excom is the international forum which is best placed to raise issues concerning the international protection of refugees, and within the UN system it is undoubtedly the Excom which should be taking action on these issues. The Excom was established by the UN General Assembly in 1957 to advise the High Commissioner in the exercise of her functions under the Statute of her Office¹. In subsequent years it has increasingly taken on the role of providing authoritative advice to states on the proper application of the 1951 Convention and 1967 Protocol relating to the Status of Refugees, and of setting standards on issues not directly or explicitly addressed in those instruments. In 1975 the Excom, with the approval of the UN General Assembly, established a Sub-Committee on International Protection which has developed numerous standards which have been adopted by the Excom in the form of conclusions. Several of these conclusions are specifically addressed to states, indicating clearly that the Excom's role has moved beyond simply advising the High Commissioner. According to UNHCR, these conclusions "lay down and further develop basic standards for refugee protection".

Most international conventions dealing with issues of individual human rights provide for the establishment of a committee or advisory body to oversee the implementation of their provisions. The committee or body is charged with such tasks as issuing advisory opinions on particular legal questions, reviewing periodic reports submitted by states and commenting on the extent to which particular obligations are being met. In some cases it is empowered to receive and decide on complaints from individuals or other states alleging a breach of the convention or treaty in question.

The 1951 Convention and 1967 Protocol do not provide for the establishment of such a body, and therefore at present the Excom is the only intergovernmental body in the UN system which deals explicitly, authoritatively, and in detail with the international protection of refugees. It is thus essential that it exercise responsibility for

¹ The High Commissioner's Statute, approved by the UN General Assembly in 1950, envisaged the creation of an "advisory committee on refugees" which would provide the High Commissioner with advice on issues creating difficulties in the discharge of her functions, particularly "with regard to any controversy concerning the international status of these persons".

considering policies or situations which pose threats to the international system of refugee protection, and it should take whatever action is appropriate to support that system. The Excom cannot simply remain quiet when its own conclusions and guidelines are flouted. It should take an active interest in the work of regional or similar intergovernmental forums that are becoming substantially involved in setting guidelines for refugee protection. In the case of both the Comprehensive Plan of Action (CPA) for refugees from Viet Nam, and the CIREFCA² process in Central America, the Excom showed a willingness to perform a supervisory function. A similar willingness is now required regarding developments in Europe.

Developments in the EC and Europe

In communications with the governments of EC member states and in reports issued in recent years Amnesty International has repeatedly raised its concerns about measures taken in common by those states, such as agreements on visa requirements and sanctions on airlines, to restrict the access of refugees and asylum-seekers to their territories. In addition, we have raised concerns about measures adopted to "screen out" from the normal asylum procedures certain types of asylum claims, and to return people to "safe third countries" where they may have been present or simply passed through on their way to an EC country to claim asylum.

At a ministerial meeting in December 1992, the EC governments adopted a number of resolutions and conclusions on such issues. These issues are already dealt with in Excom conclusions. In some respects the EC resolutions and conclusions are at variance with the Excom conclusions; also, the issues they deal with will have a direct effect on other states.

É resolution on a harmonized approach to questions concerning so-called "host third countries"

The notion of "host third countries" (also sometimes called "safe third countries") is already being applied by many European states. As a result, large numbers of asylum-seekers are being sent back to other countries, in Europe and outside Europe, without any examination of their asylum claim. According to the resolution adopted in December 1992, the EC member states agreed to follow common procedural rules for sending asylum-seekers to a "host third country"; these rules do not include any requirement that member states provide an opportunity for an asylum-

² *Conferencia Internacional sobre Refugiados Centroamericanos* (International Conference on Central American Refugees)

seeker to challenge a decision to return him or her to a third country. The resolution does provide that the authorities in the returning state must make an inquiry into the conditions in the "host third country" before returning an asylum-seeker there, and that the "host third country" must, in general terms, satisfy certain conditions, such as providing effective protection against forcible return. However, it does not require that the third country must make a commitment to provide the asylum-seeker with protection which is effective and durable, with a recognized legal status and a right to pursue their asylum claim in a fair and satisfactory procedure. Nor is there even any requirement in the resolution that the "host third country" actually agree to re-admit the asylum-seeker.

This resolution appears to be at variance with Excom Conclusion 15 (*Refugees without an asylum country*) which provides that "asylum should not be refused solely on the ground that it could be sought from another state"³. Moreover, as the UNHCR has stated in a paper on this topic, "There is no international rule or principle whereby a person who has left his country in order to escape persecution must apply for recognition of refugee status or asylum in the first safe country he has been able to reach"⁴. In the same paper, UNHCR also argues that asylum-seekers may be sent to a "safe third country" only if the sending country has established that the receiving country respects the principle of *non-refoulement*, will treat the asylum-seeker in accordance with accepted international standards, will admit the asylum-seeker and will consider the asylum claim. The last two of these essential conditions are missing from the EC resolution.

Amnesty International's concern on this point is heightened because it knows that in practice European governments often return asylum-seekers to a "host third country" without seeking any assurances that the asylum-seeker will be admitted to the country or given an opportunity to apply for asylum. For example, officials in the United Kingdom (UK), when we raise specific cases with them prior to the person concerned being forcibly returned to a third country, routinely inform Amnesty International that it is not the policy of the UK Government to seek such assurances. Amnesty International is aware of a number of cases where the

³ The EC resolution does make reference to Excom Conclusion 58 (*Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection*), but that conclusion is explicitly directed at refugees and asylum-seekers who have already found protection in another state and does not extend to those who merely transit through a third country on their way to a country where they claim asylum.

⁴ *The "safe third country" policy in the light of the international obligations of countries vis-a-vis refugees and asylum-seekers*, issued by the UNHCR Branch Office in London in July 1993

UK Government has returned asylum-seekers to a "host third country" from where they were subsequently returned to the country they had fled without any consideration of their asylum claim. We also know of cases where asylum-seekers have been sent to "host third countries" deemed to be "safe" and have then been returned by those countries to countries where they suffered serious human rights violations.

In the many cases where asylum-seekers have travelled overland before reaching the border of an EC member state, the implementation of this notion of "host third country" is likely to put heavy, even intolerable, pressures on the still fragile protection systems of some of the countries of Central and Eastern Europe. While several of these countries have lately acceded to the 1951 Convention and 1967 Protocol, and some have recently adopted or are currently adopting asylum legislation and procedures, it takes time to develop the necessary infrastructure capable in practice of dealing with large numbers of asylum-seekers. Amnesty International fears that, if large numbers of asylum-seekers are sent back to countries which have not had sufficient opportunity to develop the necessary institutions and procedures, it will be difficult to assure the effective and durable protection of refugees and asylum-seekers in those countries.

While the countries of Eastern and Central Europe are likely to be most immediately affected, countries outside Europe also will be affected by this resolution. For example, many African refugees seek asylum in an EC country after passing through other countries in Africa. More often than not asylum-seekers arriving in an EC country will have travelled through other countries since fleeing their country of origin. Indeed, it is clear that the resolution is directed at reducing the number of asylum-seekers arriving in the EC member states, with little or no regard being given to the effect this will have on "host third countries" who were not party to discussions leading to the adoption of this resolution.

The policy outlined in this EC resolution will clearly have a detrimental impact on the asylum-seekers quickly returned to other countries with inadequate assurances for their protection. But, more generally, this policy also undermines the principle of international solidarity, because some countries, by aggressively seeking to limit access to their territories by refugees and asylum-seekers, are thereby creating a greater burden for other countries which have not themselves had a chance to contribute to the discussions leading to the adoption of the policy. The Final Act of the 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which drafted and adopted the 1951 Convention, recommended that "Governments continue to receive refugees in their territories and that they act in concert in a true spirit

of international co-operation in order that these refugees may find asylum and the possibility of resettlement" (emphasis added).

È resolution on "manifestly unfounded" applications for asylum

This resolution provides for claims considered "manifestly unfounded" to be dealt with in an accelerated asylum procedure. The explicit definition of a "manifestly unfounded" claim in this resolution is similar to that already established in Excom Conclusion 30 (*The problem of manifestly unfounded or abusive applications for refugee status or asylum*). But the resolution also sets out additional criteria to identify the type of claims which will be dealt with in the same abbreviated procedure as those explicitly defined as "manifestly unfounded". These additional criteria include a general assessment that the claimed persecution is limited to a "specific geographical area" of the country and that protection is "readily available" in other parts of the country (the so-called "internal flight alternative"), or that an application is submitted for the purpose of preventing a measure of expulsion. Amnesty International does not believe it is possible to make a general assessment on such points - they can be assessed only in the light of the full facts and circumstances of the individual case. Amnesty International is therefore concerned that generalized assessments on such points will be made to categorize certain claims at the outset as destined for the abbreviated procedure for "manifestly unfounded" claims, and UNHCR has expressed similar reservations. By setting out these new criteria, the resolution effectively broadens the Excom definition of a "manifestly unfounded" claim in a way which is dangerously vague and far-reaching. Further, the resolution does not provide adequate guarantees that the accelerated procedures under which these claims will be dealt with will be fair and satisfactory and fully meet international standards.

È work program on harmonizing the application of the refugee definition

The work program adopted by the December 1991 European Council in Maastricht included the need to agree on a harmonized application of the refugee definition set out in the 1951 Convention. This is now being discussed among EC member states, and under the Danish Presidency in the first part of 1993 draft principles were prepared to guide this process.

The member states are adopting a step-by-step approach to developing a harmonized application of the definition, initially by reaching agreement on common principles for assessing selected specific elements of the refugee definition. In an open letter to the meeting of EC ministers responsible for immigration in May 1993, Amnesty International urged the EC governments in this regard not to adopt principles falling short of already established international standards. It also urged that in any resolutions on this subject an explicit undertaking be made to follow the guidance of the UNHCR *Handbook on Procedures and Criteria for*

Determining Refugee Status. The *Handbook* was issued in 1979, at the request of the Excom, for the guidance of governments, and contains authoritative guidelines on the interpretation of the refugee definition set out in the 1951 Convention. To date, we have received no assurances on these points and we understand that under the current Belgian Presidency work is proceeding on this issue.

The importance of the *Handbook* in this regard is crucial since any initiative taken by EC governments which may amount to a new interpretation of elements of the refugee definition will have consequences far beyond the borders of the EC. The refugee definition is set out in the 1951 Convention and 1967 Protocol to which around 120 states are party. Also, by far the majority of the world's refugees seek protection in countries outside the EC and Europe. The *Handbook* is meant to provide guidance to all states party to the 1951 Convention, and must therefore not be undermined by efforts in the EC member states to agree on their own interpretations of elements in the refugee definition.

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The resolutions adopted and issues currently under discussion by EC member states in some cases amount to substantive reinterpretations of conclusions adopted earlier by the Excom. Moreover, when implemented, they are likely to result in states outside the EC being forced to deal with thousands of asylum applicants turned back from EC member states. Amnesty International's view, which it has stated to the EC governments, is that it is inappropriate for EC governments to take it on themselves to develop international agreements on asylum matters without proper and meaningful reference to established intergovernmental forums, which must mean the Excom. However, in a letter last December to Amnesty International, the UK Government, on behalf of the Twelve, stated that "[we] do not accept that these are matters which should be subject to prior discussion at the UNHCR Executive Committee (Excom) or any other international forum involving states outside the Community". The letter went on to say that the Twelve maintain regular contact with UNHCR on the issues under discussion. However, this contact has only recently been established and in effect amounts to UNHCR being given an opportunity to comment on draft resolutions. The meetings where these issues are discussed by governments are generally closed to UNHCR and certainly no non-governmental organization or independent expert has ever been given an opportunity to contribute meaningfully to these discussions. In any case, the comments made by UNHCR on the EC's draft resolutions have not always been followed, and in December 1992 the UNHCR expressed reservations about some of the final conclusions reached. As the High Commissioner herself stated in a letter sent to the British Presidency of the EC in November 1992:

"I should like to share with you ... my hope that any harmonization of asylum law and policy be in line with the relevant Conclusions of my Executive Committee. The decisions taken by EC Member States in this area would have a bearing on the authority of the Executive Committee and its ability to maintain and further develop universally accepted standards and guidelines for State action. It might even influence the effective discharge of the universal protection responsibility of my Office. I feel that this is a subject on which further consultations are needed, since the EC Member States play such an important role in international protection and their policies are closely followed by other Governments.

Already countries belonging to the European Free Trade Association (EFTA)⁵ and countries in Eastern and Central Europe are, in various different inter-governmental structures, meeting with the EC member states to discuss asylum and immigration matters where policies on matters such as accelerated asylum procedures and returning asylum-seekers to "safe third countries" are being formulated. Also, on a bilateral level a number of countries in Eastern and Central Europe are concluding "readmission" agreements which provide for the return of "illegal" immigrants - which extend to asylum-seekers - to the country or countries through which they have transited. The dangers are clear: the "safe" third countries in Eastern and Central Europe who fear the sudden arrival of large numbers of asylum-seekers as a consequence of the policies of EC member states are themselves reaching agreements allowing them, in turn, to return asylum-seekers to other third countries. In this way, the asylum-seekers are shunted from one country to another, forced relentlessly back towards the country they fled.

Response of European governments to the refugee crisis arising from the situation in the former Yugoslavia

Amnesty International's concern on all the above points is exacerbated by the response of European countries, again led by the EC member states, to the refugee crisis arising from the situation in the former Yugoslavia. At EC ministerial meetings in December 1992 and June 1993, a conclusion was adopted on certain common standards relating to the reception of particularly vulnerable groups of people from former Yugoslavia. This conclusion states the view of the EC governments that the refugees from Yugoslavia should be encouraged "to stay in the nearest safe areas to their homes". No reference is made in the conclusion to the right to seek asylum set out in the Universal Declaration of Human Rights, nor does it acknowledge that it is for the individuals at risk to decide whether areas

⁵ Switzerland, Austria, Iceland, Norway, Finland, and Sweden

close to their homes are sufficiently "safe" or whether they feel compelled to seek protection abroad.

Our concern about the emphasis placed on the belief that refugees should find protection in the territories of former Yugoslavia is exacerbated because almost all EC member states, and many other European states, impose visa requirements on nationals of Bosnia-Herzegovina. Non-EC member states in Europe have followed the policy of EC member states on this point in imposing visas on nationals of Bosnia-Herzegovina. It appears they have done so, at least in part, because they feared receiving a disproportionate number of refugees as a result of closed borders elsewhere in Europe. Although the EC ministers responsible for immigration agreed to flexibly apply visa and entry controls for some people from the former Yugoslavia, Amnesty International continues to receive reports indicating a clear reluctance on the part of EC and other governments to admit and grant protection to asylum-seekers from former Yugoslavia arriving at their borders.

Further, Amnesty International believes these restrictive measures obstruct those in need of protection from reaching EC countries and, directly or indirectly, may even be forcing them to remain in areas where their lives or freedom are at risk. An Amnesty International report issued in July 1993 concluded that it was no longer reasonable to consider Croatia a safe country of asylum for Bosnian Muslim refugees⁶. There are persistent reports of forcible returns of Bosnian Muslim refugees from Croatia to Bosnia-Herzegovina, and the Croatian authorities continue to restrict access at their border to refugees fleeing Bosnia-Herzegovina, despite international standards which prohibit forcible return of asylum-seekers at the border even in situations of large-scale influx. However, Amnesty International believes that the Croatian authorities would be less inclined to violate these international standards if other European states were not resorting to imposing visa requirements on refugees from former Yugoslavia.

It is striking to note that proposals for finding regional solutions to a refugee crisis, so often advanced concerning such crises in Africa, Latin America or Asia (and indeed such solutions have on past occasions found ExCom support⁷), seem conspicuously absent in the official statements of European governments regarding refugees from the former Yugoslavia. Rather, one European country after another has imposed a visa requirement in a regrettable display of giving precedence to narrow

⁶ *Bosnian refugees: A continuing need for protection in European countries* (AI Index: EUR 48/05/93)

⁷ e.g. in Conclusion 37 (*Central American Refugees and the Cartagena Declaration*)

domestic concerns rather than the protection needs of tens of thousands of desperate people fleeing the most serious human rights violations. In this regard, it is worth noting that in May 1993 Pakistan agreed to accept 680 Bosnian Muslim refugees who feared expulsion from Croatia and who could find no other country willing to take them. In June 1993 Amnesty International received a letter from the Embassy in Switzerland of the Islamic Republic of Pakistan drawing attention to this, which also stated:

"Pakistan has made this humanitarian gesture despite the serious resources constraint problem it is facing due to the presence of over 3 million Afghan refugees The Government of Pakistan firmly believes that it is the primary responsibility of the neighbouring countries to provide shelter to the Bosnian refugees."

US policy towards Haitians fleeing since October 1991

Such threats to the international system of refugee protection arise also outside Europe. In responding to the movement of Haitian asylum-seekers fleeing gross human rights violations following the October 1991 coup which ousted the elected President of Haiti, the United States (US) has shown a steadfast refusal fully to honour its international legal obligations to protect refugees, culminating in the US Government's decision in May 1992 to forcibly return all Haitian asylum-seekers directly to Haiti.

In the months following the coup, thousands of Haitians took to the seas apparently hoping to reach the US, but were intercepted by US Coast Guard patrols before reaching US territorial waters. On 24 May 1992 President George Bush issued an Executive Order that all Haitians intercepted at sea outside US territorial waters would be returned to Haiti. Under this policy over 7,000 were intercepted and returned without the US authorities making even a cursory attempt to identify those who might be at risk in Haiti.

Under this policy, asylum-seekers fleeing Haiti were denied even the possibility of having their cases heard - albeit through an inadequate procedure - which before May 1992 had been afforded to their predecessors, who had been taken to the US naval base at Guantánamo Bay and "screened" to ascertain whether they were likely to have a claim for asylum. In Amnesty International's view the "screening" procedures followed at Guantánamo did not fully meet international standards, lacking certain essential safeguards such as access to legal advice and an effective appeal. But despite these inadequacies, this system allowed for around 11,000 of the 35,000 intercepted in this period to proceed to the US to lodge their claim (around 24,000 were returned to Haiti). After the latter part of May 1992, however, none of the Haitian asylum-seekers

intercepted at sea was allowed such an opportunity to submit their claims to the US authorities; they were simply returned direct to Haiti.

This policy is a gross violation of the internationally-recognized principle of *non-refoulement* and, specifically, the obligations of the US as party to the 1967 Protocol, under which it is bound by Article 33 of the 1951 Convention. In the context of the Americas, it is worth noting that the principle of *non-refoulement* was underlined in the Cartagena Declaration, initially adopted in 1984 by several Central American states, then endorsed in 1985 by the General Assembly of the Organization of American States (OAS) which urged all its member states, which include the US, to accept its provisions. That Declaration, among other things, reiterates:

"the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*";

and further states:

"that the countries of the region [should] establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights, taking into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx".

That Conclusion of the UNHCR Excom, adopted in 1981, states:

"Asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis it should always admit them at least on a temporary basis and provide them with protection ... In all cases the fundamental principle of *non-refoulement* -- including non-rejection at the frontier -- must be scrupulously observed".

The US Government has stated that they have established facilities for Haitians who fear human rights violations to apply for asylum to US officials in Port-au-Prince, Haiti. But in the situation prevailing in Haiti, those most at risk are unlikely to risk drawing attention to themselves by telephoning or going to the office where applications are processed, because of the need to travel to Port-au-Prince to have their cases examined after submitting their initial application, and because of the potential security risk inherent in going to the building where the processing centre is located. Sending a written application that would convince the US authorities to offer protection is in many cases

impractical in view of the high rate of illiteracy in Haiti. Moreover, in cases known to Amnesty International, people claiming asylum under this procedure have been given interview dates as long as seven months ahead; in one such case the individual concerned was badly beaten and arbitrarily detained for almost two weeks during the period he was waiting for his interview.

In any case, an asylum application lodged at an embassy cannot provide the fundamental safeguards that would be provided in an asylum procedure outside the country of origin established in conformity with international standards dealing with refugee protection. Such safeguards include the right of every asylum-seeker to appropriate legal advice and, if their application is rejected, the right to effective review of their case. Therefore, any arrangements made by the US Government for people to apply for protection to their officials in Haiti cannot be regarded in any way as a satisfactory substitute for the right to seek and enjoy asylum, set out in Art 14.1 of the Universal Declaration of Human Rights, which has effectively been denied to them by the US authorities' action in intercepting and summarily returning to Haiti those who leave the country by sea.

Amnesty International is deeply concerned that, by acting in disregard of the fundamental principle of *non-refoulement*, the US Government's policy threatens to undermine the international system for the protection of those who flee human rights violations. The US Government maintains that the prohibition on *refoulement* set out in Article 33 of the 1951 Convention is not binding on the US outside its territorial jurisdiction, and that therefore the US Coast Guard can return direct to Haiti those Haitian asylum-seekers who are intercepted in international waters. Regrettably this position was upheld by the US Supreme Court in June 1993.

In view of the prominent role played by the US in world affairs, and given the influence even outside the US of judgments of the Supreme Court, Amnesty International is concerned that the policy of intercepting asylum-seekers at sea and returning them direct to Haiti could have implications for other refugee situations. The UNHCR raised similar concerns when it issued a public statement regretting the court's decision.

Article 33 of the 1951 Convention provides that refugees shall not be forcibly returned in any manner whatsoever to the frontiers of territories where they risk serious human rights violations. The policy of the US Government with regard to Haitians intercepted at sea is an egregious violation of this fundamental principle of *non-refoulement*. It amounts to saying that, while governments are obliged to protect

refugees who have already arrived within a country's territory, if they are able to intercept fleeing refugees before they arrive at the border they may return them to face the risk of arbitrary imprisonment, torture, or death. As such it is clearly contrary to the underlying purpose of the 1951 Convention and 1967 Protocol -- the protection of refugees from persecution. Moreover, the US Government's policy of picking up fleeing asylum-seekers and returning them direct to the country they have fled runs contrary to the position taken by the ExCom in 1981, in Conclusion 23 (*Problems related to the rescue of asylum-seekers in distress at sea*), which states:

"In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis.

Amnesty International's recommendations for action by the Excom

The countries of Europe and North America assert that they are facing particular immigration problems. They argue that the measures taken to restrict the arrival of asylum-seekers are directed towards people who are not genuinely in need of protection and who are using the asylum procedure to circumvent immigration control. They also argue that the only way to secure public support for the admission and protection of refugees, and to confront rising xenophobia and intolerance, is to ensure that what is regarded as abuse of asylum procedures is eradicated. However, Amnesty International believes that in pursuing policies to eradicate alleged abuse of the asylum procedures, and to prevent the arrival of asylum-seekers through the use of restrictive measures, governments in these countries are jointly and individually adopting policies which affect individuals who are genuinely in need of protection. There is no more pressing example of this than the recent use of visa requirements to restrict the numbers of refugees from Bosnia-Herzegovina who are able to find protection in European countries.

As well as directly affecting people seeking protection, policies dictated by immediate immigration control concerns are now threatening to undermine the international system of refugee protection that has been carefully built up during the last 40 years. Amnesty International believes that the vast majority of people support the principle of offering protection to those who flee serious human rights violations -- a support that we see most readily in the active concern for refugee issues shown by our diverse membership and supporters in 150 countries and territories -- and that the most effective way for governments to

overcome hostility to refugees is for them to show a continuous and sincere commitment to that principle.

In order to address effectively the concerns raised above, the Excom must take a number of immediate steps. The willingness of states who are members of Excom to take these steps will be a test of their commitment to the principles and standards which make up the international system of refugee protection.

First, the Excom should clearly reiterate the importance of its existing conclusions, particularly

- ! Conclusion No. 8 (*Determination of refugee status*);
- ! Conclusion No. 15 (*Refugees without an asylum country*);
- ! Conclusion No. 22 (*Protection of asylum-seekers in situations of large-scale influx*);
- ! Conclusion No. 30 (*The problem of manifestly unfounded or abusive applications for refugee status or asylum*);
- ! Conclusion No. 58 (*Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection*).

Second, The Excom should clearly state that no asylum-seeker should be returned to a third country unless the returning country has first sought assurances that in the third country she or he will be granted effective and durable protection against *refoulement*. At a minimum, such assurances should include a commitment to admit the person and to give him or her effective access to a fair and satisfactory asylum procedure. In this connection, the Excom should call for an international agreement to be concluded on minimum procedural standards for considering asylum claims. This would go some way towards ensuring that asylum-seekers would indeed get a fair hearing if sent to third countries.⁸

⁸ Since November 1991 Amnesty International has been urging EC Member States to conclude an agreement on minimum procedural standards for dealing with asylum claims and has set out some essential principles which should form the basis of such an agreement. See *EUROPE: Human rights and the need for a fair asylum policy* (AI Index: EUR 01/03/91).

Third, the Excom should emphasize the importance of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* as an authoritative guide to the interpretation of the refugee definition, and call on all states to use it as a guide when making decisions on refugee status. Further, the Excom should explicitly call on states which are cooperating to reach common positions on elements of the refugee definition not to fall below the guidelines set out in the *Handbook*.

Fourth, the Excom should indicate that common measures being discussed by EC and other European states should be undertaken only in a process which allows for meaningful participation by all affected states, UNHCR and non-governmental agencies. The Excom should indicate its willingness to play a supervisory role in such a process.

Fifth, with regard to the policy of the US Government to forcibly return all Haitian asylum-seekers without giving them any opportunity to apply for protection, the Excom should reiterate the fundamental principle of *non-refoulement*, including non-rejection at the frontier, and emphasize that it applies even in situations of large-scale influx.

APPENDIX:

Recent Amnesty International papers on issues mentioned in the present paper

This list is not exclusive - in addition to the papers listed here there are several other papers which have been issued by Amnesty International sections; for details please contact the International Secretariat or individual sections of Amnesty International

EUROPE

EUROPE: Human rights and the need for a fair asylum policy (AI Index: EUR 01/03/91) (November 1991)

EUROPE: Harmonization of asylum policy - accelerated procedures for "manifestly unfounded" asylum claims and the "safe country" concept (issued by the EC project of Amnesty International) (November 1992)

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GENERAL

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