ARBITRARINESS ON THE FRONTLINES: ANALYSING THE INTERACTION BETWEEN THE INTERNATIONAL REFUGEE PROTECTION SYSTEM AND SOVEREIGNTY

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ABSTRACT

Most nations do not provide a suitable milieu for harmonizing the rights of refugees and asylum seekers within their legal and political systems by primarily advocating the doctrine of sovereign judgement for legitimizing their claims. The doctrine supports a state to have the freedom to exercise complete autonomy in its territory and therefore is often used to deny asylum and propound neglect of refugee protection which practically amplifies into use of force, denial of basic human right and selective persecution - the intensity of which can be noticed to increase with the increase in the political, economic and social pressure that befalls thereby. Furthermore, political considerations place incentives of some of the refugee groups higher than others, and it is therefore very often noticed that the opportunities of political participation of these groups even when acknowledged by the host country remain minimal, and directly contribute to their marginalization. It is in this context argued in this paper that the doctrine of sovereignty proves to be the main challenge that the international refugee protection system must confront. It is therefore imperative that the same must be reflected in public discourse to float an organic dialogue which could potentially bring forward an amicable resolve to the issue. This forms the underlying objective of the study. The paper further aims to suggest general policy measures in governance that can help in overcoming the inherent lacuna of territoriality, in the present protection regulations. The paper sets up several propositions describing the potential risks that the International refugee protection regime faces and discusses how the doctrine of sovereignty bypasses the obligations – both moral and political, that are imposed therein. The study addresses potential shortcomings in the international refugee protection system and tries to contextualize them from the standpoint of International human rights redressal mechanisms. The paper also examines the mutual implications of state and private interests in dealing with these modern day

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** The author expresses heartfelt gratitude to Professor Roman Boed, Professional Development Fellow, International Institute of Education, New York, for his invaluable suggestions and for reviewing initial drafts of this article.

migrants, while commenting on 'climate' refugee groups; and concludes with itemization of the challenges thereto, to establish how the negotiation of this terrain is prospectively demanding.

Introduction

"Refugees are not terrorists, they are often the first victims of terrorism."

– Antonio Guiterres, UN Secretary General

There are two segments of international law that for international protection to refuge seekers: international refugee law and international human rights law. This is supported by many regional and transnational organizations, out of which the UNHCR acts as the governing body.

The main issues currently pervading international protection systems is the extent of protection to be afforded, scope of jurisdiction, extra-territoriality of laws, and sovereignty as an excuse, all of which allow states to evade responsibility. They translate into denial of protection and violation of human rights of the refuge seekers. States are hesitant to provide any care and try to transfer their responsibilities on other states. Mechanisms for border and migration control evading jurisdiction have proliferated immensely in the last decade. While checks and border protection structures have been created internally as well as externally there have been no acknowledgment of the consequent denial of rights to migrants, directly blocking any hopes of progress. Furthermore, new types of migrants and crisis are originating, which require immediate attention and response. All of this is however, being overlooked by states to further their own interests. Many states do not have any regulations whatsoever, and the ones that do, have been structured in a manner that gives them political benefit and/or through partial fulfilment, resolve them of their duties.

I. Overview of the Present Framework

The present framework pertaining to persons seeking international protection dates from the days past the Second World War. The conventions therein, were revised and updated as a result of the tremendous pressure which had arisen from 1930s onwards in Europe.[2] Out of these, the United Nations Convention relating to the status of Refugees (1951) and the subsequent Protocol of 1967

[2] G Goodwin-McAdam, The Refugee in International Refugee Law, 3rd Ed., (Oxford: res, 2017).

serve as primary directives governing the protection regime transnationally; fundamental facets being, one, that they serve to formally designate as a refugee any person outside his or her country of nationality or habitual residence with a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion.[3] This facilitates ease in creation of laws and protection regulations while unequivocally demarcating their applicability. Two, they provide for a mandatory observance of the principle of non-refoulment by all contracting states, which essentially proffers disallowance on forceful return of individual(s) to territory of the state where they fear persecution/hostility. Additionally, the rights and duties of state parties in this regard are set forward through these instruments. The Refugee Convention especially allows them to avail non-compliance in cases of commission of crimes or in acts contrary to the UN principles.[4] Considering the EU specifically, Article 78 of the Treaty on the Functioning of the European Union (TFEU) mandates the applicability of these instruments over the signatory states. There also exist certain states like Bosnia and Herzegovina that do not follow these treaties via contractual obligations but instead they do so to sustain their autonomous political interests. However, a duty of cooperation with the UNHCR, specifically in the exercise of its functions and in assisting the provisions of its charter, has been imposed on majority of these states.[5] This is because the UNHCR also serves as an advisory body in pertinent refugee protection matters. Its Bureau for Europe, functions as the responsible body for guiding the applicability of these instruments in the EU, whereas the responsibility of interpretation of these instruments in cases of issues between state and citizen, rests primarily in local courts, while the commission acts as a mediator.

In addition to these instruments, the UN Covenant on Civil and Political Rights' provisions banning torture or cruel, inhuman or degrading treatment or punishment, have been interpreted by the UN Human Rights Committee[6] to prohibit sending anyone to a country where there is a substantial risk that he or she would suffer treatment contrary to the protection instruments. So far as this committee is considered, majority of countries accept its authority and jurisdiction completely, whereas certain states do so reservedly.[7] In other parts of the world, there exist similar

[3] Ibid
[4] Article 1
[5] Article 35(1)
[6] T Meron, *'Extraterritoriality of Human Rights Treaties'*, (1995) 89 AJIL 63.
[7] Ibid

directives that seek to govern refugee rights. In Africa, the Charter of 1981 provides for a right to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.[8] The local courts buttress the provisions therein by intervening in instances of breach. It must however be noted that only six out of the twenty-five signatories have encompassed a provision for filing complaints. The African Union is the responsible body of the convention guiding refugee problems here which through Article 2(2) of its own charter prohibits refugee rejection. The 1969 American Convention on Human Rights similarly prohibits this in North and South America, on an even greater extent by barring rejection to countries of non-origin. The Inter-American Court of Human Rights serves as the adjudicatory and administrative body responsible. The situation, however, is relatively contrasting in Asia as several of its states have not ratified the refugee convention. The ASEAN Declaration on Human Rights serves as the governing direction by prohibiting torture and providing a right to seek and receive refuge, subject to local laws. The Intergovernmental Commission on Human Rights has the power to implement the same. Furthermore, there are certain regional/national regulations that govern specific aspects of this system. Europe has primarily two major directives; the first one being the European Convention on Human Rights 1950 (ECHR) which through Article 3 bars torture, inhuman or degrading treatment or punishment and has been interpreted by the European Court of Human Rights as including a prohibition on being sent to a country where there is a substantial risk that such treatment will occur.[9] The Charter of Fundamental Rights functions as the second broader instrument which posits the right to asylum[10] and prohibits refoulment to a country with substantial risk of severe or degrading treatment/punishment.[11] The Court of Justice of the European Union (CJEU) is the body responsible for enforcement of the charter, and has provided a rather wide structure of doing so. It may receive a request from a nation to interpret the provisions[12] or take *Suo moto* cognizance of acts of party states and their European Union law obligations. It also accepts personal petitions but tends to be very particular about the same, and disallows any third-party intervention, be it organizational or otherwise. [13]

[8] Article 12(3)
[9] N Molsky and C Merlyn, *Asylum and Human Rights*, Human Rights Files, (Council of Europe, 2012)
[10] Article 18
[11] Article 19
[12] Article 257, TFEU
[13] As observed in *Plaumann v Commission* [1963] ECR 199.

II. The Problem of Territoriality

It is submitted that there is a significant consistency in the international and regional human rights instruments in so far as the refugee protection regime is considered, but this consistency must not be taken as one benefitting it, instead, it must be looked at as one showcasing and supporting the fundamental fallacy pervading the system – territoriality.

The provisions of these instruments are by large interpreted to oblige states to provide protection only to those refugee seekers who: (a) approach their borders or have already entered their territory and; (b) have no other territory that they can approach or be redirected to.

Thus, although the instruments provide for a duty not to return refuge seekers to a place where they could be persecuted, they do not provide a duty to grant them asylum or impose a duty not to redirect them. This has allowed nations specifically in East Asia and Europe to evade responsibility and not accept any refugees nor provide any sort of protection to them, leading to violation of the very principles of basic human existence, that the entire justice system is based on. For instance, in Southern and Mediterranean Europe, a large number of people are regularly left to suffer in international waters, without any support whatsoever.[14] Refuge Seekers are also often redirected to states that tend to be xenophobic, harmful or inimical to their interests.[15] This leaves them open to selective persecution that tends to amplify into torture and punishment.

III. Key Challenges to Access

It is submitted that the primary challenge acting towards denial of access emerges from a flawed notion of transnational duties.[16] Majority of states tend to adopt approaches that facilitate their interests, even if it means traversing the rights of others. Thus, many nations evade their protection duty by rejecting and redirecting refuge seekers who do not enter their territory legally to 'appropriate' authorities for further action. Therefore, their duties are conceived of in a quite constricted manner. Consequently, methods of transferring or evading protection duties have increased exponentially over the recent years. Western states have created immigration laws on multiple levels, beginning from the very point a person leaves the territory of his nation to the

[14] T Strik, *Lives lost in the Mediterranean Sea: who is responsible?* Parliamentary Assembly, Council of Europe, 29 Mar. 2012.
[15] Marta Lutz, *'Seeking Asylum in the Mediterranean: Obligations Accruing at Sea'*, (2013) 47 IJHL 232.
[16] For an overview, see Hansen M den Heijer, *Europe and Extraterritorial Asylum*, (Oxford: Hart, 2012).

point he approaches the borders of the host state, directly or indirectly.[17] These take diverse forms from simply regulating total in-flow to diverting handling to third parties, in some cases. Certain states have entered into mutual agreements for transferring or distributing the duty of protection they owe, while some have created regulations for dealing with refuge seekers before they can even enter their territorial waters.[18] In some parts of the world, such as Australia, or the Americas, the doctrine of sovereignty is used to evade responsibility. In Europe, since the arrival of the Schengen visa structure, the system of 'integrated border management' has come into force, which has made access to the territories themselves substantially impossible.[19] The system essentially consists of a multilevel structure with increased scrutiny in each level, and functions in co-operation with the parties to the treaty as well as nearby states. The parties are supported by regional organizations and the United Nations in this aspect and thus, the structure involves heightened surveillance along with armed security within the union, and military control outside it, to allow for immediate removal of 'aliens'. Consequently, several Schengen visa codes and directives[20] have been formulated to ensure compliance and security in both the home and host state(s), and the task of execution and implementation of the same has been delegated to private entities[21] assisted by immigration officers.[22] *Frontex*, the European border and coast guard agency secures the borders on all fronts.[23] Upon reaching, migrants must pass thorough checks consistent with the Schengen Borders Code[24]. Those failing to pass, are redirected to 'third' countries outside the union, with whom it has entered into return agreement(s) with. These are countries in where it is presumed that the chances of refoulement are minimal. This is, however, merely a perfunctory measure to facilitate smooth expulsion of migrants and has proven to be defective.[25] The same has

[17] Ibid
[18] Schengen Aquis, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF
[19] The Schengen area and cooperation, *Summaries of EU legislation*, (European Commission, 2006)
[20] Ibid
[21] For instance, a Swedish private equity firm, VFS Global Pvt. Ltd., handles the processing of visa applications in more than 130 countries, and has the authority to verify and reject applications found lacking. For more info, see: www.vfsglobal.com/en/individuals/about.html
[22] Council Regulation (EC) No 377/2004 on immigration liaison officers network
[23] Council Regulation (EC) No 2007/2004 the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union along with Council Decision (2010/252/EU) on supplementing the Schengen Borders Code
[24] Art. 7(3), Regulation (EC) No. 562/2006 of the European Parliament on Community Code on the rules governing Schengen Borders Code
[25] Supra at 13

also been observed by the CJEU.[26] In the beginning, this approach was exclusively applied towards preventing influx of African migrants, but has now been expanded to deal with other regions of the world as well.[27] As per the present proposals by the European Commission, refugee protection is being focused on, predominantly, to constitute as an essential element of the forthcoming Global Approach to Migration and Mobility so that asylum can be afforded, preferably near the home state[28]. It is however, submitted that the impracticalities associated with this approach are twofold. There has been a substantial failure to acknowledge the particular attributes of refuge seekers by individualizing the circumstantial notions associated with volitional and non-volitional migrants keeping national interests out of the context. Thus, even after sanctioned endorsement that the individual human rights at the border out to be respected, it is submitted that there hasn't been any significant formalization of this principle in any of the legal documents whatsoever. This has made access to international protection even harder as it is now directly dependent on the ability of the refuge seekers to enter the borders surreptitiously. Sanctions on transport along with increased measures of scrutiny, all done remotely, have led to the forceful adoption of illegal routes to enter the borders, keeping their lives in danger.

IV. Jurisdictional Inconsistency

Although the sovereignty doctrine provides for complete autonomy to independent states, there are certain aspects of the refugee law that circumscribe its applicability and force.[29] Jurisdiction is one such aspect which is of prime importance in truly gauging this. It is essentially a 'threshold criterion' determining the applicability of the provision(s) concerned[30]. In traditional sense, it involves the exercise of authority over the local territory but has also in certain special cases and circumstances been constructed to include extra-local exercise, as well.[31] The protection system allows this extra-local exercise for the benefit of persons, in cases of lack or inadequacy of jurisdiction. However, inconsistency of jurisdiction serves as the underlying fallacy thereby, specifically in instances where there aren't any mutual agreements between states or in instances

[26] cases C-411/10 and C-493/10 NS
[27] Draft Council Conclusions on Extending and Enhancing the Global Approach to Migration, Council doc. 10746/07.
[28] The Hague Programme, para. 1.6.1.
[29] Saadi v UK, Appl. No. 13229/03, 29 January 2008
[30] Al-Skeini v UK, Appl. No. 55721/07, 7 July 2012
[31] Bankovic v Belgium, Appl. No. 52207/99, 12 December 2001

where there are no local regulations altogether. In cases of exercising their authority in foreign territory, the states are also held responsible for the consequences. This means that in cases of imposing sanctions and establishing security checks in foreign territory, the imposing state must be held responsible for dealing with the results. However, as noted earlier, states evade this responsibility by strictly fulfilling their duty not to return refugees to the persecuting state in consonance and not doing anything further. The extent of state responsibility thus remains ambiguous. This creates a paradoxical situation wherein the home state evades responsibility by arguing imposing states' duty and the imposing states bypass their obligations taking sovereignty and lack of jurisdiction as an excuse. The human rights law seeks to fix this by serving to be fundamental and mandatory. Thus, even in such cases, the human rights must be respected and the mutual conduct evading responsibility must nonetheless take place in a manner that respects the fundamental human rights of the individuals concerned. Thus, in such instances, they are brought under the jurisdiction of the European Union States to an effect that human rights become effective and are duly respected. Therefore, security measure and border control systems must be made compatible with human rights, the protection of persons in need of international protection and the principle of non-refoulement.[32] Thus, it is clear that the primary issue that EU member states face is of determining a method of positioning control with protection.

V. States with No Asylum Regulations vis-à-vis Territoriality

Another ambiguity that surrounds the refugee protection system is that of transit states which lack asylum laws. In instances where one state redirects protection seekers to another through the territory of a state that does not have any asylum or protection laws, the question of extent and jurisdiction of affording protection arises. In such instances, the refuge seekers are left at the mercy of the local authorities before which they apply for protection. This furthers selective persecution, and subjective treatment and thus states often avoid making laws and when they do make laws, they tend to be ambiguous. Thus, the right to claim protection exists with these individuals but the concomitant system of enforcing it is seen to be missing, making the right merely a token. Furthermore, in states that have established laws, grave problems in the mode of implementation can be observed, to an extent where even illegal refoulement is carried on by authorities or is

[32] *29 measures for reinforcing the protection of the external borders and combating illegal immigration*, Council doc. 6975/10

condoned. The primary issue therefore is of legal certainty and efficacy of rights. If there aren't any laws for the subject matter concerned, there is no possibility of effecting the duty therein, as a matter of law. This is a fundamental lacuna which is deliberately overseen to exact and further private state interests. Therefore, there is a need for mutual action by the UNHCR along with the European Union to pressure nations to ratify the protection instruments and to create a structure of implementation that is sound and built on a system that focuses on the interests of the individuals, rather than ease of enforcement. The Union could act as the enforcer, and the HCR could work as the supervisor to enable a smooth flow of refugees. It is submitted that such efforts fail currently as third countries clearly can observe that any assistance provided by the EU member states is primarily to promote their own gains. Thus, due to the fear of becoming a 'dumping-ground' for Union's refugees, third states can be observed to be disinclined towards even accepting logistical and monetary aid from it. They also can be seen to be hesitant towards taking any efforts in creating proper protection mechanism for refugees, in order to not be considered 'safe' for redirection by the member states.

VI. Environmental Refugees

Of the multiple instruments that exist in the refugee protection system, none apply to individuals migrating due to environmental issues. Several discourses have been triggered on the need to expand the definition of a refugee apart from persecution,[33] as the causes for displacement today are more complex and permanent[34] as compared to those envisaged under the Convention.[35] Both the the UNHCR, and the European Commission have acknowledged that climate change migration is a "crisis in the making"[36]

Although climate change does not directly enforce migration of people, there remains a causal connection between the two, nonetheless. It must be noted that the term environmental migration must not be interpreted to mean migration due to climate change, or long-term environmental degradation, but also due to short term or unexpected environmental disasters or even natural

[33] RV Anuradha, *On A Displaced Person*, 6 SADJ, (1994)
[34] Nesrin Algan, *Transboundary Population Movements: Refugees, Environment and Politics*, 75 TURKISH YEARBOOK OF INTERNATIONAL RELATIONS 2 (1998)
[35] Adrienne Millbank, *The Problem with the 1951 Refugee Convention*, (Parliament of Australia: 2000-01) available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05
[36] James Holyfield, I. Salehaan, *Environmental Refugees*, WILSON PRESS (Dec. 21, 2015) 4available at https://www.wilsoncenter.org/article/environmental/Wer230lS.aspx

calamities. It is this aspect that is entirely overlooked while dealing with climate refugees. Furthermore, in cases of direct causality like eruption of a volcano and subsequent destruction of the settlements around, the need for migration arise as well, but this need is neither acknowledged nor approved by any law whatsoever. Human rights law also cannot come into action here, so long as the formal idea of a human right violation by a superior authority is not effectuated. In such cases therefore, states get a free hand in redirecting and returning migrants even if it poses a risk to their lives. It is therefore submitted that it is the need of the moment to regulate this aspect of migration. Again, much like other migratory issues, the present issue also involves the question of extent of state responsibility and the obligation of the migrant to return back once the danger or risk has passed. The present international refugee law is among the least suited laws to actually assist climate refugees and come to their rescue. It can only be applied to refugees who have been forced to leave their home state and then been selectively persecuted or tortured etc. However, in such cases the connection between migration and protection is not dependent on climate change but is instead dependent on state action and persecution. This need has naturally been advanced before courts of law and the pertinent authorities but has been rejected multiple times. The reasons for rejection are multiple as well. The most common contention among these is if states start accepting millions of individuals who face such issues, it would be economically unfeasible. The cases of *AF Kiribati*[37] and *Mohammed Matahir Ali v. Minister of Immigration*[38] are such instances, among others.

Another reasoning advocated by states to evade responsibility is in lieu of Article 51 of the UN Charter, which provides for a right of self-defense to the states. States have advocated that this right of self-defense does not constrict itself to cases of war or intrusion, but also includes other types of threats like large migration of people from third states. They argue that this is potentially a threat capable of interfering in their public order.[39]

The chief argument against accepting environment refugees, however, remains to be the one taking its reason from the doctrine of sovereignty. It contends that the discretion to allow or disallow migrants remains with the state and any interference to this discretion would amount to violation

[37] AF (Kiribati) [2013] NZIPT 800413, New Zealand
[38] [1994] FCA 887 (Australia).
[39] Charles B Keely, *How Nation States Create and Respond to Refugee Inflows*, 30 IM REVIEW (1996).

of the *jus cogens* principle of autonomy. This argument also puts forth that any action taken in furtherance of exercising its own sovereignty is lawful so long as it does not violate any human right directly. Thus, as discussed above, by partially fulfilling the obligation of non-refoulment in a manner that does not make them responsible, states tend to evade their ideal duties, as can be observed in the US case of *Nishimura Ekiu v. State.*[40] Although this argument is some what legally valid, it fails to respect moral and humanitarian principles.

It is therefore suggested that there is an urgent need of reconstituting the approach of dealing with these migrants. One thing that can be done in this regard is to reclassify the definition of a refugee, to include environmental distress as a ground for persecution. Creation of a separate segment of laws and regulations that afford only minimal or basic protection to environmental refugees, could prove to be beneficial as well. In addition to this, clearing the ambiguities between natural factors and man-made climatic factors, as the latter provides a platform to evade the former in terms of granting protection. Forming alliances to mutually distribute the economic burden of dealing with climate refugees, as has been advocated by the United Nations Office for Humanitarian Affairs[41] could also serve to be fruitful in creation of a systems that do not violate state interests and balance protection.

VII. Suggestions for improvement

It is submitted that the refugee crisis in the world is not an issue that any one state or states can resolve alone. It is a global issue and must be dealt with accortdingly; it is a modern-day issue that should be resolved through mutual co-operation. Rejecting or redirecting migrants to evade responsibility is absolutely not a solution of this issue. Borders rejecting incoming refuge seekers do not lower the inflow, they merely redirect it elsewhere. This creates hardship for all stakeholders including states and asylum-seekers alike. The states with the least protective migration regulations are forced to bear the burden of care while the migrants are forced to circuit among states hoping to find one that could offer them protection. It is an imminent need that this approach must be as they tend to create mutual havoc, deteriorate relationships between nations, and promote imbalance in general.

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[40] 142 US 651 12 S.C.

[41] Susan F. Martin, *International Migration: Evolving Trends From The Early Twentieth Century To The Presen*t, 214 (2014).

Furthermore, inhumane treatment and blanket rejection at the borders must not be tolerated. However, at the same time, it must be acknowledged that while exercising their sovereignty to broaden the protection measures, states have a legitimate say in the control of borders and local security. A new system of protection must thus be devised based on stability of claims of states, refuge seekers and local organizations. States must on humanitarian grounds accept migrants and afford protection for an interim period until their application for refuge is accepted, and if not, until a safer state and proper route to the same is found out. On the other hand, they must not offer to refuge seekers any kind of protection that is more than enough to shield them from persecution. Thus, non-refoulment and state interest must both be mutually supported. This also implies that those migrants who do not actually need protection from persecution must be, either redirected or repatriated.

Moreover, the concept of a safe third country, must be cast in a manner that is fair and transparent. It would then come to be beneficial towards private state interests while at the same time help in preventing 'country shopping.' Finally, the extent and period of protection to individuals actually deserving care should be limited to the time it is necessary to ensure their safety from persecution. Furthermore, it is imperative that all transnational organizations and states must in the world community should share equally in the refuge protection system. To this end, it may be ideal to constitute a global fund to which states must contribute commensurately. Acknowledging that some states suffer more from this issue than others, a multinational burden-sharing structure should be created and effected.

As far as the European Union is specifically considered, it is needed that the member states' international protection duties in consistency with the Charter of Fundamental Rights must be adopted as the basic principles of their activity dealing with migrants. This means that there must be a clear recognition and adoption of these obligations in legal and policy texts, specially focusing on extra territorial applicability of their provisions.

It must also be acknowledged that any obligation so imposed, cannot be evaded or transferred to a third country not delegated to regional organizations. The obligation to cooperate with UNHCR, pursuant to Article 35 of the Refugee Convention, should be enforced properly while giving due consideration to best practices, observations, conclusions and recommendations formulated by the organisation. At the level of implementation and before devising a structure, it is imminently

required that the refuge seeker must be engaged with as well. The European Parliament could serve as the mediator in such cases, to promote a well-built system that does not traverse any personal rights. Furthermore, in creating local protection regulations, the obligations and needs of the targeted states getting an influx of migrants must be considered into account to further mutual responsibility. The European Parliament could also play an important role here in conducting consultations. It must analyse the efficacy of policies on safe third countries and if they are fully implementing international protection standards. During this process, it should renegotiate mutual agreements, to include proper refugee provisions.