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How do states challenge international regimes? The case study of Poland and the international refugee regime

Abstract

International regimes became the topic of scholarly discussion in the study of International Relations only in the late 1970s and early 1980s. Very little scholarly explanation has been provided to clarify why, when or under what circumstances international regimes modify or collapse so far, while the expectations of the regime participants may change and disperse. This paper aims to explore how states that are not traditionally considered the most significant for the creation, design, and continuation of the regime might challenge its framework and under what conditions these actions could

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impact the regime.

Poland acceded to the International Refugee Regime (IRR) in 1991 after beginning its transformation. In the process of analysis, we argue that the Polish actions challenging the IRR by breaching its norms were initially accommodated with a mixture of cautious tolerance (especially among the EU Member States who wished to keep the migration flows through the Polish-Belarusian border stalled there), and tacit criticism expressed by international governmental institutions unwilling to exert too much pressure in order not to lose access to people with humanitarian and protection needs. We also claim that although the Polish authorities challenged the core rules of the IRR, their policies and actions have not led directly to a permanent destabilisation of the regime, not to mention its dissolution or collapse. However, unless not repelled in a direct and robust way by major participants of the regime, they might result in undermining the core framework of the IRR.

Keywords: refugees, migration crisis, international regimes, international refugee regime, Poland's asylum policy

Introduction

Poland acceded to the international refugee regime (henceforth the regime, IRR) in 1991 after beginning its transformation from a socialist state and a centrally planned economy into a democracy with a market-driven economy. Signing the 1951 Convention on the status of refugees and the 1967 New York Protocol was an important step in confirming the young democracy's support for the rule of law and human rights protection. Since the accession, Poland's approach and its role in the international refugee regime (IRR) have been changing. After joining the European Communities in 2004, the Polish Eastern border became one of the European Union's external borders (EU). The Common European Asylum System (CEAS), which grew out as one of the community policies, required cooperation in refugee protection while external pressure of migrants on the EU borders, in general, faced the Polish government with new challenges. The IRR at the universal level, rooted in the Geneva Convention and centred around the United Nations High Commissioner for Refugees (UNHCR) sets universal and minimal international protection obligations for its members[2] that may be further developed or enhanced at the national and regional levels, which is exactly what CEAS does, next to other regional refugee protection systems (in Africa and Latin America). The accession to the IRR means the need for incorporation and constant reference to the regime principles and norms in a domestic asylum policy. Therefore, the IRR can be considered as an external constraint on the right of states to formulate and implement their asylum policies unbound. The divergence causes the challenge for coherence, efficiency and compliance in formulating as well as implementing policy goals and strategies.

[2] To some extent also to non-members as, e.g., the non-refoulement norm regarded as customary and universally binding.

The analysis of the problem of acting according to the IRR norms, principles, and rules poses challenges, as the regime itself does not contain a set of organisational sanctions characteristic of it. Nor does any procedural control mechanism exist for the regime's breaches. The responsibility for the breaches may, as a rule, lead to legal disputes before international jurisdictions or negative reactions of the other members of the international community, possibly leading to losing the credibility and legitimacy of the responsible states. However, the latter ones are rather symbolic, which does not necessarily mean that they cannot change states' behaviour. For the most part, abiding by the norms of IRR for the states that wish to present themselves as leaders in the international liberal order is a necessity, if not a must. And if breaches occur, they are rather disguised under an alternative interpretation of the actions, possibly also under the security concerns, etc. Especially breaches of the fundamental norm of the IRR – non-refoulement – may lead to international condemnation or naming and shaming. The question that arises is, however, under what circumstances the breaches of the regime will lead to its modification, decay or collapse. Our research is rooted in regimes theory, which attempts to explain what international regimes in international relations (IR) are, how and under what conditions they are created, how they are changing and their significance in IR. These have been approached by different theoretical schools of thought in IR. By and large, two major approaches appear in the scholarship: rational choice and constructivist explanations, which we elaborate on further.

International regimes became the topic of scholarly discussion in the study of International Relations only in the late 1970s and early 1980s. Since then, the related theoretical reflection has been developed (see: Young, 1980; Krasner, 1982; Krasner, 1983; Keohane, 1984; Pietraś, 2014) to explain why and in what circumstances the growing international cooperation and interdependence can or will lead to the creation of international regimes made of laws and institutions that govern states' activities (Pietraś, 2014, p. 14). So far, regimes have been defined heterogeneously (Young, 1982). However, for the purpose of this paper, we apply a slightly modified classical one proposed by Stephen D. Krasner, "international regimes are defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area" (1982, p. 185) supported by international institutions which promote, elaborate, implement or guard the principles, norms and rules in question (Krasner, 1982, p. 185). Our analysis aligns Krasner's view on international regimes as "intervening variables standing between basic causal factors on the one hand and outcomes and behaviour on the other" (Krasner, 1982, p. 185). Regimes are created when states benefit from their existence, which does not necessarily always translate into material benefits but can also bring symbolic advantages, as well as benefits related to strengthening the international identity of actors. These explanations will vary depending on the theoretical tradition of the study of IR (see: Keohane, 1988; Hasenclever et al., 2000). Rational choice theories emphasise states' relative (realism) or absolute (liberalism) gains. Constructivists in turn, perceive regimes as particular international social institutions where actors' socialisation occurs. The principles and norms are under the process of constant reconstruction and redefinition. Therefore, the regimes are not determined structures but rather dynamic confirmation of common understanding. Therefore, national

interests, preferences, and actions are modified (Krasner, 1982, p. 185; Czaputowicz, 2022, p. 248; Finnemore, 1996). International regimes can have different participants. However, there is little doubt that states are the major ones. The others may include international institutions of both governmental and non-governmental character, whose role in the regime is much less significant than the one of states[3].

Very little scholarly explanation, especially in the regimes theory, has been provided to clarify why, when or under what circumstances international regimes change or collapse so far, while the expectations of the regime participants may change and disperse. Krasner suggests that we should clearly differentiate between a situation in which regimes decompose, collapse or are entirely transformed due to modifications in their fundamental principles and norms from gradual modifications of a regime due to modifications in rules and procedures in decision-making in the regime (the latter will not negatively impact the existence of the given regime) (Krasner, 1982, p. 187–188). Regimes can be resilient to exogenous factors that could weaken them or quite the opposite. In the latter case, its reliance is rather low. According to Young, international regimes, which he perceives as social institutions, are difficult to alter in a planned or guided fashion, however, "they change continuously in response to their own inner dynamics as well as a variety of political, economic, and social factors in their environments" (1982, p. 280). The latter ones include: 1) "internal contradictions that eventually lead to serious failures and mounting pressure for major alterations"; 2) "shifts in the underlying structure of power in the international system"; 3) "exogenous forces" which are "developments external to a specific regime" that "may lead to alterations in human behaviour that undermine the essential elements of the regime" (Young, 1982, p. 291–292). According to Marc A. Levy, Oran R. Young, and Michael Zuern, significant modifications in international regimes are usually due to "fundamental transformation in the domestic political system of **a major** [emphasis added] member state [of the regime]" (1995, p. 290).

This paper aims to explore how states that do not belong to the group of states that have not been traditionally considered the most significant for the creation, design, and continuation of the regime[4], might challenge its framework and under

[3] Our contention on the principal participants of the regime is in line with claims made by, *inter alia*, Levy et al. (1995), Hafner-Burton (2012) as well as Peterson (2012).

[4] The states that signed the 1951 Convention relating to the status of refugees right after it was drafted during the diplomatic conference in Geneva on July 2–25, 1951 and/or before its entry into force (April 22, 1954) were: Australia, Austria, Belgium, Colombia, Denmark, Israel, Lichtenstein, Luxemburg, Netherlands, Norway, Sweden, Switzerland, and the UK. They were soon later joined by other states, e.g., Brazil, France, Greece, Holy See, Italy, and Turkey (United Nations, 1951). Many of these state parties later became principal countries of destination for asylum-seekers. The first group of parties did not include many of the Global South states, which either were not independent at the time or had no interest in joining the system, as they were rather states of origin for refugees. The 1967 New York Protocol (signed January 31, 1967; entry into force: October 4, 1967) was eagerly signed and ratified in 1967–1968 by a handful of African and other Western and Global South states (UNHCR, 2015). As of 2023, the states listed as top refugee recipients are not necessarily members of the IRR regime, e.g., Bangladesh. For the purpose of this paper, we consider the most significant members of the regimes

what conditions these actions could impact the regime. We claim that the constant challenges from the domestic system of these IRR member states might impact the regime only under specific circumstances. We consider a single-case study of Poland to be critical (Yin, 2014, p. 51) for understanding the challenges of the IRR. We make that choice for the following reasons. First, Poland is a country that joined an already existing refugee regime and, therefore, did not participate in its creation. Yet, it did not question its basic tenets upon joining. Second, the importance of Poland in international migration flows has shifted significantly from the country of origin of migrants (including refugees) to a transit and destination country for migrants. In other words, the asylum policy in Poland has gained a new dimension and significance for the government. Poland, from being an insignificant state party to the IRR, became an important Western world regime's contesting member of the Western world regime. Third, and perhaps most important, Poland's Eastern border, which since 2004 has also been the EU external border, has become the key location of stepped-up migration flows from non-EU countries. The conclusions from the data analysis related to the case study of Poland will lead to the generalisation of the findings to see how and when states challenge international regimes and what impact such actions may bring about for a regime.

The principal research questions addressed in the paper are:

1. How have the Polish policy actions challenging the international refugee regime been perceived and accommodated by the other regime participants?
2. Have these policy practices led to any changes in the regime?

In the process of analysis, we argue that the Polish actions challenging the IRR by breaching its norms were initially accommodated with a mixture of cautious tolerance (especially among the EU Member States who wished to keep the migration flows through the Polish-Belarussian border stalled there), and tacit criticism expressed by international governmental institutions unwilling to exhort too much pressure in order not to lose access to people with humanitarian and protection needs. Open criticism was expressed by non-governmental actors of the IRR, which, however, had very little influence on the Polish authorities. We also claim that although the Polish authorities challenged the core rules of the IRR, their policies and actions have not led directly to a permanent regime destabilisation, not to mention its dissolution or collapse. However, unless not repelled directly and robustly by major participants of the regime, they might result in undermining the core framework of the IRR.

We do not aim to make any normative or moral claims about the breaches of norms of international and domestic character the Polish authorities have been committing. The contention that there are breaches, as shown by evidence collected for this research, serves a different purpose. We are attempting to take a fresh look at how the process of norm contestation by regime state members, which are relatively new to their tenants, can influence the existence, continuation, and change of the regime. The Polish case is perceived in our paper as yet another factor leading to a change in the IRR. Change may take place gradually not as a result of contesting norms, rules,

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that were proponents of their tenets at the time of their formation as well as or were in the group of top refugee-receiving states.

and principles in an open and direct way but rather through blurring them. The amassing of similar actions, not repelled by other key state member participants of the regime, might bring about lasting changes in the IRR.

Our analysis considers state members of the regime as actors represented by their executive authorities authorised to make legal and other claims in the state's name at the international level. We do not look at the domestic dynamics of contentious disputes between the executive, legislative, and judicial powers, not to mention an often divergent view of civil society representatives. It is an important reservation, as both the Polish case and cases of other state members of the regime (e.g. Italy, the US, and Australia) prove that there is no linear and coherent approach to the contentious cases at the domestic level.

At the same time, our study does not attempt to take a stand on whether the norms of the IRR are praiseworthy, sufficient or – precisely – the opposite. We look at IRR as an existing fact, with all its shortcomings and loopholes, and we analyse the circumstances that lead to undermining its tenants.

Methodology of the study

In our analysis, we include discursive events, formal documents, policy practices, and judicial actions related to the policy practices towards asylum in Poland. We argue that awareness of these dimensions is crucial for the comprehensive evaluation of policies regarding the human movement (Czaika & de Haas, 2013, pp. 494–495).

We will test our claims by analysing publicly presented opinions, documents, and the direct actions of the Polish authorities towards asylum-seekers and the ensuing reactions of the principal institutions of the regime, as well as judicial bodies, about the legality and legitimacy of the Polish immigration and asylum policies, especially in view of the core character of the principle of non-refoulement . We apply qualitative methods, specifically case study and within it – textual analysis and process tracing (Bennett, 2004). The paper starts with an elaboration on the nature and characteristics of IRR. We then proceed to the presentation of Poland's involvement with the regime, which leads us to the presentation of migration challenges for Poland in the crisis of 2015/2016, as well as from Belarus from the Summer of 2021 onwards and from Ukraine after February 24, 2022.

The international refugee regime

The international refugee regime, at present, is based on the 1951 Geneva Convention, the ensuing 1967 New York Protocol, as well as the principal institution responsible for refugees – UNHCR. The basic architectural design of the universal IRR is centred around the understanding of a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or unwilling to avail himself of the protection of that country" (United Nations, 1951; United Nations, 1966) and around its cornerstone

principle of non-refoulement (Costello & Foster, 2015, p. 205)[5]. The latter is enshrined in Article 33 which contains the prohibition of expelling or returning "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (United Nations, 1951, Article 33). Institutionally, since 1959, the UNHCR Executive Committee (ExCom) has been an important forum for advising the High Commissioner for Refugees and working on specific themes significant for refugee protection, including the reinterpretations of the UNHCR mandate.

The to-date scholarship on the universal IRR has characterised it as multicentric which means that its norms combine different legal regimes, and multifactorial, meaning in turn that the norms of the regime that regulate states' behaviour are rooted in varied sources of international law (Kowalczyk, 2014, p. 17). Alexander Betts (2010) claims that the IRR (which the author calls simply "refugee regime") should rather be perceived as a "refugee regime complex", as the traditional refugee regime now overlaps with other international regimes, namely, human rights regime, labour migration regime, travel regime, humanitarian regime, and security regime. However, for the sake of this paper, we claim that the IRR should rather be characterised as belonging to a broader understanding of human rights protection norms and, thus must be congruent with these norms. By looking at the IRR in this manner, we contend that humanitarian norms of protection, labour migration protection, and travel regulation must also be in line with the human rights framework. Hence, e.g., the prohibition of discrimination or special protection for particularly vulnerable groups is enshrined in the regime in the sense that it is in line with such basic principles. Moreover, we believe that the IRR should not be perceived as multilayered in the sense that there are universal, regional, and country-level regulations. The universal one is *lex generalis* towards the regional *lex specialis*, while the emanation of domestic law is a natural and indispensable result of the creation and effective entry into force of public international law norms (both of conventional, as well as customary character). We, therefore, refer to the IRR to the protection of individuals through refugee status and various forms of subsidiary protection[6]. Although it is perceived as sound, the construction of the universal IRR is also subject to criticism as contemporary realities on the ground demand substantial regime adjustment (Feller, 2001).

Poland in the international refugee regime

Poland acceded to the IRR in 1991, after signing the 1951 Geneva Convention and the 1967 New York Protocol. Since then, Poland has been obliged to follow the obligations

[5] The non-refoulement principle is now regarded as customary, however, there is inconsistency about whether the norm is of *jus cogens* character which would make it a peremptory one, creating universal legal obligations (see: Costello & Foster, 2015; UNHCR, 2007; Allain, 2001).

[6] In our paper, we do not consider territorial asylum, nor protection for other groups assisted by UNHCR in the refugee context, such as internally displaced persons (IDPs), stateless individuals or returnees.

mentioned in the Convention and the Protocol, as well as to cooperate with UNHCR in the area of refugee protection. In consequence, it started the process of domestic law alignment with international obligations.

Poland's engagement and approach towards international protection for individuals have evolved significantly. The first period from 1990 until 1997 was the time of accession to the regime's norms and was characterised by the rapid internationalisation of Polish asylum policy. Deficiencies in policy practices were considered as part of the adaptation process. The second period, from 1998 until November 2015, had additional features of the Europeanisation of the Polish refugee regime. It consisted of further implementation of the IRR through European regulations. Finally, the third period, from November 2015 onwards, has been coined as a phase of reinterpretation of IRR norms that took form firstly of "counter-Europeanisation" (Florczak, 2019, p. 32). For the purpose of this analysis, we have come up with the fourth period stretching from 2021 to 2022, which is characterised by further reinterpretation but in the form of domestically driven "bifurcation of IRR". What we mean by that can be explained by looking at, on the one hand, the practical application and adaptation of how international protection towards migrants from Ukraine was conducted and, on the other hand, an outright challenge or even rejection of the same regime norms, rules and principles towards migrants on the border with Belarus.

It is important to note that in each phase of the process of Polish adaptation to the IRR, Poland did not fully comply with the regime's standards and norms. The difference is that in the phase of bifurcation, one can see that non-compliance results from the policy decisions and practices conducted by the Polish authorities instead of any kind of incapacities in the adjustment process.

Before joining the IRR, Poland was primarily a country whose citizens applied for refugee status in the West. There was no legal and institutional tradition, nor any experience in dealing with refugees domestically; no adequate regulations, infrastructure, or institutions (Łodziński & Szonert, 2011, p. 168). In the second half of the 1980s, Poland was receiving around 20–30 people a year claiming asylum. Still, they saw Poland as a transit country, as their final destinations were Western European states (Łodziński & Szonert, 2011, p. 169). The only institution occasionally dealing with refugees appearing in Poland was the Polish Red Cross. The year 1990 is considered a breakthrough as Poland faced a significant influx of foreigners eligible for protection for the first time, still in the absence of legal, institutional or infrastructural solutions. That year, Sweden, having recognised Poland as a safe country, deported several hundred foreigners to Poland, who, using forged documents, entered Sweden while passing through Polish territory first. Finally, they were assisted by the Polish Red Cross (Florczak, 2019, p. 37). This new situation made the authorities adapt promptly by joining the universal and regional refugee regime (Gafarowski, 2014, p. 15).

Both the Convention and the Protocol were signed on September 2, 1991, which was followed by swift ratification and introduction of necessary amendments to domestic law establishing the normative framework for the admission of refugees (Łodziński & Szonert, 2011, p. 170).

After 1989, the Polish principal goal was to join Western institutions. Therefore, Poland needed to be perceived as a progressive democracy respecting basic human rights and liberties that implemented standards and procedures (Florczak, 2019, p. 38). Membership in international institutions grouping democratic states required changes of a normative nature. It also brought ensuing further obligations. Concerning the subject under study, of particular importance were commitments in the area of human rights, which shape an asylum policy. Poland established cooperation with several important organisations and institutions dealing with human rights (in general) and forced migration (in particular), including providing assistance to foreigners seeking refuge. These included the Council of Europe (1991), the International Organisation for Migration (1992), the Organisation for Economic Co-operation and Development (1996), and European Communities (the Association Agreement with the European Communities was signed on December 16, 1991). In March 1992, the Liaison Office of the UNHCR began operating in Warsaw. In January 1993, Poland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Deficiencies in the adopted domestic legislation, organisational underdevelopment, and the uncertainty/unreliability of the Polish refugee protection system were spectacular (Szonert, 2000, p. 34; Gafarowski, 2014). In 1995, UNHCR in Poland expressed concern about the process of adapting country-level norms as a result of adhering to the IRR. The legal loopholes and underdeveloped procedures were the basic problems influencing asylum-seekers on the Polish border. There were noted cases where asylum seekers, despite contacting the UNHCR office in Poland, were not admitted to the asylum procedure (UNHCR,1995).

The adaptation of the Constitution of Poland in 1997 and new legislation related to foreigners in June 1997, consistent with the principal norms of the IRR started the new, very dynamic phase. It was characterised by an intensive process of forming, reshaping and adapting legal solutions, institutional design as well as procedures for the administration of asylum cases, and implementation of the EU *acquis communautaire*. UNHCR intensively advised the Polish authorities and commented on proposed legislation to protect refugees. Many of its comments were considered in the Law on Aliens adopted in 2003. As a result, Poland in 2003 (the year of signing the accession treaty with the European communities) had asylum-related regulations and procedures generally in line with the EU and international standards (UNHCR, 2003; Sobczak-Szelc et al., 2022, p. 18).

In 2012, Poland took a more proactive approach to the migration problem for the first time as, after years of preparation, on July 31, 2012, it published the document on the *Migration Policy of Poland – current state and postulated actions*, presenting a proposal for a state strategy in the area of migration (Departament Analiz i Polityki Migracyjnej MSWiA, 2012). The UNHCR praised this action.. The Office considered the preparation of the strategy as a manifestation of achievements and good practices (UNHCR, 2011). Regarding asylum-seekers, the strategic document clearly emphasised that country-level policies and actions were "largely determined by international obligations arising from the Geneva Convention and the membership of the Republic of Poland in the European Union" (Departament Analiz i Polityki

Migracyjnej MSWiA, 2012, p. 64), indicating the principle of non-refoulement and the principle of full access of foreigners to the refugee status procedure as crucial for this policy.

At least from 2000, Poland had its first experience with a steadily increasing influx of asylum-seekers from Chechnya (a region of the Northern Caucasus, part of the Russian Federation) (Suduł, 2009, p. 96; Boćkowski, 2020, p. 340). Between 2005 and 2008, the share of Chechens in the total number of foreigners applying for international protection in Poland exceeded 90%, and between 1992 and 2016, in total, Chechens submitted more than 100,000 applications (Górny et al., 2017, p. 43). On the occasion of the increased influx of refugees from Chechnya, systemic problems concerning the standard of protection granted, the rules of integration, and the lack of preparedness of the Polish services for the increased number of refugees became apparent (see: Boćkowski, 2020; Łukasiewicz, 2011; Suduł, 2009).

The 2015–2016 refugee and migration crisis was a stress test, especially for regional solutions offered by the EU. It was the time when the gap between the normative aspirations of the EU and European countries and real-life actions concerning asylum was fully manifested (Trauner, 2016; Beaupré, 2023). The period of intensive Europeanisation ended with the change of the ruling party in Poland, however, the previous liberal government's actions on asylum lacked coherence and robustness which would prove absolute support for the CEAS. The Law and Justice (PiS) party that took power presented open anti-immigration rhetoric, accelerating the politicisation of migrants and refugees. The European Commission, based on 78(3) TFEU, proposed an emergency relocation mechanism for asylum seekers (the Communication of European Agenda on Migration) that was rejected by the new government.

In January 2016, Beata Szydło, the new Polish Prime Minister, during a debate in the European Parliament, defended the modified stance of Poland and stated that Poland had taken in around one million refugees from Ukraine, stressing that these were people whom nobody wanted to help. That statement was exaggerated, and not reflected in the statistics (Górny et al., 2017). In 2017, the Ministry of the Interior and Administration (Pol. Ministerstwo Spraw Wewnętrznych i Administracji, MSWiA) presented a proposal to amend the *Act on granting protection to foreigners on the territory of the Republic of Poland* assuming, *inter alia*, the introduction of the so-called "border procedure" allowing for processing of applications for protection along with simultaneous detention of foreigners. Experts and NGOs criticised these proposals as being incompatible with Poland's international obligations and ultimately were not introduced (Król et al., 2018). Since 2015, the Ombudsman (Pol. *Rzecznik Praw Obywatelskich*, RPO) has been receiving complaints from foreigners who were refused entry to Poland via the Terespol Border Guard in violation of the EU law and the provisions of the Geneva Convention regarding compliance with the principle of non-refoulement. Also, UNHCR noted with concern the sharp increase in the number of foreigners stating that they were not allowed to enter the territory and apply for asylum in Poland, while Polish authorities were insisting that the person did not express their intention for international protection and had economic reasons to enter Poland (UNHCR, 2018, p. 3) The report of RPO prepared in 2021 for the UN Special Rapporteur's on the Human Rights of Migrants regarding pushback practices

and their impact on the human rights of migrants (Biuletyn Informacji Publicznej RPO, 2021) directly pointed out the continuous malfunctions of Polish border authorities that were not consent with the legal obligations taken by Poland, and recommended changes to cease them.

Since 2017, domestic courts have been investigating the already notorious refugee protection norms breaches by the Polish authorities. It was a notable change, as earlier cases of asylum procedure breaches in Poland, as well as of poor reception conditions in the country, were perceived as challenges with adapting to the international standards of protection by international institutions rather than actual breaches of law. As the officials from Poland had not made outspoken claims about the modifications in the interpretation of basic refugee protection standards, these challenges did not lead to harsh official condemnation. In 2017, the UNHCR came up with a submission in the case of Iman Tashaeva v. Poland before the Regional Administrative Court in Warsaw, in which the Office elaborated on the basic normative principles of IRR (UNHCR, 2017). In 2018, the UNHCR in the submission in the case of D.A. and others v. Poland before the European Court of Human Rights, highlighted the discrepancy between the letter of the law and practice (UNHCR, 2018).

A clear change of approach towards Polish inadequacies in institutions mandated with refugee protection and overseeing the application of binding regulation was noted in 2020 in the case of M.K. and others v. Poland (complaints placed in 2017). In its judgement, the Court contended that the authorities of Poland had breached the 1951 Convention by, *inter alia*, denying the applicants access to the asylum procedure and exposing them to a risk of inhuman and degrading treatment as well as torture in Chechnya. Poland had taken decisions in asylum procedures without diligent analysis of individual cases. The judges also determined that the practices M.K. and others had mentioned in their applications formed part of a broader policy of "collective expulsion of aliens" and "refusing entry to foreigners coming from Belarus" (ECHR, 2020).

Poland's policies and actions as regards refugee protection became crucial for the stability of the EU and its asylum policy with the deliberately planned and orchestrated by president Aleksandr Lukashenko migration crisis at the Polish-Belarusian border from July/August 2021. The Belarusian authorities used migrants from third countries (especially: Afghanistan, Syria, India, Yemen, Bangladesh, Ethiopia, Eritrea, Somalia, etc. (Zawadka, 2023)) in a hybrid conflict with the EU as a tool of destabilisation of the EU territory in response to the growing isolation of Belarus, sanctions decided by the EU as well as the support for the members of Belarusian political opposition. Migrants, including asylum-seekers, were welcomed in Belarus and pushed first in the direction of Lithuania and later, after its decision to close the border to irregular migrants, the flows were rerouted to Latvia and Poland (see: Grzymski et al., 2021)[7]. The Polish government as well as local authorities were unprepared for what was about to happen, however, judging from the previous governmental policies and actions mentioned above as well as from the opinion polls

[7] Complex analysis of the migration and humanitarian crisis at the EU Eastern border from various perspectives, see: *Białostockie Studia Prawnicze* (2023).

conducted in Poland (see, e.g., Notes from Poland, 2021a; Notes from Poland, 2021b) it was rather evident that the irregular crossings would not be welcomed in Poland. The Polish government presented the opinion that entrances of asylum-seekers should be strictly formalised. Marcin Przydacz, vice-Minister of Foreign Affairs in August 2021, commenting on disturbances in Usnarz Górny said:

> *[I]n order to apply for asylum or for international protection, one must be on the territory of the Republic or in a Polish mission. Screams issued from outside the territory of Poland […] are not really an application for international protection. […] The Ombudsman [RPO] looks at this from a legal and human rights and fundamental rights perspective, and unfortunately, the Schengen Code says clearly: the border should be crossed in places designated for this purpose. […] These people have the right to apply. There is a consulate in Grodno nearby.* (Przydacz, 2021)

Due to the growing border pressure, especially since November 2021, the Polish government has undertaken legal and operational measures to curb migration flows by legalising push-backs and breaching international and domestic norms on asylum. As early as August 20, 2021, the Minister of Internal Affairs and Administration issued an ordinance amending the restrictions imposed on border crossings from Belarus *inter alia*. With the new regulation, the Border Guard was allowed to return individuals who were not legally eligible to be present on the territory of Poland. That amendment was largely criticised as unlawful and in breach of the Polish constitutional provisions (Amnesty International, 2022; Bodnar & Grzelak, 2023). Nevertheless, the government initiated a new legislation amending the law on aliens and other laws. The bill, approved by the parliament on October 14, 2021, entered into force nine days later (Ustawa z dnia 14 października…, 2021). It cemented the blatant breaches of international law of universal character, the CEAS regulations and directives, as well as domestic constitutional and other normative acts once again. The unlawful character of the amendments was first and foremost related to the fact that it permanently legalised the push-back procedure by determining that migrants, when apprehended immediately after an illegal border crossing, would be expelled from the country according to an administrative decision issued by the Border Guard with the ensuing prohibition to enter the Schengen area for a maximum period of three years. The decision can be appealed, but it does not hold its execution (Ustawa z dnia 14 października…, 2021).

What is more, the appeal will be decided still within the ranks of the Border Guard. The amendment does not differentiate between migrants and asylum-seekers, nor does it exclude asylum-seekers from the push-back procedure. At the same time, the amendment may lead to disregarding the applications for asylum by refusing to handle them, which is contrary to the obligations of state parties to the 1951 Geneva Convention and 1967 New York Protocol, not to mention the CEAS provisions (especially The Return Directive 2008/115, The Qualification Directive 2011/95 and The Asylum Procedure Directive 2013/32), as well as to the domestic regulation.

Both the August 2021 ordinance and October 2021 law stand in contradiction to the prohibition of non-refoulement (Grześkowiak, 2022), as well as numerous

norms of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as confirmed in earlier judgments of the European Court of Human Rights (D.A. and others v. Poland, M.K. and others v. Poland). Illegal border crossing defies one of the basic assumptions of refugee protection, namely, the fact that refugees cannot be sanctioned for entering the territory of the state of protection illegally (both in terms of the crossing itself as well as in terms of missing entry documents). Even if, during the analysis of asylum applications by responsible state institutions, a final decision on expulsion is reached, asylum seekers' requests, in light of the non-refoulement principle, should be considered[8]. The mentioned law amendments resulted in a critical reaction from the UNHCR. The Office statement read: "UNHCR regrets that the amendments significantly restrict the possibility to seek asylum for persons intercepted in the border area, creating de facto two categories of asylum seekers and penalising those who have crossed the border irregularly" (UNHCR, 2021a). UNHCR also noted that the law amendments allowed the Polish authorities to arbitrarily and without attention to individual circumstances of the applicant reject applications for asylum. As such, according to the Office, it means in practice that the right to seek and enjoy asylum, as stipulated in Article 14 of the 1948 Universal Declaration of Human Rights, 1966 Human Rights Covenants and the 1951 Geneva Convention. The latter's Article 31 has been, according to the UNHCR, misinterpreted and misapplied by the Polish authorities. Its provisions oblige state parties not to punish migrants seeking asylum for illegal entries but also prohibit imposing movement restrictions except for extraordinary circumstances (that is also a regulation contained in the CEAS)[9]. Alas, as reported by numerous NGOs and the Ombudsman Office, the Polish authorities have been using detention as a means of restricting the movement. What is more, the conditions in the detention centres as well as the treatment of the detained individuals, may amount to torture or other inhumane or degrading treatment or punishment. Amnesty International has pointed out that serious violations of human rights have been committed by the Polish officials (Amnesty International, 2022).

On 15 September 2022, the Provincial Administrative Court in Białystok ruled[10] that expulsion of foreigners from the territory of Poland without the necessary procedural guarantees (pushback procedure) based on the amended ordinance and bill of law were unconstitutional and not in line with other domestic regulations as well

[8] The legality of entry of a third party national who applies for protection as well as the subsequent consideration of the application will be viewed in light of the notion of a safe country of origin. Belarus, however, is not regarded as one of the states on the list, which is also confirmed by verdicts on the European Court of Human Rights. The EU Agency for Asylum Expert Panel on the use of the concept of safe countries of origin in international and nation jurisprudence has confirmed this view (European Union Agency for Asylum, 2023).

[9] The Geneva Convention allows, in extraordinary circumstances. to apply detention measures and movement restrictions. However, as pointed to the commentaries to the 1951 Convention and 1967 Protocol, parties to these provisions are obliged to consider the asylum application first and only then to take a decision on imposing the said measures. See: Goodwin-Gill (2001).

[10] The ruling is subject to appeal.

as contrary the provisions of norms of international character that Poland is bound by (Wojewódzki Sąd Administracyjny w Białymstoku, 2022). Participants in the court proceedings included the Ombudsman office which has been presenting critical comments about the situation at the Polish-Belarusian border numerous times before and after the judgement (Biuletyn Informacji Publicznej RPO, 2022a; 2022b; 2023). The judgement did not radically change the situation and the Polish Border Guard has not ceased to use pushbacks towards migrants crossing the border with Belarus. So far, 30 individuals have been confirmed to have died in relation to crossing the border and 200 of them as unaccounted for (Grupa Granica, 2023). The Border Guard has been regularly publishing information about the "attempts of illegal border crossings". In 2022, altogether 15,700 of these attempts were prevented, while in 2021 that number was much higher – 39,697 which, in comparison to the previous years, is striking: 2020 – 129; 2019 – 20; 2019 – 4 (Szczepańska, 2022; Szwed, 2023). Obviously, the numbers are misleading in that sense that the border was guarded much differently before the events relating to the actions of the Belorussian authorities started. What is more, these events led to the decision to construct a monitored wall at the border which makes any border crossing outside of the regular ones practically impossible, yet, if they happen – traceable.

At the onset of 2023, the push-backs were still ongoing. So were the breaches of the migrants' basic human rights. Both at the border and detention centres. The European Court of Human Rights is looking into the case R.A. and others v. Poland (no. 42120/21) in which the UNHCR intervened as a third party with a submission in which it concluded that (emphasis added):

> *[…] systematic* ***denial of asylum-seekers access to the territory and to asylum procedures*** *at the Polish-Belarusian border, which is not only current Polish State practice but authorised by Polish law, is at variance with international refugee law and international and European human rights law. Non-admission at the border which results in exposing asylum-seekers to a* ***risk of refoulement;*** *the wholly* ***inadequate material conditions near the border that have cost lives****; and* ***expulsions without any individual assessment and without providing for an effective remedy****, are at variance with […] ECHR and […] Protocol 4 ECHR.* (UNHCR, 2022, p. 10)

Other UN bodies have also expressed concern about the human rights breaches of the migrants at the Polish-Belarusian border. Three special rapporteurs for the UN Human Rights Council as early as October 6, 2021, reminded both countries that: "the right to life and freedom from torture, refoulement and collective expulsions are non-derogable rights. This means they can never be suspended, not even in a state of emergency" (UNHCR, 2021b). There was no notable reaction of the Polish government to that urge.

What is significant though, is the fact that while the EU institutions have largely criticised Poland's authorities after the refusal to implement the solidarity clauses of the Council decisions reacting to the 2015–2016 migration pressure, the Polish-Belarusian border crisis has been passing without a coherent negative reaction from the EU institutions so far (with the Commission not being outspokenly critical about

the actions of the Polish authorities, contrary to the views expressed by the European Parliament) (European Parliament, 2021; Bodnar & Grzelak, 2023). As Grześkowiak (2022, p. 21) contends, even though the amendments in domestic legislation were a clear breach of the EU law, "the European Commission remained predominantly passive when confronted with legitimate reports pointing to abuse. Representatives of the Commission did not explicitly express criticism towards Polish authorities, let alone initiate proceedings [infringement procedure] under Article 258 TFEU[11]".

The works on the New Pact on Asylum and Migration have been ongoing within the EU since 2020. The draft proposed by the European Commission significant reforms to the CEAS. While referring to the IRR's core values, the Pact proposal has provoked mixed reactions due to the direction of the reform. Some members of the European Parliament have expressed concern that the new legislation may not comply with fundamental human rights (European Parliament, 2020). In particular, it has pointed out that the documents, by introducing the pre-entry screening procedures, would expose irregular migrants seeking asylum in the EU countries to limited access to protection stemming from asylum legislation. At the same time, the proposed border procedures involving the expansion of the competence of border services would limit the rights of asylum seekers (Council of the European Union, 2023; Konsorcjum Migracyjne, 2021)[12].

From the onset of the crisis, it tended to be perceived by the EU institutions and its members as a security issue. Migrants pushed through the Belarusian border were seen as a weapon that President Lukashenko had at his disposal. Mid-October 2021 Tweets from the European Commissioner for Home Affairs Ylva Johansson, as well as her declarations that more pressure would be placed on the governments of Poland, Latvia, and Lithuania to make sure that they abide by the norms of CEAS, together with announcements that there would be neither financial nor logistical support from the Commission was less than could have been expected. In early October 2021, the director of the European Coast Guard and Border Agency (Frontex), Fabrice Leggeri, visited the border and allegedly praised the Polish authorities for how they were dealing with the crisis. Questions and critical comments on Frontex's actions that were largely influenced by the scandal around the agency revealed by the findings of an investigation led by the EU anti-fraud agency OLAF launched in December 2020[13].

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[11] Treaty on the Functioning of the European Union.

[12] The Polish authorities rejecting the core idea of the solidarity mechanism proposed in the Pact have vetoed the whole document.

[13] The report from the OLAF's investigation into the alleged fraudulent actions of Frontex, was leaked to the media on October 13, 2022 (Izuzquiza et al., 2022). The document revealed that the agency covered up serious human rights violations and proved that Frontex, contrary to its mandate, failed to assist the migrants and was involved in deliberate actions amounting to pushbacks and withholding help towards the shipwrecked in the Aegean Sea in Greece. Allegedly these breaches were committed with the tacit approval of FRONTEX's director, Fabrice Leggeri. The leaked report's content confirmed that the EU and its institutions, together with the member states, were approving of keeping the migrants outside of the EU territory at a very high cost – the cost of blatant breaches of the norms of the CEAS (Izuzquiza et al., 2022).

Against that background, Frontex's inaction towards Poland and little pressure on the Polish authorities to cease EU and domestic law infringements presents a pattern of approval to keep as many asylum-seekers from entering the Schengen area.

November 2021 made it clear that migrants were in a dire situation at the Polish-Belarusian border. First fatal casualties of the attempted or successful crossings of the Polish border were recorded, which did not lead to a strong statement from the EU representatives, still expressing solidarity with Poland that was attacked with the use of hybrid warfare (human beings – *sic*!) but with little attention towards the serious breaches of the EU laws. The Polish authorities did not invite Frontex to assist at the border. Instead, the Polish military forces were deployed at the border and in the border regions sealed off from the rest of the Polish territory through the imposition of the state of emergency on September 2, 2021, extended on November 30, 2021, for another seven months (until June 30, 2022) (UNHCR, 2023).

On July 1, 2022, the decision of the Provincial Governor in Podlasie Province on the imposition of the law prohibiting entering the 200-metre-zone along the border with Belarus entered into force with the justification of the applied measure related to the construction of the wall on the border (Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 2 września…, 2021; Rozporządzenie Rady Ministrów z dnia 2 września…, 2021; Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 30 listopada…, 2021). Nevertheless, the existing wall and barrier did not stop migrants from entering the Polish territory, and there are still fatal cases among those who decide to cross, which is confirmed by independent and state institutions' reports (see: Chrzczonowicz, 2023; Szwed, 2023).

On February 24, 2022 the Russian Federation commenced a full-scale military invasion of the territory of Ukraine, leading to massive forced displacement of the civilian population which was directed towards the borders of neighbouring states, Poland becoming the principal third state of their destination. As of January 3, 2023, 7,915,287 refugees from Ukraine have been recorded across Europe (UNHCR, 2023). With the growing number of Ukrainian citizens amassing in the border checks with Poland, Moldova, Romania, Slovakia, and Hungary, decisions were made both at the EU level and domestically to regulate the legal status of those arriving. As a rule, refugee status was not granted, even though a well-founded fear of individual persecution was the principal cause of the plight in many cases. Instead, a decision was made to offer them temporary protection as it could be awarded without case-by-case analysis of an individual's situation.

Poland, as of January 3, 2023, registered under Temporary protection and other domestic schemes, noted the biggest number of Ukrainians – 1,553,707 (UNHCR, 2023). The first responder to the plight of war-related migrants from Ukraine was the Polish society and non-governmental community. The Poles offered massive support on an unprecedented scale. The state and local authorities were not prepared to act for a longer period of time. However, it must be emphasised that the borders remained open and there were no impediments to the crossings. Moreover, the Polish authorities introduced legal, operational and financial measures to accommodate

the Ukrainians fleeing war atrocities resulting from the Russian aggression[14]. The reaction of the authorities and the society at large to the influx of migrants from Ukraine was entirely different from the one towards the individuals being pushed back, harmed, tortured, and discriminated against when trying to cross to Poland through the border with Belarus. Poland did not request assistance from the EU or international governmental and non-governmental institutions to help with the evolving humanitarian crisis, which, as we claim in this paper, was due to two principal reasons. First, this approach allowed us to present the Polish actions in the field of international protection as exemplary and, through that – reject a few critical comments on the approach towards how the crisis at the border with Belarus was handled. Second, because letting in international actors and granting them unimpeded access to individuals seeking asylum and refuge in Poland could lead to more international attention towards the hidden humanitarian disaster in reference to the border with Belarus (Kozak, 2022; Grześkowiak, 2022).

Conclusion

The existence, stability, and continuity of the international refugee regime, rooted in the interwar period and gradually developed after World War II depends on the role its participants attach to the core principles it is based on. As in every international regime, which, for the purpose of this analysis, was defined as an institution "possessing norms, decision rules, and procedures which facilitate a convergence of expectations" (Karsner, 1983), the IRR will be modified or will collapse when expectations of the regime participants change or disperse (Krasner, 1983), which translates to discontinuity of actions aligned with the regime requirements. If key principles and norms of the regime are questioned and modified or rejected, regimes decompose or collapse. If, however, gradual modifications in rules and procedures in decision-making in the regime take place, regimes can be modified, still, converging the expectations of the regime participants.

The paper aimed to explore under what conditions state policies and actions can influence an international regime by leading to its modifications or collapse. We looked at the case study of Poland and its influence on the international refugee regime and attempted to find answers to the questions about (1) how have the Polish policies and actions challenging the international refugee regime been perceived and accommodated by the other regime participants and (2) whether the Polish policies and actions towards the international refugee regime (especially towards the right to and request for protection as well as towards the principle of non-refoulement which we see as the cornerstone norms of the regime) have permanently destabilised the regime leading to its modification, decay or collapse.

In the process of analysis, we confirmed that the Polish policies and actions towards the IRR have been initially accommodated with a mixture of cautious tolerance,

[14] For details on the legal and institutional arrangements, see: Stowarzyszenie Interwencji Prawnej, 2023.

especially among the EU Member States which wished to keep the migration flows through the Polish-Belarussian border stalled there. Tacit criticism was expressed by international governmental agencies and organisations such as UNHCR and the non-governmental community, which was openly critical which, however, had an almost unnoticeable impact on the Polish authorities. For the time being of completing this research, Polish policies and actions challenging the IRR have not led to permanent destabilisation of the regime, not to mention its dissolution, for Poland as a participant in the regime is not characterised by features that are key to the regime's duration (financially, organisationally, and normatively) despite challenging the regime's core. Poland joined the IRR 40 years after the Geneva Convention was signed. It did not participate in the process of regime creation and was not viewed as key to the continuation of the regime. The first phase of accession to the regime was marked by the creation of the legal and institutional domestic framework for protection through rapid socialisation to the norms of IRR and prompt internalisation. Very little post-war experience with multicultural and multiethnic challenges coupled with little interest of asylum-seekers in choosing Poland as the country of final destination, which rendered the topic of refugee protection invisible in the public discourse. The role of Poland in IRR must not, however, be underrated. Poland was a role model for the democratising former Eastern Bloc states and the West due to its size, population, as well as political significance. Yet, Poland has not become a crucial participant of the regime further on. Though a member of a well-developed and relatively rich Europe with a long external border, the protection of which is key to the EU security and the effectiveness of the Dublin system and the larger CEAS, Poland remained a transit country for a long time. That changed only with migration from Ukraine after February 24, 2022.

Poland's actions are causing bifurcation within the regime because they have not been explicitly criticised by major governmental actors (states and intergovernmental organisations). The only stark opponents are NGOs and – to a limited extent – the institutions responsible for managing the regime. That said, changes in IRR may occur, especially since the CEAS modifications are about to happen, once the New Pact on Asylum and Migration is approved with all its new elements. The modifications in the Pact, however, are not a direct result of Poland's approach to CEAS but rather seem to have played the role of a trigger of a serious debate about reinterpreting the regime's rules of operation.

As noted in the introductory part of our paper and as proved by the analysed evidence regarding Poland, IRR member states' judicial authorities do not always necessarily go in line with the executive actions of states' institutions. Ultimately, however, until such judicial decisions are enforced, states' actions are defined and conducted by the executive[15].

[15] In this regard, a recent judicial decision by a court in Catania, Sicily, provides interesting evidence. In September 2023, the court ruled that the Italian government's decrees providing for detention and speedy border procedures in Italy stand contrary to Italian constitutional law and EU law (Hlebowicz, 2023). Similar to the Polish and Italian courts' decisions are Dutch judicial institutions' proceedings and verdicts dated April 2023 on the illegality of asylum procedures in the Netherlands (Euronews, 2023).

Further and extensive research is needed to see whether the generalised findings claim that international regimes will undergo significant changes only when the approach towards the regime of particular actors will change. These particular actors need to play a crucial, sometimes leading role in the regime's functioning. At the same time, their policies towards the regime and its core norms, rules, principles, and institutions in a specific time span must be coherent and consistent, which excludes acting in the regime along the lines of expectations of the general public and for one-off political gains.

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