

The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU

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Abstract

This article compares the “right to seek and enjoy asylum” enshrined in Art. 14 of the Universal Declaration of Human Rights with the current EU policy developments to “externalize” or “extraterritorialise” migration control and refugee protection. Examining the genesis of Art. 14 during the negotiations of the Universal Declaration, it is argued that while Art. 14 clearly falls short of granting a substantive right to be granted asylum, its formulation was intended to maintain a procedural right – the right to an asylum process. While the Universal Declaration is not a legally binding instrument, going back to the fundamental norms expressed herein nonetheless provides an important starting point for evaluating current policies, especially in light of recent critiques against overly expansive interpretation of human rights law. As such, the article concludes that the current EU policies to shift migration control and refugee protection away from Europe in important respects contravenes “the right to *seek* asylum” as it was conceived exactly 60 years ago.

Keywords

Universal Human Rights Declaration; Art. 14, drafting history; right to an asylum procedure; EU asylum and immigration policy; extraterritorial migration control; visa, carrier sanctions; immigration liaison officers; interdiction, outsourcing refugee protection; regional protection programmes; offshore asylum processing

1. Introduction

To compare the current state of EU asylum policy with the UN’s Universal Declaration of Human Rights may on the face of it appear strange in the light of the huge development that has occurred within international refugee law and national policies since the Declaration was devised exactly 60 years ago. Nonetheless, the later phases within this development – and the climate in which it is happening in some countries – make it natural, perhaps even necessary, to go back to the fundamentals, to the starting point of the development after World War II.

This undertaking is motivated partly by developments in European policies. In the last couple of decades, a host of regulatory mechanisms have developed that shift migration control outwards in order to intercept the unsanctioned traveller

towards Europe much before arriving at his or hers intended destination. Mechanisms that today have all been incorporated and refined as part of EU law and practice. At the same time, the EU is now getting ready to present proposals for the second phase of the Common European Asylum System, moving towards full harmonisation of asylum legislation across 27 countries. Yet, while emphasis is placed on the full and inclusive application of the 1951 Refugee Convention and other human right treaties, it is noticeable that more and more refugees find themselves unable to reach the territory of EU Member States and, as a consequence, unable to access asylum procedures.¹

Further, in the last couple of decades a certain tendency to express scepticism or even to throw suspicion on parts of the international work to promote and develop human rights and refugee protection has been noticeable. In Europe, the criticism is often targeted at the practice of the European Court of Human Rights and the Court's so-called dynamic style of interpretation, which in the critics' opinion implies that a group of lawyers in Strasbourg without a proper democratic mandate are making decisions which rightly should be a matter for the (national) political decision-makers. It is claimed that the Court contributes to establishing human rights far beyond the European Human Rights Convention and the scope of the associated protocols; and that the Court also occasionally gets involved in mere trifles which in the critics' opinion have no connection whatever with the human rights concept.²

It should not be taken for granted that some of the sceptics' observations and views are not worth a thought. Most of all, however, the above-mentioned tendency gives cause to go back, also historically, to the basic issues, declarations and documents. Faced with criticism which often extends to details and matters unrelated to the essence of the human rights ideology, it may be necessary to recall what the human rights work in its increasingly extended form basically concerns – and where it all started, in our epoch.

¹ See e.g. remarks by Erika Feller, Assistant UN High Commissioner for Refugees, Public Hearing on the Future Common European Asylum System, 7 November 2007, printed in *International Journal of Refugee Law*, 2008, 20(1), 216–220; European Council for Refugees and Exiles, *Defending Refugees' Access to Protection in Europe*, December 2007.

² Such critic and scepticism has been fairly widespread in Denmark, but also in other European countries such as Norway and United Kingdom. For a survey, and refutation, of the critical points see Isi Foighel, Reflections of a Former Judge of the European Court of Human Rights, in: Lagoutte, Sano and Scharff Smith (eds.), *Human Rights in Turmoil*, Leiden: Martinus Nijhoff, 2007, pp. 271ff. See also, *inter alia*, Lord Mackay of Clashfern, The margin of appreciation and the need for balance, in: Mahoney, Matscher, Petzold and Wildhaber (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Rysdal*, Köln: Heymanns 2000, pp. 837ff; C.A. Gearty, "Reconciling Parliamentary Democracy and Human Rights", *Law Quarterly Review*, 2002, 118, pp. 248ff; Marie-Bénédicte Dembour, *Who Believe in Human Rights?*, Cambridge University Press, 2006, pp. 232ff; Ida Elisabeth Koch and Jens Vedsted-Hansen, International Human Rights and National Legislatures – Conflict or Balance?, *Nordic Journal of International Law*, 2006, 75, pp. 3ff.

In such a “back to basics” effort, it is natural to turn to the fundamental document for the development of human rights in our time, the Universal Declaration on Human Rights (UDHR), which was adopted by the UN General Assembly on 10 December 1948. – As already mentioned, the issue to be discussed here relates to one of the rights listed in the Declaration’s catalogue of universal human rights, specifically Article 14 (1): “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

The observations will be limited to the issue of “*the right to seek*” asylum from persecution.³ Contrary to the substantial right of asylum, one can clearly conclude from the provision’s genesis, as well as from its wording, that the procedural right (the right to an asylum process) was maintained and established in Article 14. – The intention of the authors is in this contribution partly to demonstrate that this is the case, and partly to reflect on whether in their consequences EU policies are in accordance with this procedural right.

It is of course well known that UDHR is a declaration, not a convention, and therefore is not legally binding as such (in this context, we will disregard the discussion of whether at least parts of UDHR can be considered international customary law). The various rights listed in UDHR are for the most part implemented in actual conventions, which are binding on the participating states. As far as Article 14 is concerned, this was done with the UN Refugee Convention of 1951 – especially Article 33 of the Convention concerning *non-refoulement*⁴ – and the associated Protocol of 1967. Other conventions likewise result in protection of refugees, to the extent that they belong to certain groups or are in particular situations. These include several of the international human rights conventions, such as the Convention on the Elimination of All Forms of Racial Discrimination (1965), the Covenant on Civil and Political Rights (1966), especially Articles 7, 9 and 13, the Convention against Torture (1984), especially Article 3, the Convention on the Rights of the Child (1989) and the European Convention on Human Rights (ECHR) (1950), especially Articles 3, 5, 8 and 13.

Nonetheless, there is reason to go back to UDHR. The Declaration provides a strongly compressed formulation of the basics, the very core of the matter, as has frequently been expressed also in official documents.⁵ And in any case UDHR is

³ Other authors have dealt with the same perspective, i.e. the direct relationship between Article 14 and the asylum practice of the states, e.g. Alice Edwards, *International Journal of Refugee Law* 2005, 2, pp. 293ff; Colin Harvey, *European Human Rights Law Review* 2004, 1, pp. 17ff; Morten Kjørsum, in: Alfredsson and Eide (eds.), *The Universal Declaration of Human Rights, A Common Standard of Achievement*, The Hague: Martinus Nijhoff, 1999, pp. 279ff; Helen O’Nions, *Web Journal of Current Legal Issues*, 2006, webjcli.ncl.ac.uk/2006/issue2/onions2.html.

⁴ Article 33 thereby in particular added a certain substantial-legal content to the procedural right established in Article 14 of UDHR.

⁵ One illustrative example among many others is the UNHCR Ex.Com. Conclusion no. 82, 1997, where the Executive Committee (section b) “reaffirms that the institution of asylum... derives directly from the right to seek and enjoy asylum set out in Article 14 (1)”.

the expression of basic values to which our part of the world also subscribes.⁶ If there is a conflict between the content of UDHR and the practice followed in our part of the world – which in this context mainly refers to the EU – in relation to asylum policy and immigration control, this therefore implies a discrepancy which should as a minimum be revealed and specified. It may be that most of the debatable and controversial points of the issue in a more narrow and strictly legal sense should be sought elsewhere⁷ rather than in relation to UDHR, but a major discrepancy between Article 14 of the Declaration and the EU asylum practice is nonetheless a serious moral and legal political issue which in this sense also has legal implications.

2. Article 14 and the Right to an Asylum Process

The history of Article 14 (1) is interesting because it throws a great deal of light on the thoughts and intentions behind the concisely phrased provision. Through the period from summer 1947 until its adoption in December 1948, the process forms an undulating movement from purely declaratory provisions towards actual individual rights, which are then to some extent dropped again, but precisely only to some extent.

Its genesis started in June 1947, when a Drafting Committee set up under the Commission on Human Rights (CHR) had its first series of meetings.⁸ The discussions were based on two full drafts of an “International Bill of Rights”, one from the Secretariat and one from the British representative. In addition, the US representative had proposed some amendments to the Secretariat’s draft.

Neither the British nor the American proposal touched upon the asylum issue, but the Secretariat’s draft included the following provision: “Every State shall have the right to grant asylum to political refugees”. This phrasing was repeated in a combined draft, which was prepared by the French representative (René Cassin) during the committee work as member of a “temporary working group”. The other three members of the group considered the issue of the content of an actual convention of human rights. They recommended that the British draft was followed in this respect, but with three additions, one of which was “the right of asylum”. The final recommendation by the Drafting Committee to CHR limited itself to the following provision in the Declaration: “Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial

⁶ In this connection, see also Johannes Morsinck, *Human Rights Quarterly* 1993, pp. 357ff, especially pp. 358 and 383–389.

⁷ Particularly in connection with the interpretation and implementation of Article 33 of the Refugee Convention on *non-refoulement*, cf. previous note 4.

⁸ The Drafting Committee report is doc. E/CN.4/21; the drafts mentioned below are included as appendices to the report, including the Committee’s final proposal to CHR (Annex F).

prejudice by taking refuge on the territory of any State willing to grant him asylum” – i.e. a right to seek, but not to be granted asylum.

The next act was played out in December 1947. First meetings were held in a Working Group under CHR (consisting of seven members supplemented with representatives of other UN organs and a number of NGOs). Here the proposal from the Drafting Committee, which during these discussions was explicitly described as a right to seek asylum, underwent a very significant change. This happened at the initiative of the attending representatives of two NGOs (the International Organisation of Christian Trade Unions and the World Jewish Congress) as well as the IRO (International Refugee Organization), who felt that “the expression “to seek asylum” did not sufficiently express the right of a persecuted individual”.⁹ The CHR working group accepted the view and recommended that the relevant part of the provision should be worded as follows: “Everyone shall have the right to seek and be granted asylum from persecution”.¹⁰

In the following days, CHR had meetings. The wording in the working group’s recommendation – including “and be granted” – was adopted.¹¹

A consultation round with the governments followed in the early months of 1948. Two countries were against the proposed wording of the asylum provision. The Netherlands was doubtful that the asylum issue belonged in the Declaration at all and South Africa stated that the proposed provision “appears to be in conflict with every restriction on immigration anywhere in the world”¹² (cf. the British argumentation in the Third Committee mentioned below).

In May 1948, the Drafting Committee (now supplemented with representatives of other UN organs and a few NGOs) met for its second session. The negotiations about the asylum provision began with a proposal by France and the World Jewish Congress that a UN obligation to secure asylum should be added. The United Kingdom distanced itself from this and instead submitted another proposal: “Everyone shall have the right to seek, and *may* be granted *temporary* asylum, ...”.¹³ In the evening of 17 May, the Committee rose, but only after having appointed a small group (the representatives of the United Kingdom, France and China), which was to prepare a proposal for a new wording of the provision overnight.

⁹) E/CN.4/57, p. 9.

¹⁰) During the same period, a Working Party under CHR prepared the draft for a Human Rights Convention; the report of this work concluded with the following recommendation: “This Working Party recommends that the Commission on Human Rights should examine at an early opportunity the question of the inclusion of the right of asylum of refugees from persecution in the Bill of Human Rights or in a special convention for that purpose”. – E/CN.4/56, p. 15.

¹¹) E/CN.4/77/Annex A, p. 4.

¹²) E/CN.4/85, p. 24.

¹³) E/CN.4/AC.1/SR.36, pp. 13ff.

The next morning, Cassin presented the group's proposal: "Everyone shall have the right to seek and may be granted asylum from persecution. The United Nations is bound to secure this asylum in agreement with Member States."¹⁴

Several members distanced themselves from the second part of the sentence in the proposal on the grounds that any such obligation must be ratified by a General Assembly resolution and/or a convention. A few also objected to "may be" and wanted the substantial right of asylum secured with no provisos. The USA attempted to have "temporary asylum" included. – However, the following recommendation to CHR was agreed at the final vote (with 5 votes to 0, 2 abstained): "Everyone has the right to seek and may be granted asylum from persecution".¹⁵

CHR debated the proposal during its third session on 2 and 3 June 1948.¹⁶ Several of the members and representatives of the attending NGOs objected to the far too vague nature of the proposal offered. The Chinese delegate proposed the following wording: "Everyone has the right to seek and shall be granted temporary asylum...". However, even though Eleanor Roosevelt, the chairwoman of the Commission, supported the inclusion of "temporary", it was nonetheless dropped.

The representative of the World Jewish Congress regarded a right of asylum to be "implicit in the concept of the right to life"¹⁷ and found it difficult to understand that the nations that had received so many Jewish refugees before and during World War II had objections to such a right.¹⁸

Between the meetings on the two days, a small drafting sub-committee (the representatives of France, United Kingdom, China, India and the USA) came up with a wording which included the condition that asylum could only be granted "as humanity requires"; but this proposal was rejected by a large majority.

Eventually, after detailed discussions and several voting rounds, CHR returned to the original phrasing with no provisos or qualifications. With 12 votes to 1 (4 abstained) it was agreed: "Everyone has the right to seek and be granted, in other countries, asylum from persecution".

This wording was then the Commission's proposal to the Third Committee.¹⁹

2.1. *Final Phase*

ECOSOC considered the proposal on 25 and 26 August 1948. The members made general statements about the entire draft declaration and discussed several of the proposed provisions (though not relating to asylum) as well as certain issues not mentioned in the draft. However, no changes were made as it was decided to

¹⁴) E/CN.4/AC.1/SR.37, p. 8.

¹⁵) E/CN.4/AC.1/SR.37, p. 14.

¹⁶) E/CN.4/SR.56–57.

¹⁷) E/CN.4/SR.56, p. 7.

¹⁸) Cf. also Morten Kjørsum, *op. cit.*, p. 282.

¹⁹) E/CN.4/SR.57, p. 11.

forward CHR's proposal unaltered to the General Assembly accompanied by a summary of the views expressed during the ECOSOC's debate.²⁰

The Third Committee considered the asylum provision on 3 and 4 November 1948.²¹ The CHR proposal was accompanied by nine proposed amendments, only two of which were adopted in succession. Both amendments, from Saudi Arabia and the United Kingdom respectively, involved the removal of the right to obtain ("and be granted") asylum and, in the British proposal, to insert "and to enjoy" instead. The others related to e.g. diplomatic asylum, specification of the reasons for persecution and a obligation on the UN together with the states affected to ensure that the right of asylum was fulfilled. A proposal by Australia was in line with the proposals from Saudi Arabia and the United Kingdom.

The argumentation in favour of removing "and be granted" consisted in not wanting to impose an obligation to grant asylum on the individual state.²² The representative from Saudi Arabia considered the right to "enjoy asylum" indisputable, but emphasised that this did not mean that everyone has the right to be granted asylum "in the country of his choice". The British representative argued that the wording of the proposal was contrary to virtually every existing immigration rule. The Australian delegate offered the clearest statement, in all its ambiguity, of why "and be granted" had to be dropped: "It should be a straightforward clear and precise statement of the fundamental rights of man and must make no reference to the corresponding obligations of the State".²³ – The conclusion was that the removal of "and be granted" proposed by Saudi Arabia was adopted with 18 votes to 14, while 8 abstained.

The debate then moved to the above-mentioned United Kingdom proposal of including "and to enjoy" instead. The British delegate explained that this addition, together with "the right to seek", among other things implied an indication that "there was a right of asylum to which persecuted persons could have recourse...".²⁴ The proposal was adopted with 30 votes to 1, while 12 abstained.

The provision now had the form which we know today.

During the General Assembly's consideration in four meetings,²⁵ the delegates mainly made general statements about e.g. the universal nature and the morally and politically binding force of the Declaration. A few statements, especially by the French delegate, also touched on its legal implications. – Criticism was expressed by the USSR (supported by five other Eastern European countries) and South Africa. Some individual provisions were affected (but not the asylum

²⁰) See *Yearbook of the United Nations* 1947–48, pp. 576ff.

²¹) Third Committee, 121st–122nd meetings, 3 November 1948, Summary records, pp. 327ff. The proposed amendments are listed in A/C.3/285/Rev.1.

²²) See in this connection Morten Kjærum, *op. cit.*, p. 283.

²³) Third Committee, Summary records, p. 338.

²⁴) Third Committee, Summary records, p. 330.

²⁵) General Assembly; Third session, 180th–183rd Plenary meetings, 9–10 December 1948, Summary records, pp. 852ff.

provision), especially in connection with a number of amendments proposed by the USSR, but they were all voted down. By contrast, a United Kingdom proposed amendment to Article 2 was adopted.

During the separate votes on each individual article, the asylum provision was unanimously adopted. – Finally, shortly before midnight on 10 December, the General Assembly was able to adopt the entire Declaration with 48 votes to 0, while 8 abstained.²⁶

Article 14 was later confirmed under UN auspices, in both the Declaration on Territorial Asylum of 1967,²⁷ preamble and Article 1, and the Declaration to the UN World Conference on Human Rights in 1993, Article I, 23.²⁸

The right to *be granted* asylum was thus eventually dropped with explicit reference to a desire not to impose the corresponding obligation to grant asylum on the states (or the UN).

However, the right to *seek* was retained. When the considerations in CHR and the various sub-committees, the Third Committee and the General Assembly are taken into account, this therefore implies acceptance of a corresponding *obligation* on the states. The substantial right of asylum was dropped, but the procedural right (*the right to an asylum process*) remained, centrally placed among UDHR's enumeration of the civil and political rights.

It is thus not just an ordinary linguistic interpretation of the wording of Article 14 which gives everyone the right to seek asylum – and imposes a corresponding obligation on the international society and states to respect this right to an asylum procedure, i.e. to grant access to refugee status determination. The preliminaries and the entire history behind the provision show very clearly that this is the case. As described above, every stone was turned in connection with the wording. After extremely detailed discussions in a battle which swayed to and fro, a substantial right of asylum was eventually rejected in order not to impose excessive obligations on the states, but during the entire process the procedural right had been evident – and untouched. There could hardly have been a clearer indication that there were no objections to imposing an obligation on the states in relation to the right to an asylum procedure.

This obligation has since been substantially supported particularly by the binding principle of *non-refoulement* as enshrined in e.g. Article 33 of the 1951 Refugee Convention. While an important difference remains in some situations (in particular regarding the possibility of rejecting asylum-seekers to “safe third countries”), the substantive *non-refoulement* obligation in practice compels States to

²⁶) General Assembly, Summary records, p. 933.

²⁷) GA Res. 2312 (XXII) of 14 December 1967.

²⁸) Vienna Declaration and Programme of Action of 25 June 1993, Article I, 23: “The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments....

undertake at least part of an asylum procedure in order to avoid sending back individuals to persecution. The precise nature of this obligation to respect the right to an asylum process and which state is under this obligation in the specific case, raise extremely complex issues. Innumerable texts have been prepared about the requirements of a satisfactory asylum procedure and the first asylum country principles respectively. However, the question is whether it is not possible – beyond these issues – to make the so to speak preliminary assumption that it is under any circumstances contrary to the obligation to respect and protect the right to an asylum process when states directly and systematically work against the physical-actual opportunities of the individual asylum-seeker to obtain this right. In many other contexts, the physical-actual obstruction of a legal position would clearly be regarded as a legal denial and therefore be characterised as an explicit infringement of the law. There are numerous examples of this, incidentally especially within EU law.

3. “The Right to Seek” and the EU

The right to an asylum procedure as a fundamental building block is also recognised within the EU. With the Amsterdam Treaty, the asylum issue became part of the first pillar of the EU collaboration along with border controls as an accompanying measure to ensure free mobility within the borders of the Union. At the same time as the competence to prepare the basic pillars of a common asylum and immigration policy was laid down in the new Chapter IV, Article 63 (1) emphasised that all EU instruments must be in accordance with the Refugee Convention and its Protocol. Similarly, Article 6 (1–2) points out both that the Union is “based on human rights principles” and that community law must respect “fundamental rights” as expressed in the European Human Rights Convention and “the common constitutional traditions of the member states”.

More specifically, “the absolute respect for the right to seek asylum” was confirmed in the 1999 Tampere programme, which laid down the political objectives for the first phase of the EU asylum policy. Last, but not least, Article 18 of the EU Charter of Fundamental Rights demands that “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community”. At the time of writing, the Charter is still non-binding. However, if the Lisbon Treaty enters into force, binding effect will finally be conferred on this instrument. The full effect of this in relation to Article 18 is still difficult to gauge, yet it is noteworthy that the European Court of Justice has already referred to the Charter as a source confirming the general human rights principles of the Union.²⁹

²⁹ *EP v Council*, ECJ C-540/03, not yet reported. See also Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, 2006, pp. 68f.

However, one thing is discourse, another is practice. Though poised as a fundamental value for the Europeanisation process in this area, the right to seek asylum – understood precisely as a procedural right – has not been reflected as strongly in the design of actual instruments within the still growing EU *acquis* on asylum and immigration control. On the contrary, the harmonisation process in the asylum and immigration area so far can to a large extent be described as various attempts to prevent access to asylum procedures – at least within the EU. This applies firstly to the development of instruments preventing access to asylum procedures or replacing them with simplified procedures or other kinds of protection. Secondly, and this perspective is the main focus of the present article, attempts are increasingly being made to target asylum-seekers before their arrival in the member states. These policies function as a series of successive pre-arrival mechanisms, where the member states themselves, private actors and third countries respectively are mobilised at each step of the route towards Europe in order to prevent physical access to EU territory. In this way, what is often termed the externalisation of border control in reality becomes a countermove to the right to an asylum process, as it denies the asylum-seeker access to the “procedural door”.³⁰ Finally, various measures have been tabled in recent years in an attempt to replace the right to an asylum process in Europe with asylum procedures outside the EU and protection in host states closer to the country of origin.

3.1. *Control Before Departure*

The visa is probably one of the oldest examples of *preventive* or *external* migration control. Already in 1924, the USA introduced visa regulations in order to move its border control to the consular representations of the countries from which people were emigrating.³¹ The first EU list of countries from which visas were required was introduced in 1995.³² The current EU visa regulation is based partly on a “white list” of countries explicitly exempt from the visa requirement and partly on a “black list” of countries from which visas are required.³³ Today, the “black list” requires visas from people arriving from 133 countries and two territories³⁴ covering virtually all countries in Africa, the Caribbean and Asia, as well as a number of countries in Eastern Europe, Central American and the Pacific Rim.

In this way, the EU visa regulation divides the world into two main categories. For people arriving from countries on the “white list”, the control is reduced and

³⁰ Guy Goodwin-Gill, *The Refugee in International Law*, Clarendon Press 1996, p. 333.

³¹ Aristide Zolberg, *Matters of State*, in: Charles Hirschman, et al. (eds.), *The Handbook on International Immigration*, Russell Sage Foundation, 1999, pp. 71–93.

³² Regulation 2317/95, 25 September 1995.

³³ Respectively Article 1 and Annex I as well as Article 2 and Annex II of Regulation 539/2001, 15 March 2001, as amended.

³⁴ Taiwan and the Palestinian Territories.

facilitates access to trade and tourism. By contrast, the “black list” ensures an additional control level for all people arriving from developing countries and countries with many asylum-seekers. It implies an assumption of entry prohibition and only an additional control measure – a visa application through one of the consulates – can disprove this assumption.

That the EU visa regime particularly affects asylum-seekers is demonstrated in several places. The Common Consular Instructions, which prescribe specific procedures for visa allocation, encourages the representations to be particularly vigilant in relation to “persons in special risk categories, the unemployed, persons without regular income, etc.”³⁵ It seems reasonable to assume that many asylum-seekers, especially those in transit countries hoping to travel on to Europe, come within this category. For such “risk groups”, it is recommended that supplementary documentation is obtained, something which typically is not possible for asylum-seekers. In addition, the instructions introduce a special transit visa for airports, limiting the otherwise established principle of free transit in airports, for countries with particularly high asylum rates and immigration potential.³⁶

However, the visa regulation does include an exemption paragraph (Article 4), which allows the member states to deviate from the ordinary visa requirements for special groups of persons from countries on the “black list”. This lists e.g. airport personnel, sailors, international emergency workers and persons with diplomatic or service passports. Although the list is not exhaustive, the lack of reference to persons seeking international protection is nonetheless noteworthy.³⁷ Similarly, there are no current examples of individual member states systematically issuing “refugee visa”, corresponding to e.g. the famous “Nansen passports” in the 1920s.³⁸

There is thus little doubt that the function of the EU visa is, at least in part, to deny refugees access to EU territory. The fact that most visa controls tend to be operated from within the country of origin is particularly problematic from the perspective of refugee law. To the extent that refusal to issue a visa prevent persons seeking protection from leaving their country of origin, an essential premise of

³⁵) 2005/C 326/01, section V.

³⁶) See note 33, Annex 3. Currently, this applies to Angola, Afghanistan, Bangladesh, The Democratic Republic of Congo, Eritrea, Ethiopia, Ghana, Iraq, Iran, Nigeria, Pakistan, Somalia and Sri Lanka. Additional countries may appear on the lists of individual states, at the moment especially Liberia and Sudan.

³⁷) Such an exemption possibility was in fact mentioned in the corresponding provisions in the Schengen Convention, which forms the basis of the Visa Regulation. Article 5 (2) here permits the states to suspend the visa requirement when this is considered necessary due to national interests or international legal obligations. See further Gregor Noll, *Negotiating Asylum*, The Hague: Martinus Nijhoff, 2000, p. 478.

³⁸) Article 3 of the Regulation, however, contains the possibility of visas for recognised refugees and stateless persons, but does not include asylum-seekers whose case has not yet been processed. Notably, Article 5 (2) of the Schengen Convention from which the common visa rules are derived included a clause specifying that restrictions on entry “shall not preclude the application of special provisions concerning the right of asylum”.

refugeehood under the 1951 Refugee Convention remains unfilled and no protection may thus be derived from this instrument.³⁹

3.2. *Privatisation of Control*

The efficiency of the visa rules should be seen in close connection with another EU initiative – carrier sanctions. Not having a visa does not in itself prevent access to the EU, after which member state authorities will be bound by the *non-refoulement* principle if asylum is sought. European countries have therefore been keen to make visas a precondition of even leaving the country of origin. The most prominent instrument for this purpose is the introduction of sanctions against private airlines and other international transport companies carrying passengers without valid travel documents.⁴⁰

Germany, the United Kingdom and Belgium have had such rules since 1987 and Denmark since 1989. At the common European level, they were introduced in connection with the Schengen Convention, where Article 26 imposes an obligation on the carriers to handle the return of rejected foreigners (section 1a) and to “take all necessary precautions to ensure that foreigners carried by air or sea are in possession of the travel documents required for entry into the area of the contracting countries” (section 1b). In addition, the companies are fined between 3,000 and 5,000 Euro for each foreigner transported without the required documents.⁴¹

The threat of a fine and the explicit requirement in Article 26 (1b) have made the airlines introduce quite sophisticated control functions for their passengers before departure. This is not limited to checking that passports and visas are valid, but also involves spotting false passports and persons travelling on the documents of others. Several companies have thus hired security personnel previously employed with the border authorities of the respective member states and accepted training and assistance by national border and immigration authorities in order to be able to handle these functions.

What does this mean for asylum-seekers? Although Article 26 of the Schengen Convention mentions that the above obligations should be understood “subject to the obligations arising out of their accession to the Geneva Convention of 28 July 1951”, it has not been entirely clear exactly how this should be interpreted. While e.g. the United Kingdom has been repaying fines for individuals who have later been granted refugee status, Denmark in the past exclusively imposed fines

³⁹⁾ This follows from Article 1 of the convention. As discussed below, however, this does not bar access to similar protections afforded under other human rights instruments.

⁴⁰⁾ Other initiatives consist e.g. in the deployment of European border authorities in airports in third countries and, with less effect, criminalisation of persons who organise irregular entry – so-called human smugglers.

⁴¹⁾ This was regulated in a supplementary directive, 2001/51/EC, 28 June 2001, Article 4.

for undocumented asylum-seekers, but not *bona fide* immigrants.⁴² Article 4 (2) of the EU Directive of 2001⁴³ specifies that the sanction requirements do not apply to persons seeking international protection, but this does not necessarily mean that the right of asylum is secured: several member states continue to impose fines for bringing in asylum-seekers⁴⁴ and the private transport companies are unlikely to be prepared to take the risk. On the competitive market for international air transport, the total costs of fine, care for and return of rejected passengers are likely to substantially outweigh the income from selling tickets to undocumented and potentially rejected asylum-seekers.⁴⁵

In sum, the carrier sanctions thus serve not only as a preventive measure to obstruct asylum-seekers' access to EU territory, but as importantly as a *privatisation* of migration control, where state functions are increasingly taken over by private companies or security firms. In the nature of things, such actors are not directly bound by international human rights standards and unlikely to be trained in the finer nuances of international asylum law. On the contrary, private companies tend to be driven by an economic logic, where a cautionary principle impels them to reject any passenger who gives cause for doubt that he or she will be approved by the European authorities.

3.3. *Collaboration with Third Countries*

The third element in the EU's preventive migration control is the increasing number of agreements with non-EU countries, which either allow the member states themselves to operate outside EU territory or *delegate* the responsibility for migration control to the authorities in these states. These collaboration agreements are typically politically rather than judicially regulated. Just a few examples are given below.

A mechanism that plays an important practical role in preventing asylum-seekers from reaching Europe is the growing network of immigration liaison officers, which many member states have stationed in strategic countries of transit or origin. In an EU regulation of 2004,⁴⁶ the tasks of such officers are defined as gathering of information about "flows", "routes" and "modus operandi" for irregular immigration towards Europe, helping with identification and repatriation, and maintaining regular contact with the authorities in the host countries.

⁴² See Antonio Cruz, *Carriers Liability in the Member States of the European Union*, CCME Briefing Paper no. 17, Brussels, 1994, pp. 11ff.

⁴³ 2001/51/EC, 28 June 2001.

⁴⁴ In 2003, Ireland thus refused to drop carrier sanctions in cases involving asylum-seekers on the grounds that such a practice would make carrier sanctions useless and encourage more false asylum applications. See James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 385.

⁴⁵ Gregor Noll, cited above note 37, p. 177.

⁴⁶ 337/2004 26 February 2004, Article 2.

The EU regulation presupposes that immigration liaison officers do not influence the host country's execution of sovereign tasks, but instead provide support and advice to the national authorities. However, in practice the relationship is less straightforward. According to the regulation, immigration liaison officers are responsible for communicating and supporting the introduction of EU norms, standards and recommendations in relation to e.g. border control and asylum processing. Liaison officers are therefore often directly involved in training authorities and secondment of border personnel from the member states to the border and asylum authorities of the host countries is getting increasingly common.⁴⁷

In addition, immigration liaison officers are often the operational factor in relation to more structurally motivated pressure on third countries to make them take on tasks in relation to migration control. Today, migration is an important element in all areas of EU foreign policy and political relations and all political agreements signed between the EU and third states as a rule include standard clauses containing obligations to readmit rejected asylum-seekers and other foreigners and help combat irregular immigration. This is particularly important in the Cotonou Agreement, which establishes the framework of EU's collaboration with developing countries in Africa, the West Indies and the Pacific Rim. Here collaboration in relation to migration control and readmission is a condition of development subsidy from the EU.⁴⁸

Similarly, migration, and especially migration control, is a key element in the EU's Neighbourhood Policy (ENP), which covers the neighbouring countries to the east, North Africa and various countries in the Middle East. Among other things, the ENP framework provides support in the form of technical border control equipment such as electronic document readers, X-ray machines, infrared cameras and speed boats. Together with the above-mentioned training projects, such support is the starting point of the capacity development of the neighbouring countries' border and migration control. The individual country agreements under the Neighbourhood Policy thus contain political obligations requiring these countries to collaborate about control and deterrence of immigrants towards Europe – not merely in relation to their southern borders, but also by assuming responsibility for “exit control” and thereby preventing irregular migration from their own country towards Europe.⁴⁹

⁴⁷⁾ Under bilateral agreements, liaison officers may however also exercise migration control more directly. This is the case in the arrangements between the United Kingdom and France, allowing the UK Border Agency access to perform controls in designated migration zones at Boulogne, Calais and Dunkerque. Similarly, UK liaison officers have been seen to exercise direct migration control at airports of non-EU countries. See *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004.

⁴⁸⁾ 2000/483/EC, 23 June 2000, see especially Article 13.

⁴⁹⁾ See also Thomas Gammeltoft-Hansen, *Outsourcing Migration Management: EU, Power and Immigration Policy*, DIIS Working Paper, no. 1, 2006.

A specific extension of this collaboration is the agreements concerning joint patrolling in the Mediterranean and along the West African coast outside the Canary Islands. Here, the EU border agency Frontex has in the past years launched several operations in collaboration with African countries. The HERA missions currently involve EU vessels patrolling within the territorial waters of Senegal and Mauritania. According to information from Frontex, 3,665 migrants were prevented from reaching international or EU waters during the first four months of the operation in 2006. These were returned straight to the ports they had left. At the same time, a number of people who allegedly facilitated this immigration were arrested by the Senegalese and Mauritanian authorities on the basis of European interrogation of immigrants.⁵⁰

The arrangement is based on earlier experiences from bilateral agreements between e.g. Spain and Morocco as well as Italy and Libya. Since 2004, the latter countries have jointly patrolled the Mediterranean. Italy has supplied sophisticated control equipment to Libya and they have collaborated on establishing a reception centre in Libya to stop potential migrants and asylum-seekers wanting to travel on to Europe.⁵¹ Libya, which is not a signatory to the Refugee Convention, has also introduced additional controls along its borders towards Chad, Niger and Sudan in order to block migration towards Europe further south.

It is hard to say to what extent such collaboration agreements are responsible for third countries strengthening their control and attempting to repel migration flows towards Europe. The EU's own border control and increasing use of rules concerning safe third countries and readmission agreements are in themselves an incentive for such countries to strengthen their border control. Many of the EU's neighbouring countries are currently themselves experiencing a growing number of asylum-seekers and probably fear becoming the end station, a *cul de sac*, for refugees and economic migrants who can no longer move onwards to the coveted European Union.⁵² However, the above examples illustrate that, from a European perspective, collaboration with third countries has also become an important tool to prevent migrants from reaching Europe.

For the asylum-seekers, this means that they typically meet the EU control regime and risk being rejected long before they are able to submit an asylum

⁵⁰) Press release, 19 December 2006, available at <http://www.frontex.europa.eu>. No directly comparable figures have so far been released for 2007 or 2008.

⁵¹) Sandra Lavenex, *Shifting Up and Out: The Foreign Policy of European Immigration Control*, *West European Politics*, no. 2, 2006, p. 340.

⁵²) The same dynamic has been evident in the EU enlargement towards the east. Although a strengthening of the border control was a *sine qua non* for admission, the new member states have undoubtedly also themselves been interested in securing both border control and refolement agreements in relation to their neighbours towards the east, as they might otherwise risk being left with a disproportionately large asylum-burden because of the Dublin system. See generally Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, Kluwer Law International 2002.

application. In legal terms this may affect the protection owed under international refugee and human rights law. As in the case of visas, to the extent that the asylum-seekers themselves come from the above-mentioned collaboration countries, the Refugee Convention will not apply, as the asylum-seekers have not left their native country.⁵³ Other human rights instruments, however, do not carry this limitation, and especially the protection against *non-refoulement* that follows from Article 3 of the European Convention on Human Rights may be relevant in these cases. Yet, for this as well as most other human rights instruments, the establishment of responsibility for EU States exercising migration control extraterritorially hinges on the determination of whether in the particular instance those rejected come within the “jurisdiction”, or effective control, of the acting State.⁵⁴ As long as States are acting within their own territory this jurisdiction is taken for granted. Yet, when control is moved outside the territory, and especially within the potential territorial jurisdiction of another State, or delegated to private entities or third States, the question of both jurisdiction and attributability become inherently more complex.⁵⁵

Maybe even more importantly, the remote and delegated control may mean that some of the procedural guarantees are lost. Few of the institutions that secure the individual *access* to rights are easily applicable in the middle of the Mediterranean or when the control is carried out in third countries. This applies to rights of trial such as access to the courts and other public appeal bodies, but also the access to legal assistance by lawyers or private aid organisations, which often plays a significant part in the individual’s opportunity to submit an actual asylum application.

In addition, different authority functions are decoupled. Although the control moves outside the territory, the national asylum authorities typically only function within the territory. Thus Frontex and Spain rejected a Danish offer of asylum expert assistance for the operations outside the Canary Islands on the grounds that this was outside Frontex’ competence and the operations did not involve refugees, but solely an attempt to stop “illegal immigration”. Slightly simplified, it could thus be said that insofar as the asylum-seeker is out of sight, the right to an asylum process is likewise out of mind. Hereafter, states in practice remain free to

⁵³) Such “exit control” may however constitute an infringement of Article 12 (2) in the Convention of Civil and Political Rights, which lays down that all individuals have the right to leave any country in which they find themselves.

⁵⁴) See e.g. Article 1 of European Convention on Human Rights, Article 2 (1) of the International Covenant on Civil and Political Rights, and Article 2 of the Convention on the Rights of Child. See also *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004.

⁵⁵) For an assessment of this issue and an argument in favour of extending extraterritorial jurisdiction on a functional basis, see Thomas Gammeltoft-Hansen, *Extraterritorial obligations under international refugee law*, in: Mark Gibney and Sigrun Skogly (eds.), *Extraterritorial Human Rights Obligations*, University of Pennsylvania Press, forthcoming.

employ sovereign right to control and reject migrants with little regard to the specific plight of those hoping to seek asylum.

3.4. *Outsourcing Refugee Protection*

The final element in the EU's preventive strategies does not involve migration control, but the moving of asylum procedures and refugee protection themselves outside EU territory. In the last five years, a series of proposals have been made aimed at either relieving the European asylum systems by building capacity in the local countries or completely abolishing the current asylum systems in Europe in favour of a combination of refugee protection in the regions of origin and asylum procedures outside the EU. These initiatives therefore still have a preventive rationale – it is a matter of reducing the number of asylum-seekers in Europe. However, unlike the control mechanisms, they are not aimed at removing access to the right to an asylum process, but rather at replacing the asylum procedure in Europe with similar procedures somewhere else.

It is important to remember that neither the right to an asylum process crystallised in UDHR Article 14 nor the rights that follow from the Refugee Convention specify where and how the asylum procedure must be guaranteed. Historically, the right to an asylum process has been focused around the Western and developed countries, while the majority of the world's refugees have been locked in the global South, where resources to guarantee both procedures and substantial protection have typically been scarcer.⁵⁶ Both UNHCR and refugee experts have thus pointed to the need to restructure or reformulate the international refugee regime in a way which places greater emphasis on the capacity in the countries which still continue to host by far the largest refugee populations.⁵⁷ It is therefore worth examining to what extent the most recent European initiatives are able to compensate for, or even entirely counterbalance, the lack of access to an asylum procedure resulting from the above-mentioned control mechanisms.

The political momentum of current EU initiatives in this area grew following a radical proposal forwarded by the United Kingdom in 2003. The “new vision for refugee protection”⁵⁸ contains two main elements. The first was the establishment of regional protection areas to avoid secondary flight towards Europe and ensure that rejected asylum-seekers could be returned. However, the second

⁵⁶) A notable exception being the Comprehensive Plan of Action implemented in South East Asia in the early 1980s. See e.g. Alexander Betts, International Cooperation Between North and South to Enhance Refugee Protection in Regions of Origin, Refugee Studies Centre, working paper no. 25, 2005.

⁵⁷) While UNHCR has only advocated more support to regional asylum countries as a *supplement* to the Western asylum-tradition, others have proposed more wide-ranging initiatives, where protection and asylum-procedures in the local areas to a greater extent replace corresponding requirements in regional asylum countries to a greater extent. See especially the contributions in James Hathaway (eds.), *Reconceiving International Refugee Law*, The Hague: Kluwer Law International 1997.

⁵⁸) UK Home Office, *New Vision for Refugees*, London, 7 March 2003.

element caused most debate. This proposed the establishment of so-called “transit processing centres” in the EU’s neighbouring countries which constitute the main asylum routes to Europe. Asylum-seekers arriving spontaneously in the EU would then be returned to these centres to have their asylum case processed.

Although the concrete proposal was rejected in the European Council, the basic elements of the two components are still on the EU agenda. The first is the possibility of moving the asylum procedure outside EU territory. Here the main objection to the UK proposal was the obvious *refoulement* issues, especially under ECHR Article 3, which would not allow asylum-seekers from Europe to be returned to neighbouring countries with dubious human rights and asylum standards. The later proposals have therefore emphasised that extraterritorial asylum procedures should be seen as a *supplement* to rather than a substitute for similar procedures within EU territory. In 2003, the Commission published a study of the feasibility of introducing so-called “protected entry procedures”, i.e. the possibility of launching asylum applications at the EU countries’ consulates and embassies. The conclusion was that this would be a valuable complementary entry mechanism and deliver “more protection for the Euro”.⁵⁹

Even though such procedures in various incarnations had already been implemented in a number of member states the concept has so far not won wide support. On the contrary, Denmark, the Netherlands and Austria have over the last decade discontinued this option as part of a general tightening of the countries’ asylum policy.

This may seem strange, as protected entry procedures in a way represent precisely an effective separation of the right to an asylum *process* from the substantial right of asylum. This is connected with the visa issue as mentioned above. Even if it is recognised that the *non-refoulement* principle applies extra-territorially, this does not necessarily entail a positive right to grant further entry from the embassy to the host country by e.g. issuing a visa. Such an obligation can only be claimed in special cases, where refusal of further entry in itself would involve infringement of Article 3 of the European Convention on Human Rights or the Convention on the Rights of the Child, which both explicitly have extraterritorial scope. In the majority of cases, protected entry procedures will also leave the issue of substantial rights of asylum to the discretion of the state.⁶⁰

In addition, the procedural rights that can be claimed by those applying for asylum extraterritorially are not directly comparable to those guaranteed in similar procedures within the member states. As the Commission study itself noted, access to effective legal remedy is typically limited and cannot be fully guaranteed

⁵⁹⁾ Gregor Noll et al., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and Goal of a Common Asylum Procedure*, Brussels: The European Commission 2003. Quote from p. 5.

⁶⁰⁾ See Gregor Noll, “Seeking Asylum at Embassies: A Right to Entry under International Law?”, *International Journal of Refugee Law*, 2005, 3.

under international law.⁶¹ Moreover, asylum-seekers whose cases are processed outside the EU borders may find themselves unable to claim additional protection guarantees under national law. Last, but not least, it is, as mentioned above, in practice far more difficult to submit an asylum application without being in the country of asylum. Even if the right to an asylum process is formally respected, there is therefore a risk that its content will be diluted.

The second part of the UK proposal could be argued to have partly inspired the subsequent development of the “regional protection programmes” in the EU context. However, unlike the UK concept of protection “zones”, these programmes are aimed at strengthening the respective countries’ own protection capacity. Pilot programmes have so far been initialised in, respectively, Tanzania and neighbouring countries and the Western SNG countries, Ukraine, White Russia and Moldavia. The initial activities are aimed especially at strengthening the asylum authorities, which is justified precisely by the need to secure access to asylum procedures.

It is still too early to say what difference such programmes may make, but various factors point to inherent contradictions. Even though great political importance is attached to the initiative, the economic framework has so far been very limited. In 2006, less than 6.5 million Euro were set aside in the EU’s own budgets for these programmes, which is far less than the corresponding EU funds to support the more control-oriented initiatives in collaboration with third countries.⁶² Even if the procedural capacity is strengthened in these countries, there is therefore little money for securing the substantial protection capacity. To this end, the original proposal contained a vision for a common European resettlement programme to ensure some sharing of protection costs, but this has so far not materialised. These factors, together with the heritage from the UK proposal, has led to pronounced scepticism, especially from the African countries, which fear that the initiative will merely push even greater responsibility for refugees onto their shoulders.

In this connection, it is worth noting that, as was the case with the control collaboration, there has been a significant “export” of precisely the mechanisms introduced by the EU itself in the countries selected for the regional protection programmes to prevent access to its territory and its asylum procedures respectively. This should probably not be seen solely in connection with the above-mentioned initiatives, but it is clear that as long as these countries are afraid of being left alone with the protection responsibility, they will have a significant incentive to introduce their own rules to prevent access to asylum.

⁶¹⁾ Gregor Noll et al., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and Goal of a Common Asylum Procedure*, Brussels: The European Commission 2003, p. 89.

⁶²⁾ These figures are from the AENEAS framework, which has been the EU’s main budget for support of third countries in relation to migration. The total budget in 2006 was 40.7 million Euro.

In summary, so far EU initiatives to strengthen the right to an asylum process outside EU territory are at best supplementary. While they may be applaudable in themselves, they are hardly adequate compensation for the preventive control mechanisms described above. In conjunction, they are perhaps best interpreted as an attempt to replace the historically imbalanced access to asylum procedures weighted towards the industrialised countries with an equally imbalanced geographical right to an asylum process weighted towards the regional and neighbouring countries.

4. Conclusion

During its EU chairmanship in 2004, The Netherlands presented the vision of protection in the local areas as “a shift from a European *asylum* policy towards a European *refugee* policy”.⁶³ The statement seems to express that we in Europe wish to contribute to the global *substantial* protection of refugees, but not to the continuation of a *procedural* right of asylum within the EU.

Although this is probably a rather simplified interpretation, it is nonetheless a telling indication of the way EU policy is moving. The survey of the above-mentioned rules and mechanisms paints the outline of an asylum and immigration policy where external migration control and collaboration with third countries build a systematic series of barriers to asylum-seekers’ access to EU territory and therefore to the asylum procedures.

On this background, one has to conclude that the EU asylum and immigration policy in important respects contravene Article 14 of the Universal Declaration of Human Rights concerning “the right to seek”, understood as the right to an asylum process. This also creates tension with the general references to international human rights and refugee law in the EU treaty basis and various instruments. Above all, the policy pursued is in sharp contrast with the explicit recognition of the right of asylum in the EU Charter and the political harmonisation programmes.

In addition, one may ask whether the gradual undermining of the *procedural* right of asylum in Europe in the long term may also result in a certain undermining of the *substantial* refugee protection. The political intentions of coupling increased migration control and protection in the regions of origin or transit with more extensive resettlement of refugees in Europe have not materialised so far, either at EU level or generally among the member states. Similarly, it is important to note that so far the EU programmes aimed at strengthening refugee protection in the regions have not been backed by major financial commit-

⁶³) Own italics and translation. Quoted in Alexander Betts, *International Cooperation Between North and South to Enhance Refugee Protection in Regions of Origin*, RSC Working Paper, Oxford University, 2005, p. 15.

ment nor significantly raised the *level* of protection offered in these countries. Of course this may change, but it should be kept in mind that under the current refugee regime, European plans for such a “global refugee protection” will be carried mostly by *political* commitment rather than *legal* obligation.

Some will argue that the elements of the EU asylum policy highlighted here are the expression of political necessity. That is a political issue which has to be considered and debated elsewhere. However, pointing out the clear contradiction in relation to the UDHR is not in itself part of the purely political discourse, but on the contrary a premise (among others) of that discourse. It is a premise that has to be recognised and acknowledged, but of course everyone is free to attach great or little importance to it. The latter will depend on the individual’s personal attitude to the United Nations Universal Declaration of Human Rights as a global expression of a set of fundamental norms and values which were formulated in a tradition and historical situation whose experiences both European and other nations, at least at the time, attached importance to remembering and, as far as possible, preventing in the future.