



The Threat to International Migration Law from Recent Polish Legislation

There is a legal problem in the works, and it takes the form of Poland legalizing a cold shoulder to needy migrants. In response to substantial migration from Middle Eastern countries,¹ Poland has fashioned a blunt answer² by passing legislation that legalizes migrant border expulsion dependent on border agent determinations and provides immigration officials the discretion to deny asylum status applications.³ Bringing in the surrounding context of a migration

system under substantial stress,⁴ the question raised is whether Poland has violated international law by denying the ability to seek asylum status.

A plain reading of the relevant international law plainly renders this question rhetorical: Poland's action obviously enters the territory of violating international law. For example, the Universal Declaration of Human Rights (UDHR) unequivocally announces that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁵ Another clear claim for a right to seek asylum is found under the American Convention on Human Rights (AmCHR) by stating “every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”⁶

However, if argued that Poland's action is less obviously violating international law because international law arguably lacks binding force, then perhaps narrowing the analysis to the more binding context of the European Union would quell such an objection. Multiple EU agreements are undeniably tied to the directives of the aforementioned international law. For example, Article 18 of the Charter of Fundamental Rights of the European Union recognizes “a right to asylum . . . based on the right to asylum provided in the UDHR. . . .”⁷ Furthermore, this charter states that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees”⁸ Finally, the “Council Directive 2004/83/EC [that] govern[s] . . . common policy on refugee status . . . orders EU member states to 'grant refugee status to a third country national or a stateless person, who qualifies as a refugee.’”⁹

Concededly, the language of these agreements must coexist with both a state's right to expulsion within its borders¹⁰ and its right to grant (or not grant) asylum.¹¹ However, a state's

power under its sovereignty does not consume a state's obligation to provide, at the minimum, the *chance* to acquire asylum status. Firstly, scholarly analysis suggests the aforementioned "treaties provide for an individual right to asylum, supplementing the traditional state right to grant asylum."¹² And if general objections to academic assessments are raised, then perhaps more persuasive are the customary practices that point to "an emerging consensus" for an individual right to apply for asylum.¹³ And while it is true that a "legal duty to prevent irregular departure" is naturally encompassed by a State's sovereignty, the effectiveness of this duty, however, falls short of "form[ing] any customary international law obligation to prevent irregular emigration."¹⁴

And if the combination of the plain language international law, EU agreements, and when customary international practice is not enough to cast Poland's act as violating international law, then perhaps an even narrower examination than that of the EU would prove persuasive. Poland itself stands as one of the many examples of a state with an explicit constitutional directive that "specifically articulate[s] . . . for those qualifying as refugees, asylum [as] a right."¹⁵ Thus, when state action act stands in opposition to not only the plain language of an international agreement, but also customary practice and the language of one's own constitutional amendment, it is hard not to see an international law violation.

This legal impermissibility carries with it dire consequences for EU international migration law. Indeed, "the experience of the [migration] crisis of 2015 . . . suggests that integrity of supranational law is more susceptible to harm when states object or subvert its constituent instruments."¹⁶ This context is made all the more alarming when placed against the backdrop of Poland's recent populist streak that holds "a strong antipathy towards elites and the international legal obligations that they promote."¹⁷ Thus, it stands that if international migration

law is to persevere under substantial pressures of modern migration, belligerent attempts to undermine its institutional authority should neither go unnoticed nor unremedied.

¹ Antonio Collison, *Poland: Critics say new law to legalize eviction of immigrants at borders that have passed parliament in violation of human rights law*, Emetra, <https://eminetra.co.uk/poland-critics-say-new-law-to-legalize- eviction-of-immigrants-at-borders-that-have-passed-parliament-in-violation-of-human-rights-law-world- news/757007/>, [<https://perma.cc/4GDM-JTRN>].

² Rutgers, *Poland Passes Legislation Allowing Migrant Pushbacks at Border*, USNEWS, <https://www.usnews.com/news/world/articles/2021-10-14/poland-passes-legislation-allowing-migrant-pushbacks-at- border> [<https://perma.cc/9Y8U-RFPJ>].

³ *Supra*, note 1.

⁴ William Worster, *The Contemporary International Law Status of the Right to Receive Asylum*, 26 Int. J. Refugee L. 477 (2014).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Andrew Wolman, *The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective*, 31 Int. J. Refugee L. 30 (2019).

¹⁵ *Supra*, note 4.

¹⁶ Satvinder Juss, *The Decline and Decay of European Refugee Policy*, 25 Oxford J. Legal. Studies 749 (2005).

¹⁷ *Id.*