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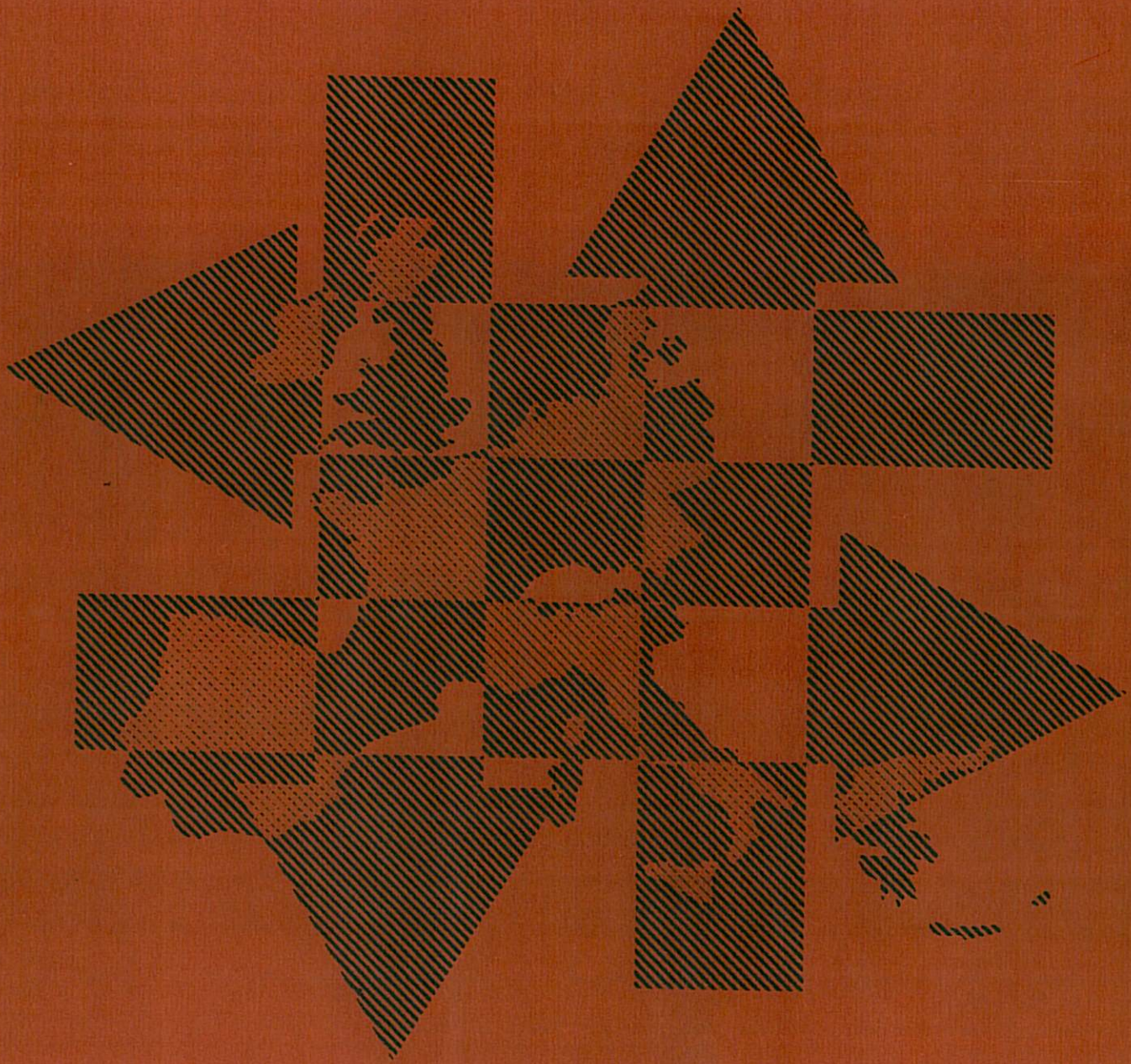
BY ANTONIO CRUZ



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INTRODUCTION

Over the years carriers' liability legislation has been introduced in most of the Member States of the European Union. As will be argued by the author of this Briefing Paper, the professed reason for its introduction is not so much to combat clandestine immigration but rather the prevention of the alleged abuse of asylum procedures. One of the questions raised is whether this goal has been reached by making carriers liable for transporting people without the proper travel documents. Moreover, it may be argued that carriers' liability is incompatible with civil aviation and human rights obligations.

This Briefing Paper is an update of one published in 1991. Since then, more Member States have introduced such legislation. On the other hand, others have, by now, considerable experience with its implementation. In April 1994, aware of the interest and concern of the Commission of the European Communities with this issue, the Churches' Commission for Migrants in Europe requested and obtained its support to make a comparative analysis of the various pieces of legislation on carriers' liability within the European Union and of the effects of their implementation. The study was undertaken by Antonio Cruz, editor of the Migration News Sheet. His comprehensive report, "Carriers liability in the Member States of the European Union - A Comparative Analysis", served as basis for this Briefing Paper.

Chapter I explains how carriers' liability legislation was introduced in most Member States of the European Union. Chapter II gives more details on how such laws have been implemented in the various Member States. Chapter III points to possible incompatibilities of carriers' liability with international instruments of refugee protection. Chapter IV outlines some of the measures carriers have adopted to avoid fines. Finally, in Chapter V, some concluding remarks are made.

Compared with this Briefing Paper, the full report contains, in addition, extensive reports on case law and the application of such laws since their introduction, including a chapter on carriers' liability in the United States and Canada, and a chapter on its incompatabilities with civil aviation obligations. Whereas in this Briefing Paper endnotes are kept to a very minimum, the full report is rich in footnotes with references to complementary sources of information, legal texts, case law, and other studies and publications on carriers' liabilities. Those who take an interest in the report for professional or other reasons can order it from CCME's Secretariat.

CHAPTER I:
THE EXTENSION OF CARRIERS SANCTIONS WITHIN THE UNION

1. Shifting the burden of immigration control

The introduction of carriers' liability legislation has been aimed not so much as to combat clandestine immigration, which is the official argument presented, but rather to prevent what these Member States consider to be the widespread abuse of the asylum procedure. Refusal to grant entry to a would-be clandestine immigrant or the issuing of a deportation order after the latter's arrest is quite a straightforward procedure as opposed to the entry of asylum-seekers, even those who fear persecution or danger in circumstances not covered by the 1951 Geneva Convention on the Status of Refugees, as amended by the 1967 New York Protocol.

Under existing human rights obligations and laws on individual rights, as well as, in some States, rights and freedoms guaranteed by the constitution, asylum-seekers have the right of entry to submit their applications. In case they are turned down, they have the right to resort to and exhaust all existing domestic legal remedies, as well as the right to refer their case, in the last instance, to the European Court of Human Rights.

Faced with obligations to admit an increasing number of people wanting to apply for asylum, Member States have therefore resorted to forcing carriers to assume a far greater responsibility for immigration entry checks, and most threaten to fine carriers for bringing in inadmissible passengers. They thus hope to severely limit the access of asylum-seekers to what can turn out to be very lengthly legal procedures of a possible duration of several years.

After as many as seven years of application of such a law in several Member States - Belgium, Denmark, Germany and the UK - it is highly questionable as to whether it has been an effective means of curtailing the arrival of asylum-seekers. Since their entry into force, the number of asylum-seekers in these country has actually continued to rise. In Belgium, the overwhelming majority (about 95%) of asylum-seekers arrive through land borders, and in the UK the large majority of asylum-seekers enter the country legally, as tourists, students, or other kind of visitors, and subsequently apply for asylum.

On the other hand, carrier sanctions, coupled with entry visa obligations, have led to a rapid expansion of illegal activities of "human smuggling" such as the buying, selling and exchange of false, counterfeit or stolen passports, visa stamps and other entry papers, and the organisation of alternative travel routes which used to be mostly via southern and eastern Europe. The more difficult it has become to enter Europe, the higher is the price paid to traffickers, and the more lucrative and attractive the "business" has become.

In the meantime, in trying to comply with the wishes of Member States, airline staff have been forced into becoming accomplices of States' violation of human rights obligations, refusing to allow asylum-seekers (and bona fide tourists as well) board flights, flagrantly discriminating against non-European passengers, and even going so far as to actually kidnap passengers and prevent them from presenting themselves to the airport immigration authorities so as to avoid having to pay fines. Gradually and reluctantly carriers accepted the much detested burden placed on them in the hope that full co-operation and collaboration with the immigration authorities of the States concerned would reduce the possibility of being fined and, perhaps, lead to a friendly settlement of the huge amounts of unpaid fines. They have, in fact, no other choice given the increasing financial difficulties which they face in an increasingly competitive industry.

As public sympathy towards asylum-seekers has tended to diminish over the last couple of years and carriers have, de facto, agreed reluctantly to assume the role of international immigration officers imposed on them, the issue of fining carriers would probably have become less controversial had it not been for the long and much awaited implemention of the complete free movement of persons which Member States were supposed to have introduced as of 1st January 1993, but have shown themselves incapable of doing so in fear of an influx of asylum-seekers and clandestine immigrants. The reality is that instead of seeing an abolition of checks at the internal borders of the Union, we are having to put up with an ever increasing number of checks and questions, especially at airports and precisely because of legislation on carriers' liability. Even if immigration authorities of the Member States were to finally accept to suppress checks on passengers on intra-Community flights, the legislation on carriers' liability would still oblige airline staff to continue on with such checks. Airlines, which have already become the scapegoats par excellence of Western countries' incapacity to deal with their own problems of reception of asylum-seekers arriving by air, are today the easy targets of criticisms of the failure to suppress all passport checks for internal EU flights.

Members of the European Parliament, affected by the increasing number of checks, have, on several occasions, denounced the effects of carriers' liability, in particular the obstacles which it places in the way of the free movement of persons (1). On 15 July 1993, the European Parliament adopted with a very large majority a resolution on free movement on persons pursuant to Article 8a of the EEC Treaty, thereby paving the way for legal action to be taken against the Commission for failing to act to ensure the abolition of internal borders.

Since then, the European Parliament has consistently called for the suppression of checks at the internal borders, in particular at airports for intra-Community flights. Such checks have been repeatedly condemned by MEPs of almost all the political groups during part-time plenary sessions. At its April 1994 part-time plenary session, the European Parliament adopted the Beazley- report (2) which calls for the complete withdrawal from the Commission's proposal of a draft convention on external border controls of Article 14 on responsibilities of carriers.

Reacting to complaints of excessive and repetitive passport checks for intra-Community flights, Commissioner Paleokrassas assured the Parliament that the Commission was continuing with the procedure of informal consultations with the Member States so that they abolish checks at internal borders. He added that "while there is a stick behind the door, there are other measures that should be taken before one uses the stick". He promised that "if the other measures do not bring about a result, in the end the stick will be used". As we shall see, the issue of carriers' liability is tightly knitted with two highly sensitive and aggravating problems, those of asylum-seekers and clandestine immigration, and it is therefore rather doubtful whether this "stick behind the door" has taken shape.

2. Extension of carrier sanctions to almost all EU Member States

Although the laws in the various Member States imposing sanctions against carriers are aimed at air and sea carriers, as well as international coaches, this comparative analysis is essentially limited to the effects on air carriers. With the exception of the ferry companies with services to the United Kingdom, those with regular services with destination to other Member States have not, so far, been burdened with accumulating fines. However, there is now a strong likelihood that ferry companies will soon be faced with the same problem of a similar magnitude as more asylum-seekers make use of ferry routes. Following strong pressure and threats of fines by the German authorities, Denmark, as of 1st February 1994, and Sweden, as of 1st April 1994, introduced stringent checks on ferry passengers heading for northern Germany.

The practice of sanctioning carriers does not, in itself, represent a precedent in legislation governing the rules of entry. Carriers have long been obliged, at their own expense, to transport inadmissible passengers back to their countries of departure. In addition to possible accommodation costs at or near the airport for the passengers refused entry, the burden of assuming such expenses used to be considered as an adequate form of sanction against the responsible airline. In 1987, three Member States, Germany, Belgium and the United Kingdom, in a move that was clearly aimed at curbing the influx of asylum-seekers, introduced laws to increase the responsibilities of carriers, making them liable to fines. Although a similar measure was included in the Danish Aliens Law of 17 October 1987, it did not come into force until 1st January 1989.

The contents, interpretation and application of such laws have varied greatly from one Member State to another, and have been applied most severely in the United Kingdom, followed by Denmark, and, to a much lesser extent, Germany where court rulings have curbed its application. As for Belgium, the authorities have so far not succeeded in fining any airline due to, inter alia, the almost impossible burden of not only proving negligence, but also imputing it to a physical person.

By now, almost all the other Member States of the Union, with the exception of Spain, Ireland and Luxembourg have passed a similar law. In Spain, the authorities consider that sanctions such as (repatriation are adequate, but an interministerial working group has been set up to examine the feasibility of following the example of the other Member States of the Schengen Group. In Ireland, with a total of no more than 91 asylum-seekers in 1993, the bringing in of inadmissible passengers has never been considered a problem. However, a similar measure may be included in its long-awaited asylum Bill aimed at enabling the ratification of the 1990 Convention on the Member State responsible for examining an application lodged in one EC Member State, the so-called Dublin Convention. For obvious reasons, Luxembourg has also not been confronted by the problem of inadmissible passengers by air, but under a new Bill drawn up with the aim of bringing its Aliens Law in line with the Schengen Convention, there is a provision on carriers' liability.

Although it is evident that carrier sanctions relate not only to policies of controls of the EU external borders, but also to plans for the suppression of internal borders, there has been no co-ordination whatsoever, either among the 12 Member States of the Union or among the 9 Schengen States, to approximate their respective policies and practices. Carrier sanctions have, apparently, never been considered as an issue to be taken up by any of the working groups or the

sub-groups set up to ensure the creation of a Schengen area without internal borders. Consequently, there was no exchange of information on the experiences of the Member States which introduced such legislation earlier. Bills to this effect were simply introduced and amended in accordance with the strength of opposition parties before reaching the stage of final approval.

All the Member States which have, after 1990, introduced or intend to introduce a law to fine carriers have cited the obligation to be in conformity with Article 26 of the Schengen Convention. It is, however, important to underline that under this Article, Contracting Parties are obliged to impose "sanctions" "on carriers who tranport aliens who do not possess the necessary travel documents". There is no mention whatsoever of imposing "fines". Moreover, the obligation of imposing "sanctions" only refers to undocumented passengers arriving from outside the Schengen area. Likewise, Article 14 of the Commission's proposal for a Convention on external border controls, imposes on carriers the obligation "to take all necessary measures to ensure that persons coming from third countries are in possession of valid travel documents and of the necessary visas". The condition that the undocumented passenger arrive from a third country has been ignored in all the laws governing carriers' liability.

The term "sanctions", which is used in the various languages of the Schengen Convention is, of course, open to various interpretations and does not necessarily imply "fines". For example, in the German version, the term "Sanktionen" is used, an extremely unprecise term for a country whose legislation provides for no less than three distinct kinds of fines. Only in the English translation of the Schengen Convention is a much stronger term, "penalities", used. However, it must be pointed out that the English translation provided by the Schengen Secretariat in unofficial, since English is not a working language of the Schengen Group.

It is significant to note that this same discrepancy of terminology reappears in the Commission's proposal for a Convention on external border controls. The English version, official in this case, is the only one which uses the term "penalties" instead of "sanctions". On the other hand, there is no such discrepancy in the draft Convention of the Member States of the EC on the crossing of their external borders, elaborated by the ad hoc Group Immigration.

Besides, Article 26 of the Schengen Convention hold carriers responsible only for passengers being in possession of the necessary travel documents, not for their authenticity. In addition, there is no mention of "entry visas", nor of the obligation to ensure their authencity or their validity. The way fines have been

imposed in the countries applying strict liability upon carriers has imposed the burden upon the airline staff to act as well-qualified, professional immigration officials with knowledge of entry requirements of all countries served by their company.

Unlike the afore-mentioned Member States, the practice of imposing fines for inadmissible passengers, as an immigration control mechanism, originated in traditional countries of immigration - the USA, Canada, Australia, as well as Argentina, Bolivia, Brazil, Thailand, Uruguay and Venezuela. The wealthier and more industrialised ones, particularly the USA and Canada, have, as in Europe, also been confronted with an increasing number of people arriving by air with inadequate or forged entry documents who subsequently apply for asylum. Consequently, carriers transporting passengers to these countries also run the risk of having to pay out large amounts in fines.

CHAPTER II:
POLICIES AND PRACTICES IN THE EU MEMBER STATES

1. EU States where carriers are/may be fined and amount(s)

Belgium: The law entered into force in July 1987. A penality amounting, at present, to BF 150,000 (ECU 3,788) per inadmissible passenger is imposed if there are at least five inadmissible passengers on the same flight/voyage. The law is only applicable to air and sea carriers. As the burden of proof of negligence is upon the authorities, and carriers have taken measures to ensure that passengers are in possession of the required valid travel documents, no carrier has yet been fined. A court ruling handed down on 15 April 1993, concerning Sabena Airways, as well as the unique element of the Belgian law of not imposing fines when less than 5 inadmissible passengers arrive on the same flight have rendered the law virtually impossible to apply. As of 30 June 1994, no airline had yet been fined.

Germany: The law entered into force on 7 January 1987, but there had already been provisions, since 1981, to fine carriers in cases of serious negligence and/or of criminal act. There are two distinct kinds of administrative fines: "Zwangsgeld" of DM 500 - 5,000 (ECU 260 - 2,600) per inadmissible passenger with a minimum of DM 2,000 (ECU 1,040) for air and sea carriers, and "Geldbusse" of up to DM 20,000 (ECU 10,400) per inadmissible passenger. As opposed to "Geldbusse", no proof of negligence is required to impose "Zwangsgeld". However, in order to impose "Zwangsgeld", the airline concerned must be under a certain prohibition order (Untersagungsverfügung) not to bring in passengers without the required valid documents. If an airline does bring in such passengers, and it is not or no longer under an "Untersagungsverfügung", no fine is imposed. On the other hand, if it is a case of serious negligence and/or of an intentional act to transport undocumented passengers, the airline would be required to pay "Geldbusse". The question as to whether the fining of airlines is incompatible with the constitutional right of asylum has still to be decided by the Federal Constitutional Court (BVG). In the meantime, all court cases in which the airlines have appealed against their fines have been left pending until the BVG makes its ruling which is already excluded for this year.

Denmark: The law entered into force on 1st January 1989. A penalty of Dkr 8,000 (ECU 1,062) is applied per inadmissible passenger. So far, the fine only applies

to airlines, after having been warned once, and only in cases of passengers without the required entry documents who apply for asylum in Denmark. In the case of a bona fide tourist, for example, who does not have an entry visa, no fine is imposed. Denmark is the only country where the highest judicial body, the Supreme Court (the Højesteretsdomme), issued, on 26 June 1991, a ruling on the levying of fines on carriers. It confirmed the earlier ruling, on 29 October 1990, of the High Court (Østre Landesret) on a limited application of strict liability on carriers. Airlines are required to submit convincing evidence that they had done all that was possible to prevent the arrival of the passengers without valid entry documents whom they had transported to Denmark.

Greece: The law entered into force on 4 December 1991. An administrative fine of Drch. 100,000 - 1,000,000 (ECU 350 - 3,500) per inadmissible passenger is levied if the carrier refuses to assume responsibility for accommodation, repatriation and other costs incurred by the inadmissible passenger(s). In other words, no fine is imposed on carriers which agree to cover such costs. The same possibility of a fine plus a 12 months' prison sentence are imposed in case of deliberate participation in the clandestine entry of inadmissible passengers. If the offence is repeated and/or there are other aggravating circumstances, the carrier risk two years' imprisonment plus a fine of Drch. 500,000 - 5,000,000 (ECU 1,748 - 17,480).

France: The law entered into force on 9 February 1993. An administrative fine of FF 10,000 (ECU 1,520) is imposed per inadmissible passenger brought in by air or sea. FF 5,000 (ECU 760) per inadmissible passenger brought in by land. Carriers charged with violating the law are required to submit evidence that they had not acted negligently. There are already a number of cases of appeals lodged by carriers. Apparently, in practice, carriers are not fined when the passengers without valid entry documents are removed almost immediately from France without incurring any costs for the authorities.

Italy: The law entered into force on 2 Octobre 1993. An administrative fine of It. Lit 200,000 - 250,000 (ECU 108 - 135) is imposed per inadmissible passenger when negligence is proven by the authorities. Carriers' liability is apparently not a problem in Italy not only because of the relatively small amount of the fine stipulated by law, but also because asylum-seekers are often prevented or not given the opportunity by the authorities to present their applications.

Luxembourg: (only a Bill) An administrative fine of FLux 50,000 (ECU 1,263) is to be imposed per inadmissible passenger. Since all of Luxembourg land borders are with Schengen Member States, the future law would only be

applicable to airlines which would be required to submit proof that they had not acted negligently. In any case, Luxembourg is not confronted with the problem of arrival of passengers without valid entry documents.

Netherlands: A penalty of Dfl 5,000 (ECU 2,315) or 6 months imprisonment is imposed per inadmissible passenger. Under the new Aliens Law which came into force on 1st January 1994 there is a provision that explicitly obliges carriers to photocopy the passport of passengers who board flights in so-called "risk countries", that is to say refugee-producing ones. The provisions on imposing fines on carriers are not expected to be applied until the Schengen Convention, which entered into force on 1st September 1993, is itself effectively applied. At the meeting of the Executive Committee of the Schengen Group in Bonn on 27 June, it was announced that the Convention would be applied as of 1st October 1994.

Portugal: The law entered into force in Portugal itself on 3 March 1993. The amount of Esc. 200,000 - 250,000 (ECU 1,006 - 1,258) levied on carriers per inadmissible passenger is neither an administrative fine nor a penalty. Called "coimas", it is situated somewhere between an administrative fine and a penalty since "coimas" are levied by the administrative authorities, but appeals against the charges are dealt with by lower criminal courts. Although applicable, according to the law, to air, land and sea carriers, only air and sea carriers are affected since its land borders are with Spain, a Schengen Member State. There are already a few cases of appeals before the courts. According to the frontier authorities (SEF), carriers are charged only in cases when "serious negligence is proven".

United Kingdom: The law was given its final approval on 25 May 1987, but has been applied, with retrospective effect, as from 5 March 1987. An administrative fine of £ 2,000 (ECU 2,576) is applied per inadmissible passengers who are brought it by air and sea carriers, but the operators of the Channel Tunnel are to be exempt from its application. The law is very strictly applied, the harshest of all European Union States, and the circumstances under which fines are waived are very few and defined in a restrictive way. Since its application, there has not been one single ruling in the civil courts on the numerous appeals lodged.

2. Special provisions concerning asylum-seekers/refugees

Special provisions concerning undocumented asylum-seekers whose applications are not manifestly unfounded are explicitly mentioned in the carriers'

liability law in France, Italy, Luxembourg (Bill) and the Netherlands. No liability is incurred if a passenger without the required valid travel documents is authorised to apply for asylum and the case is not considered to be "manifestly unfounded".

In **Germany**, even if undocumented passengers are subsequently granted refugee status or permission to remain on humanitarian grounds, the fines against the carrier that transported them are not cancelled. The argument is that there is no connexion between the fact that the person is a genuine asylum-seeker and the transporting of a passenger without valid papers. The latter act violates the law and the carrier must therefore be fined. Carriers operate on business lines: since they do not accept passengers without valid travel tickets, neither should they be allowed to accept passengers without valid entry documents. However, this issue has yet to be decided by the Federal Constitutional Court (BVG).

Denmark applies the same reasoning as Germany. The authorities do not take into consideration at all whether a passenger without valid entry documents is an asylum-seeker fleeing from death and/or torture. What matters is whether or not the person arrived in Denmark with the required entry documents. The reasons for not having them, however valid they may be, are totally irrelevant if the person subsequently applies for asylum. In such cases, the airline responsible would have to submit convincing evidence that it could not possibly have avoided the transportation of this passenger. Contrary to Germany, the highest judicial body in Denmark has already issued its ruling on carriers' liability.

In **Greece** no mention is made of undocumented asylum-seekers in the law, but Greek courts have accepted to annul the charges against carriers when the undocumented passengers whom they brought into Greece were subsequently granted refugee status.

In the **United Kingdom**, the Government refused to add such a provision in its law on carriers' liability. But later it issued a set of guidelines specifying situations in which fines are cancelled or there is no liability. One of them concerns refugees. However, as a rule, fines have been cancelled or reimbursed only in cases (rather rare) when the undocumented passengers ultimately received refugee status. Fines have not been cancelled when the undocumented passengers received exceptional leave to remain on humanitarian grounds. This matter is still in dispute between the Government and a number of airlines.

3. Other forms of sanctions in addition to fines

Other forms of sanctions, namely the covering of all costs incurred as the result of the bringing in of inadmissible passengers, as well as their deportation costs, are explicitly mentioned in all the existing laws on carriers' liability, with the exception of the British law. Nevertheless, carriers which bring into the UK undocumented passengers are required to pay detention and deportation costs. The German carriers' liability law is very precise in requiring carriers to assume full responsibility for the costs of deporting passengers without the required entry documents. When in doubt as to whether such costs will effectively be covered by the airlines concerned, the authorities have the right to demand that a certain sum of money be deposited with them. Responsibility for the removal of inadmissible passengers used to be considered as an adequate form of sanction against the carriers responsible. It is still the case in Spain.

CHAPTER III:
INCOMPATIBILITIES BETWEEN CARRIERS' LIABILITY AND INTERNATIONAL INSTRUMENTS OF REFUGEE PROTECTION

The introduction of entry visa requirements, complemented with warnings and threats of fines against carriers to force them not to bring in passengers without the required entry documents clearly violate, indirectly, international obligations of granting protection to refugees. Such measures are explicitly criticised in a Recommendation of the Council of Europe (3) which notes that:

"*Stricter visa requirements have increased the use of forged travel documents, as it is difficult for a genuine asylum-seeker fleeing persecution to acquire them through legal means*".

The Recommendation then points out that:

"*(...) airline sanctions (...) undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from the immigration officers*".

Without going so far as to issue an outright condemnation of such practices, a British High Court Judge, in a ruling on 6 March 1990, implicitly condoned the practice of six asylum-sekers who lied and misled an airline so as to circumvent visa requirements and its fear of fines, and be able to fly to the UK to apply for asylum. Moreover, in another far-reaching ruling by the British Court of Appeal in April 1992, upheld by the House of Lords on 26 May 1993, the Court clearly affirmed that it was not a prerequisite to hold a valid passport (by deduction, a valid visa as well) to apply for asylum. Besides, the Court found no offence in the use of forged documents to arrive in the UK if the ultimate and real aim is to apply for asylum, and not try to enter the country illegally.

Some refugee experts have argued that carriers' liability violate Article 13, paragraph 2 of the 1948 Universal Declaration of Human Rights, Article 12, paragraph 2 of the 1966 International Convenant on Civil and Political Rights, as well as Article 2, paragraph 2 of Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. All three of these provisions provide for the right of everyone to leave any country, including

his own. Such a liberal interpretation of these instruments would have difficulty in gaining acceptance in a court since laws on carriers' liability do not really prevent a person from leaving his country, including his own, but rather from departing to a certain country.

The European Court of Human Rights, as well as the European Commission, have ruled and reaffirmed on several occasions that "the right of an alien to reside in a particular country is not as such guaranteed by the Convention" (4). It is, of course, possible to argue that the increasing number of countries which have introduced a law on carriers' liability is creating more and more obstacles before the options of departure. As mentioned already, there are more and more incidents of air passengers with valid travel documents who are prevented from boarding their flights. This tends to happen if the passenger is a national of a Third World country or appears to be such, travels on a one-way ticket, and does not have any check-in luggage.

In any case, the real issue here is not the prevention of a person from leaving a country, but rather the gradual elimination of possibilities of flight to industrialised countries for those fleeing persecution. This is where carriers' liability is blatantly incompatible with the principal international instrument of refugee protection, that is the 1951 Convention relating to the Status of Refugees. Article 31 clearly prohibits Constracting States from imposing:

"*penalities, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened (...) or are present in territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*".

With legislation designed to impose penalities on carriers which bring in asylum-seekers whose travel documents are subsequently proven to be forgeries, the penalities are imposed indirectly on refugees who are thus prevented from fleeing from their country of persecution.

Carrier sanctions are also inconsistent with paragraph 2 of this same article which prohibits Contracting States from applying

"*to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country*".

Moreover, Contracting States with laws on carriers' liability are indirectly, if not directly, violating Article 33 on the prohibition of expulsion or return by placing on airlines the obligation to refuse asylum-seekers without, for example entry visas, the right to embark on board an aircraft. An airport is also a 'frontier', and the refusal to allow an asylum-seeker leave his alleged country of persecution has exactly the same effect as returning him there.

As for the United Nations High Commissioner for Refugees (UNHCR), it has, on a number of occasions, expressed its concern over the effects which laws on carriers' liability are having on protection for refugees. Its position on such laws is as follows:

"While States have a legitimate interest in controlling irregular migration and a right to do so through border measures, including visas, they act inconsistently with their international obligations towards refugees when measures such as carrier sanctions hinder the access of refugees to status determination procedures and to asylum. Carrier sanctions pose a threat to basic principles of refugee protection, to the operation of asylum procedures, to procedural guarantees of due process, and to international cooperation in resolving refugee problems with full respect for the human rights of the individuals involved. UNHCR is concerned, for example, that the emphasis by some European States on the 'authorization principle' (5) will have the effect of causing States to strengthen carrier sanctions even further as a mechanism for enforcing entry requirements. UNHCR's position is that States' concern about unfounded claims can be better addressed by careful harmonization of standards of application, treatment, and implementation, such as, for example, with regard to accelerated procedures.

"If States consider recourse to carrier sanctions unavoidable they should, at a minimum, implement them in a manner which is consistent with refugee protection principles, and which does not hinder access to status determination procedures. States should enforce sanctions only in the event that they can establish that carriers are negligent in checking documents, and knowingly brought into the State a person who did not possess a valid entry document and who did not have a well-founded fear of persecution. This puts the onus on the State to demonstrate airline's recklessness in bringing in individuals, in full knowledge that they do not leave their countries for persecution reasons. It does not require, therefore, any judgement by airlines on the asylum claim or the validity of the documents. Rather, it requires the State to prove that the airline knew the claim was not well-founded. In this posture, the burden of proof falls, more appropriately, upon the shoulders of the State, in recognition of the fact that States, not carrier personnel, have the appropriate training and authority to identify those with well-founded claims for refugee and asylum. Airlines must not be required to determine whether passengers are refugees. States should

exempt carriers from liability if the person is admitted to the asylum procedure, and should consider waiving penalties if a person is admitted for humanitarian reasons generally.

"The introduction or not of visa requirements for a particular nationality is a legitimate measure of immigration management as is the use of sanctions for carriers who bring passengers without the necessary documentation. When visa requirements are applied in combination with carrier sanctions indiscriminately to persons in need of protection and to persons who are not they may however prevent access to safety for persons in need of it."

CHAPTER IV:
MEASURES ADOPTED BY CARRIERS TO AVOID FINES

The consequences of imposing fines on carriers which are known to the general public are, in fact, comparatively innocuous when considering other victims who have been prevented from boarding flights. True enough, air passengers used to showing their passports to airline staff only once, when checking-in, have quite valid reasons to be infuriated at having now to do so three times, especially after having been told since 1986 that passport checks at the internal borders would disappear as of 1st January 1993.

There are, of course, also the often humiliating treatment meted out to some EU nationals whose only "fault" is to be of non-European origin or do not look European enough. It may just be a question of time before some airlines are eventually convicted for practising overt discimination as a result of the special treatment of passport checks (including photocopying of travel documents), reserved for "suspicious passengers".

Those who have suffered the most are, unfortunately, the ones whom we do not hear about since they have no legal or effective access of complaints. These are the people whom airline officials, acting alone or upon the advice of immigration officials of countries of destination, have been denied the right to board their flights. We may safely assume that quite often they were potential asylum-seekers who, because of stringent visa and other entry requirements in the planned country of destination, might have made use of the services of traffickers of false passports and/or visas. However, with more countries introducing laws on carriers' liability, more and more cases are beginning to emerge of bona fide tourists refused the right to board an aircraft even though they had valid tickets.

On the other hand, one of the more perverse consequences of the introduction of harsh visa policies and fines in the planned country of destination has been the development of a rather lucrative business for traffickers. The more difficult the conditions of departure and entry have become, the higher the price that must be paid. The business owes its prosperity to the fact that the price is high, the risk is low if not negligible, and there is no refund when the services offered cannot be fully rendered.

The variety of methods used to circumvent stringent checks prior to embarkation leaves little doubt of traffickers' imagination. Other than forged visas, forged passports, tickets which are not fully used up because it is the country of transit where the asylum-seeker wants to disembark, there are asylum-seekers who embark with one identity and disembark with another. One method that is quite often used consists of "lending" very good forged documents to a group of asylum-seekers. These persons would then not encounter difficulties in boarding their flight. A middle-man would travel with them to collect their documents, and return to the country of departure so that they can be used again.

Airlines complain that they are being confronted more and more with very professional work on forged passports and visas. British Airways has pointed out that during the first few years of the implementation of the Carriers' Liability Act, most of the fines were the result of what it has acknowledged to be their "errors". Now, more than 50% of the fines result from passengers arriving without documents (although they were in possession of them before boarding) or with forged ones. Despite strenuous efforts, including the checking of passports at the exit gate to ensure that the identity concur with that of the boarding pass, British Airways admits that it is not making progress in bringing the proportion of such fines down.

One major problem facing airlines, which some governments continue to ignore, is the fact that in many airports around the world they do not or may not handle the checking-in of passengers. This is most often done by the staff of the national airline and its major competitor of the country concerned. Even if the 'fault' is committed by the check-in agents of another airline, the one which brings in the undocumented passengers is the one which is fined. There is no way that the "offending" airline can turn against the company whose staff carried out the check-in formalities. Airlines most affected by such fines have tried, in vain, to insert a clause in the handling contracts to remedy this situation. Consequently, they have had no other alternative but to pay private security companies in some "sensitive airports" to double-check passports, which is not only very expensive, but also detrimental to their image.

Another one concerns a tactic that is rather often used by asylum-seekers, that is disposing of their travel documents in the toilet during the flight. Airlines angrily complain that there is nothing that they can do to stop this as they can neither prevent passengers from going to the toilet, not accompany them inside the toilets! One could imagine the introduction of a rule that requires all passengers to surrender their travel documents at the exit gate, before boarding. Upon arrival, airline officials would have great difficulties in sorting out passports and

giving them back to the right person, especially when there are some 300 or more passengers on board. Unlike the procedure of surrendering passports on board a train or an international coach for inspection at a frontier, passengers arriving by air cannot be expected to remain seated for a couple of hours while their passports are being returned. Besides, the aircraft cannot be stationed at the arrival gate for a long time. Once passengers leave an aircraft, they mingle into a crowd of thousands of people at a major international airport, and it would be extremely difficult to locate someone with the wrong passport.

Moreover, as pointed out by a judge of the Administrative Court (VG) of Frankfurt, since an airline would have to restitute these documents when passengers disembark, there would still be many possibilities to get rid of one's travel documents before arriving at the immigration control desk. Another possibility would be to restitute the passports at the immigration control desk, but unless airports are completely restructured, this would provoke a real chaotic situation every time an aircraft lands! This latter possibility is to be excluded, not only because no party will or is able to assume the very high costs required, but also, where the European Union is concerned, it would make a mockery of the principle of free movement of persons.

In practice, there are some airlines which withhold the passport of some passengers. The Canadian Immigration Ministry proposes that passports, when withheld by an airline, be kept in a sealed bag. Some airlines are very much against implementing this proposal as they feel that it would do much harm to their reputation. There is also the danger that passports taken into custody by airline officials may get stolen, lost or restituted to the wrong person. Besides, with all the risks involved in withholding passports, the practice itself may be used as a further argument to fine the airline. If the passenger concerned applies for asylum upon arrival, the authorities, in particular the British Home Office, may argue that the airline had, in fact, suspected that the travel documents of the passengers were either insufficient or invalid. Otherwise, the airline would not have taken the passenger's passport into custody.

The criteria of judgement when deciding which passengers should surrender his/her passport inevitably include discriminatory ones, and passengers are under no obligation to surrender their passports other than a possible threat by the airline to refuse carriage. In making such a threat, carriers run the risk of being confronted with a lawsuit.

In order to deal with the problem of travel documents which "disappear" between the country of departure and place of destination, airlines are also advised by

immigration authorities of countries which levy fines to make photocopies of passports when there are reasons to suspect that the passengers concerned intend to dispose of their travel documents. Such a procedure, like the witholding of passports, inevitably constitutes an encouragement to discriminate against certain categories of passengers since it is virtually not practical to photocopy the documents of all passengers.

International flights usually require passengers to check-in two hours prior to departure time. The time schedules must be strictly respected because of the importance of the "time slot" allocated to each flight, that is a certain time range within which the aircraft must be ready for take-off. Otherwise the slot is lost, the airline incurs important financial losses, and this can result in a delay of several hours before another "time slot" can be allocated. If passports are to be photocopied, this should be done at the exit gate so as to eliminate the possibility which a passenger has to switch travel documents after presenting himself at the check-in desk. When there are a few hundred passengers on a flight, the photocopying of all passports would inevitably lead to the lost of the "time slot".

Besides, it is not worth taking the risk of losing a "time slot" since there is no guarantee that the photocopy of a passport which subsequently "disappears" will free the airline concern of any liability. Most countries with laws on carriers' liability require, in fact, that the photocopy shows no sign of "evident forgery", a very subjective appreciation almost always used to the advantage of immigration officials - what is "evident" to a trained and experienced immigration official under no time pressure is not necessarily "evident" to an airline staff member obliged to respect time schedules most attentively.

It is also appropriate to point out that airlines are having to shoulder the greater part of a burden which they have in no way created, that is the arrival of asylum-seekers, most of whom do not have the necessary valid entry visas or have resorted to the use of forged documents. Carrier personnel are not and will never become competent immigration officers and, not least, refugee sympathisers. When faced with a likely persecuted person whose possibility of entry into the country of desired destination may be in some doubt, operators will prefer not to transport the passenger to avoid the risk of being sanctioned. As we have seen, some have even "kidnapped" passengers to prevent them from disembarking so as to avoid fines.

In today's highly competitive airline industry, carriers sanctions have placed some airlines at a disadvantage, in particular the national ones of the countries with a very harsh carriers' liability law. The tendency to single out passengers of

Third World countries as possible "risks", and therefore subjected to more stringent checks, has tarnished the reputation of some airlines. Airlines have had to spend more on passport controls, and some have been closely co-operating with government officials, and still they get fined. Indeed, the legislation on carriers' liability, as it is applied in some countries, is one example of a law that designates and penalises "offenders" who have done their utmost to respect the law. Fining carriers when there is neither intent of negligence nor misconduct on the part of their staff is arguably the same, if not worse, than applying sanctions against immigration entry officers for authorising entry to visitors who remain in the country after their visas expire.

Where the application of justice is concerned, fining airlines constitutes neither a retributive form of penalty, nor a utilitarian one. The penalty is not retributive because, in the overwhelming majority cases, not only is there no conscientious act of negligence but also there is concrete evidence that strenuous efforts were made to avoid committing the "offence". It is not utilitarian since there is still no substantiated evidence that it has served a legitimate purpose. Far from curbing the activities of traffickers of false passports and visas, it has contributed to their expansion, and multiplied their profit margins. On the contrary, it is anti-utilitarian, unfair, and makes scapegoats of carriers forced into a position of violating international human rights obligations to which the countries imposing such fines have subscribed.

In order to avoid the burdens of fines, airlines have been actively collaborating with governments, allowing them to second airline staff in charge of checking passports. The once talked about "potential danger of an unholy alliance between governments and airlines" is now a reality.

CHAPTER V:
CONCLUDING REMARKS

The issue of carriers' liability cannot, in fact, be separated from that of spontaneous asylum-seekers arriving by air to whom Member States, if they are to be guided by the principles of human rights which they themselves advocate and the rule of law, may not refuse entry without examining the merits of their claims. Such a right is either enshrined in their own constitution and/or their own national legislation, upheld and reaffirmed in their own case law.

It so happens that a fair and equitable procedure for examining asylum applications may take quite some time in cases of negative decisions when the applicants will inevitably try to exhaust all legal means of appeal to avoid deportation. Whilst there are people who flee for reasons unrelated to persecution, it cannot be denied that the increasing number of areas of ethnic, civil and international conflicts has led to an inflationary number of people seeking asylum.

This problem has been growing at least since the mid 1980s, and the Member States of the Union have shown themselves to be totally incapable of agreeing to and implementing a co-ordinated strategy aimed at providing an adequate response to this humanitarian challenge. Each Member State has been trying to avoid taking in more asylum-seekers that they have to, trying to pass on the responsibility to another Member State.

The lack of will and enthusiasm in working together on the asylum issue is clear from the fact that four years after it was signed, the Dublin Convention has still not come into force. This is all the more surprising as the Convention is, in fact, a very limited instrument whose application is restricted to the territory of the Union. Selfish interests continue to prevail, and the Convention has been used as a pretext, especially by the UK, to deport asylum-seekers to another Member State.

Since the Member States cannot do much to prevent asylum applications from being submitted once the asylum-seekers arrive, the response chosen has been to block their access by land, with readmission agreements, and by air and sea with threats of fines to carriers, in particular airlines. The transfer of responsibilities which governments themselves are unable or unwilling to assume to airlines is blatantly clear. Besides, this is not limited to the problem of undocumented asylum-seekers. As shown in a case presently before the European

Court of Human Rights, airlines handling cargo may also have to pay a very heavy price when they are outwitted by traffickers involved in drug smuggling.

It is significant to note that in all the laws on carriers' liability, none of them include a provision to fine the railways despite the fact that on the continent many asylum-seekers use rail transport. One possible reason is that most railways are State-owned, and if railways were to be treated like airlines, that is charged with fines unless they provided convincing evidence discharging them of any negligence, this could cause embarrassing problems between European States.

Eurotunnel is, however, a private company, and there are legitimate reasons to question why this company should be exempt from both the British and the French carriers' liability laws. The explanation given by the information department of the UK Home Office is that there is no need, in its view, to apply its 1987 Act to the Channel Tunnel operators since passengers are to be checked before leaving France, and checked once again when they arrive in the UK. It is, indeed quite difficult to imagine the difference between checks carried out by the Channel Tunnel operators, and those carried out by shipping companies or airlines. The Home Office, apparently, sees a difference.

The decision by the Home Office to exempt Eurotunnel from the 1987 Carriers' Liability Act has prompted a cross-channel hovercraft operator, Hoverspeed Ltd., to lodge two complaints with the Commission of the EC on 27 July 1994. In its first complaint, Hoverspeed claims that the 1987 Act is in breach of the UK Government's obligations under Articles 5 and 7a of the Treaty on European Union in so far as it is applied with respect to passengers arriving in the UK from another EU Member State. The reason is that the 1987 Act obliges its check-in assistants to operate as immigration officials to check all passengers. Moreover, in its second complaint, Hoverspeed argues that exempting Eurotunnel from the application of the Act constitutes a "hidden subsidy", and therefore a form of illegal State aid.

The continuing failure of the Member States to suppress checks at their internal borders is largely due to their failure for almost a decade now to work together not only on the question of asylum but on the whole issue of migration. Reports of the European Parliament, and of the Commission or requested by the Commission have remained on the shelves or inside drawers while Member States continue with unilateral actions to diminish or evade their humanitarian responsibilities towards asylum-seekers. We have, unfortunately, seen the selfishness of some Member States at its worse during the current conflict in Bosnia: instead of the "sharing of humanitarian responsibilities", West European

States, even the more generous ones, have spoken of "burden sharing" which, in addition to its derogatory implication, has largely been received with insensitivity.

As negotiations continue on how to suppress checks at internal borders, checks which had been suppressed since the sixties are now reappearing. Faced with strong pressure from the German Government, and with threats of fines on their ferry companies, Denmark has re-introduced passport checks (based mainly on appearance) on some ferry passengers arriving, in particular, from Sweden. Such checks were suppressed more than 30 years ago as a result of the Nordic Passport Agreement. Likewise, checks at the border between Belgium and the Netherlands, which was considered to be a thing of the past, have been reintroduced by the Netherlands faced with an increasing number of asylum-seekers.

It is within this background of being overwhelmed by asylum-seekers that legislation on carriers' liability was passed in some Member States and others followed in the belief either that they could leave no door unlocked and/or that they had to do so to comply with the obligations to which they susbcribed in the 1990 Schengen Convention. As it turned out, the number of asylum-seekers kept on increasing whereas the number of people fleeing persecution throughout the world reached levels not seen since the end of World War II. If some EU States are now witnessing a decline in the number of asylum-seekers, it is not because of their legislation on carriers' liability, but rather of the tightening up of their respective asylum laws, and the "cordon sanitaire" which has emerged, especially along the eastern periphery of the Union, as a result of so-called readmission agreements.

The argument used by some Member States is that if their laws on carriers' liability did not exist, the number of asylum-seekers entering into the country would be even higher. There is, of course, some truth in this, and we shall perhaps never know how many persons have been prevented from leaving their country of persecution on account of such a law. Nor shall we ever know many asylum-seekers managed to leave their country of persecution only to be sent back directly or via a third country by the airline which took them out, but wanted to avoid having to pay heavy fines.

A law in application for some time will require, in order to be repealed, fact and arguments far better than the ones used to have it adopted in the first place. It would be illusory to believe that given today's aggravating refugee crisis in the world and the growing migration potential fueled by poverty and unemployment

Member States would simply repeal their laws on carriers' liability on the ground they constitute a major obstacle to the complete free movement of persons within the Union.

An alternative in the form of a Community Directive on carriers' liability could be made acceptable, if it could allay Member States' fear of having to confront the arrival of an increasing number of undocumented passengers who subsequently apply for asylum. For the sake of the right of free movement, it would, of course, have to be based on the principle of the Union being one geographical entity, thus implying that no fines, nor any other forms of sanctions should be imposed on airlines for flights within the Union. Airlines should, whenever possible, assume the return of an inadmissible passenger from the Member State of arrival to the Member State of departure. The condition "whenever possible" is needed because airlines cannot be expected, for reasons of flight security, to return passengers opposed to their removal. The setting up of a common fund to pay for alternative means of returning an inadmissible passenger to the Member State of departure may prove to be necessary to avoid opposition from Member States which are likely to complain of excessive financial burdens.

The condition sine qua non of such a Directive would be the implementation of the Dublin Convention, to be followed by the so-called parallel one involving non-Member States of the Union. States which are party to either convention would, of course, need full trust in each other, and adhere strictly to the rules designating the Member State responsible for examining asylum applications as well as to (very probable) future rules designating the Member State responsible for taking back clandestine immigrants.

As for flights arriving from outside the Union, it is necessary to examine the wide discrepancies of the Member States laws on carriers' liability in view of their harmonisation, taking into account the court rulings so far and constitutional requirements of some Member States. If such discrepancies are allowed to continue, there is the risk of a "downward spiral" with more and more Member States adopting severe laws on carriers' liability, in almost the same way as Member States have, in turn, tightened their laws on asylum. The practice of fining carriers when the State is not obliged to or cannot provide concrete evidence of wilful negligence is, as we have seen, contrary to the principles of both retributive and utilitarian penalties, and should therefore be stopped. The obligation for an airline to return a passenger to the country of departure or any other country where he may be admitted, as well as assume, with the passenger, joint responsibility for costs incurred, for example accommodation expenses, pending the outgoing flight is more than an adequate form of sanction. If fines

are to be imposed, in addition to these sanctions, then they should be within a range of between zero and a maximum amount for the most evident cases of manifest negligence on the part of a carrier.

Unfortunately, the afore-mentioned alternative does not tackle the issue of asylum-seekers wanting to leave their country of persecution, and seek the services of traffickers because of entry visa requirements in the country of planned destination. This is a humanitarian issue which has no place in the commercial activities of airlines, and has to be discussed between governments and the international agency responsible, that is the UNHCR, with the participation of interested bodies, in particular the International Air Transport Association (IATA) and the International Civil Aviation Association.

Judging from what we have seen so far of the 12 Member States' attempts to co-ordinate their policies in the domain of migration and refugees, the elaboration of such a Community Directive may very well take at least a couple of years. In the meantime, as long as they are confronted with the risk of fines, carriers will continue to order their staff and private security firms to check travellers moving within the Union. There is no sense in pretending that the Single Market has brought about the abolition of internal border checks on people as the Commission has done in its posters to publicise the merits of the post 1992 Europe. Rather than make repetitive and meaningless declarations that active negotiations are being pursued to bring about the abolition of internal border checks, the institutions of the Union should do better to publicly acknowledge that that unless the obstacles are removed, the free movement of persons without checks at internal borders cannot be realised.

15 August 1994

NOTES:

(1) REPORT of the Committee on Legal Affairs and Citizens' Rights of the European Parliament on the incompatibility of passport checks carried out by certain airlines with Article 7a of the EC Treaty (sic!). Rapporteur: Mr David MARTIN. Doc. A3-0081/94, 17 February 1994.
(2) REPORT of the Committee on Civil Liberties and Internal Affairs of the European Parliament on the communication of the Commission containing a proposal for a decision, based on Article K.3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States. Rapporteur: C. BEAZLEY. Doc. A3-0190/94, 29 March 1994.
(3) Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports, 43rd-Ordinary Session of the Parliamentary Assembly of the Council of Europe.
(4) Case of Vilvarajah and others v. United Kingdom (45/1990/236/302-306), Judgment of the European Court of Human Rights, 30 October 1991.
(5) The principle of imposing a visa requirement as a condition for entry.

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