UKRAINE AND THE EMERGENCY POWERS OF INTERNATIONAL INSTITUTIONS

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ABSTRACT

As global crises become more frequent, international organizations increasingly invoke emergency powers to address them. But the study of international organization emergency governance remains in its infancy. We consider the EU response to the Russian invasion of Ukraine. The EU built on the emergency to accelerate EU integration and introduce unprecedented reforms in defense and security, migration and asylum, and energy. We map the techniques the EU deployed to achieve this and argue that they are not as alarming as critics have suggested.

I. INTRODUCTION

International organizations exercise emergency powers much like states do. They advance exceptional actions through exceptional procedures to address sudden international crises, such as war, disease, or mass displacement. The emergency actions of international organizations might lack a clear legal basis in their mandate and might even circumvent or contradict their constitutive documents.

Examples abound. The 2019 swine flu pandemic prompted the World Health Organization (WHO) to promote controversial medication procurement agreements.[1] More recently, the WHO declared COVID-19 a public health emergency, triggering a series of exceptional measures.[2] During the 2008 debt crisis, the European Union famously bailed out member states at risk of sovereign default, despite robust EU Treaty "no-bailout" principles.[3] Amid COVID-19, the EU adopted a groundbreaking stimulus package to combat a pandemic-driven recession. Some member states received funds as grants, not loans, and the

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[1] CHRISTIAN KREUDER-SONNEN, EMERGENCY POWERS OF INTERNATIONAL ORGANIZATIONS: BETWEEN NORMALIZATION AND CONTAINMENT, ch. 6 (2019). *See also* J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1 (2016).

[2] World Health Org., *COVID-19 IHR Emergency Committee*, *at* https://www.who.int/groups/covid-19-ihr-emergency-committee; World Health Org., *Timeline: WHO's COVID-19 Response*, *at* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline.

[3] Treaty on the Functioning of the European Union, Art. 125(1), OJ L326/47-326/390 (Oct. 26, 2012); KREUDER-SONNEN, *supra* note 1, ch. 5.

EU undertook to raise money *collectively* through bonds.[4] The EU also added novel income sources and required higher member state contributions to expand its regular budget to fund the package.[5] The UN Security Council is itself an emergency mechanism baked into the global order. The Security Council is different, however, in the sense that the exercise of emergency powers is at the core of its mandate and is not in itself extraordinary.

Surprisingly, however, the study of how, when, and why international organizations invoke emergency powers remains in its infancy.[6] This stands in contrast to extensive scholarship about *domestic* emergency powers, and how their exercise contributes to the concentration of power in executives.[7] In this Essay, we consider the exercise of international organization emergency powers in the legal and policy responses to the Russian invasion of Ukraine. The responses inform theory about how international organizations behave in emergencies and how they accrue power.

While several international organizations, from the North Atlantic Treaty Organization (NATO) to the UN High Commissioner for Refugees (UNHCR), have taken action to help Ukraine and contain Russia, this Essay focuses on the European Union. The EU is the international institution that has used emergency powers most ambitiously in this crisis to date. The first large-scale traditional war on European soil since World War II jeopardized core EU interests and brought back painful memories of life under Soviet occupation, creating a swell of support for major action. The EU's use of emergency powers is particularly impressive because the EU—unlike the UN Security Council and NATO—is not designed for agile, speedy action. In normal times, it is an unwieldy, all-purpose governmental institution known for its byzantine bureaucracy.

We argue that the central EU institutions—the EU Council and Commission—have built on the emergencies created by the Russian invasion along key fronts to advance unprecedented measures that inject new life into EU integration. We consider these dynamics in the areas of security and defense, migration and asylum, and energy.

We first analyze how the Russian invasion allowed the EU to take extraordinary measures to consolidate key defense authorities and reshape its regional security role. The EU circumvented a constitutional prohibition on funding military and defense actions from the regular EU budget to provide Ukraine with 2.5 billion euros in military assistance, thus setting a precedent for collectively arming a third state during armed conflict.[8] With regard to refugees, for the first time, the EU permitted current and future displaced Ukrainians to relocate, work,

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[4] Matina Stevis-Gridneff, *E.U. Adopts Groundbreaking Stimulus to Fight Coronavirus Recession*, N.Y. TIMES (Dec. 10, 2020), *at* https://www.nytimes.com/2020/07/20/world/europe/eu-stimulus-coronavirus.html.

[5] Council of the EU Press Release, Next Multiannual Financial Framework and Recovery Package: Council Moves to Finalise Adoption (Dec. 14, 2020), *at* https://www.consilium.europa.eu/en/press/press-releases/2020/12/14/next-multiannual-financial-framework-and-recovery-package-council-moves-to-finalise-adoption.

[6] *See, e.g.*, KREUDER-SONNEN, *supra* note 1; Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319, 334–38 (2009) (calling for the development of "a sub-field of specialized work on emergency powers of IOs").

[7] *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (2007); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020); *but see* Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CONST. L. 1498 (2021).

[8] *See* text accompanying notes 26–28 *infra*.

and receive benefits in any member state of their choice.[9] And in the energy field, the Ukraine invasion accelerated EU policies to collectively promote energy independence and divest from rogue exporters like Russia, including the introduction of authority to mandate EU-wide emergency rationing.[10]

The EU Ukraine emergency measures use several techniques: legal workarounds; scaling up; consolidation; and technocracy-maximization. They create legal workarounds by circumventing constitutional restrictions or suspending longstanding EU rules. They leverage and repurpose existing programs to scale them up. They consolidate power by migrating important authority from the member states to the central EU institutions. In some cases, they push through policies that EU member states had affirmatively rejected before. And they maximize technocracy by deploying centrally predetermined quotas, formulae, and legal definitions for allocating obligations and entitlements among member states to reduce—if not eliminate—political haggling. Overall, the Ukraine crisis broke new frontiers in EU integration and created major precedents for future EU action.

Some view such practices as power grabs by unaccountable international bureaucracies.[11] Under a cynical version of this view, the exercise of emergency powers by international organizations like the EU is little more than opportunistic overreach that contravenes their legal mandates, tilts toward authoritarianism, and lacks legitimacy. Others maintain that resort to emergency powers stems from gaps in the capacity of international organizations to effectively meet the governance challenges for which they were established.[12] It is therefore appropriate to bridge the gaps through exceptional measures and creative legal workarounds. If international organizations overreach, there are accountability mechanisms to condemn and reverse their practices. But if emergency measures find political support as emergencies ebb, they could eventually become standard practice.[13]

We argue that the EU example supports the latter view. Ukraine underscored the significant capacity gaps of the EU in responding to mass displacements, ensuring energy security, and defending the Union's common defense interests. The crisis generated urgency and political will to advance reforms that better meet those challenges. Accountability concerns are overblown in part because the emergency measures have all been adopted with the support

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[9] *See* text accompanying notes 34–38 *infra*.

[10] *See* text accompanying note 60 *infra*.

[11] Jan Christoph Suntrup, *From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management*, 19 GER. L.J. 375 (2018); Christian Kreuder-Sonnen, *An Authoritarian Turn in Europe and European Studies?*, 25 J. EUR. PUB. POL'Y 452 (2018); Felicity Vabulas, *Book Review: Christian Kreuder-Sonnen. 2019. Emergency Powers of International Organizations: Between Normalization and Containment*, 15 REV. INT'L ORG. 969, 969 (2020) ("Alongside the promise of international cooperation lies a growing concern regarding the potential overreach of international organizations (IO). Scholars and policy-makers alike wonder how transnational actors can constrain IOs. . . . At the heart of this dilemma is the potential abuse or misuse of institutional power; yet these crucial concerns become even more pronounced during and after *emergency rule*."); Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT'L J. CONST. L. 627 (2012); *see also* Office of Senator Rick Scott Press Release, Sen. Rick Scott Introduces Legislation to Stop Overreach of WHO (May 26, 2022), *at* https://www.rick-scott.senate.gov/2022/5/sen-rick-scott-introduces-legislation-to-stop-overreach-of-who.

[12] *See* Vabulas, *supra* note 11, at 971–72.

[13] *See* KREUDER-SONNEN, *supra* note 1; *see also* Kingsbury & Casini, *supra* note 6 (discussing accountability mechanisms); Jonathan White, *Authority After Emergency Rule*, 78 MODERN L. REV. 585 (2015); *see generally* Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, 14 REV. INT'L ORG. 581 (2019).

of member states at the EU Council.[14] Many of these initiatives transfer significant administrative authority to the EU Commission and other central institutions, such that their implementation may gradually move away from intense political oversight. However, the EU refugee, defense, and energy measures are Ukraine-specific, and they have built-in sunset clauses that will prevent them from becoming permanent by default. Broader, ambitious energy initiatives pushed through in the wake of Ukraine compensate for their breadth through largely soft requirements and implementation mechanisms.

The EU case study no doubt has unique features that are difficult to generalize. But the EU Ukraine response provides rich insight into how international institutions behave in emergencies and the techniques they deploy to expand their power. In creating legal workarounds, scaling up existing policy and legal infrastructure, consolidating authority and pushing through previously rejected initiatives, emphasizing technocracy, and entering entirely new policy fields, the EU shows that international institution emergency behavior shares much in common with that of domestic institutions. It concentrates power in the hands of organs comparable to national executives, deviates from normal process, and sets precedents that seem pathbreaking and controversial now, but could be normalized as the emergency subsides—moving the goalposts for future action. As one European official commented, one emergency energy proposal "was crazy in June, it was fringe in July, and it was mainstream in August."[15]

II. Defense and Security Measures

Developing a common security and defense policy has been a stated goal of the EU from its earliest days.[16] Nevertheless, until Ukraine, that goal remained aspirational. Notwithstanding repeated member state political commitments to increase EU participation in global security and to build appropriate capacities,[17] including the creation in 2004 of a European Defence Agency,[18] the defense and security element of the EU's common foreign and security policy largely failed to produce major international EU military initiatives.[19] Despite important reforms in the 2008 Treaty of Lisbon,[20] until recently, the EU invoked common security and defense authorities sparingly.

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[14] In the case of EU regular budget expansion, the addition of new funding sources was approved not only by the EU Council, but also by all twenty-seven national parliaments of EU member states. *See* Council of the EU Press Release, *supra* note 5.

[15] Kim Mackrael & Matthew Dalton, *European Governments Back Broad Intervention in Energy Markets*, Wall St. J. (Sept. 9, 2022), *at* https://www.wsj.com/articles/europe-holds-emergency-talks-on-energy-market-intervention-11662713678?st=ahxyx5yrfe610xr&reflink=share_mobilewebshare.

[16] Panos Koutrakos, The EU Common Security and Defence Policy 1 (2013).

[17] Eur. Defence Agency, *Our History*, *at* https://eda.europa.eu/our-history/our-history.html; Peter Van Ham, *Europe's Common Defense Policy: Implications for the Trans-Atlantic Relationship*, 31 Security Dialogue 215, 215 (2000).

[18] Council Joint Action 2004/551/CFSP, at 17, OJ L 245 (July 17, 2004); Eur. Comm'n, *European Defense Fund*, *at* https://defence-industry-space.ec.europa.eu/eu-defence-industry/european-defence-fund-edf_en (primarily designed to support the EU domestic defense industry and research and development).

[19] Koutrakos, *supra* note 16; Julian Bergmann & Patrick Müller, *Failing Forward in the EU's Common Security and Defense Policy: The Integration of EU Crisis Management*, 28 J. Eur. Pub. Pol'y 1669 (2021); Anand Menon, *Defense Policy, in* The Oxford Handbook of the European Union 587 (Erik Jones, Anand Menon & Stephen Weatherill eds., 2012).

[20] Treaty on European Union, Arts. 42–46, OJ C325/5 (Dec. 24, 2002).

Member states continued to advance their own security and defense policies and remained protective of their freedom to govern this core element of national sovereignty independently of the EU. The Treaty on European Union states that the common security and defense policy "shall not prejudice the specific character of the security and defence policy of certain Member States."[21] The Treaty requires that the Council—the main political decision-making organ of the EU in which each member state is represented—authorize common defense decisions unanimously.

Against this backdrop, the creation of the European Peace Facility (EPF), and its most ambitious invocation yet to aid Ukraine, are a watershed moment.[22] Four days after Russia invaded, the EU Council decided to establish an EPF "assistance measure" for Ukraine.[23] The EPF itself was established only recently, in 2021, "for the financing by Member States of Union actions under the Common Foreign and Security Policy . . . to preserve peace, prevent conflicts and strengthen international security."[24] It replaced and expanded more limited regional initiatives and has global scope.

In essence, the EPF is a financial workaround designed to circumvent a constitutional prohibition on EU regular budget funding for actions with military or defense implications.[25] Before Russia invaded Ukraine, the Council adopted several assistance measures under the EPF to support limited action in various countries,[26] including non-lethal assistance to Ukraine.[27] But none were as extensive as the post-invasion Ukraine measures. And none involved the provision of lethal weapons to a third country during armed conflict. The Council adopted several decisions on lethal and non-lethal military assistance for Ukraine under the EPF by July 2022, setting a target of 2.33 billion euros in lethal assistance and 170 million in non-lethal assistance like first aid kits, protective gear, and fuel.[28] In the fog of the Russian invasion, the EU scaled up a relatively modest preexisting extra-budgetary military funding program to provide billions to a third country. It stretched the program to cover EU military participation in a major active armed conflict.

EPF assistance measures are funded through member state contributions based on the estimated annual budget for the EPF and Council decisions that create tailored assistance measures to address concrete situations in various states, like the Ukraine assistance measure. Individual member state contributions are calculated using an objective criterion—gross national income. In other words, contributions are centrally allocated and mandatory,

[21] *Id.* Art. 42.2.

[22] *Ukraine War: EU to Buy and Deliver Weapons to Kyiv, Says Ursula Von Der Leyen*, EURONEWS (Mar. 5, 2022), *at* https://www.euronews.com/2022/02/27/eu-to-buy-and-deliver-weapons-to-ukraine-the-first-time-the-bloc-has-financed-military-sup; Maïa De La Baume & Jacopo Barigazzi, *EU Agrees to Give €500M in Arms, Aid to Ukrainian Military in "Watershed" Move*, POLITICO (Feb. 27, 2022), *at* https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid ("Another taboo has fallen . . . [t]he taboo that the EU was not providing arms in a war.").

[23] Council Decision (CFSP) 2022/339, at 1, OJ L61 (Feb. 28,2022).

[24] Council Decision (CFSP) 2021/509, at 14, OJ L102 (Mar. 24, 2021).

[25] TEU, *supra* note 20, Art. 41(2). Eur. Comm'n, *European Peace Facility*, *at* https://fpi.ec.europa.eu/what-we-do/european-peace-facility_en. The EPF currently has a total budget of 5.69 billion euros for 2021–2027.

[26] Eur. Comm'n, *supra* note 25.

[27] Council Decision (CFSP) 2021/2135, at 59, OJ L432 (Dec. 3, 2021).

[28] EU Council Press Release, European Peace Facility: EU Support to Ukraine Increased to €2.5 Billion (July 22, 2022), *at* https://www.consilium.europa.eu/en/press/press-releases/2022/07/22/european-peace-facility-eu-support-to-ukraine-increased-to-2-5-billion.

with some exceptions.[29] The EU External Action Service, the Union's combined foreign and defense ministry, and an EU Council Committee administer assistance measures at the EU level.[30]

The EPF is an important framework for military and defense spending moving forward. It fills a gap created by the prohibition in the EU treaties on financing military operations from the regular EU budget. Unlike past programs, the EPF can be used for any conflict, anywhere in the world, and to assist any third state. This gives the EU a vital tool for initiating common military operations and consolidating more power. Ukraine is a test case for how far the newly revamped EPF can be stretched. Billions in military assistance to a single country over six months is arguably quite far. The Ukraine assistance measure also extends the EU's reach into the defense and security realm by creating a precedent for collective EU provision of lethal weapons to a third state during an armed conflict. It is a new model of EU international military engagement.

Although member states are still free to advance their security interests independently, the EU now has a model for collective exercise of military and defense powers that member states previously only exercised on their own. The obligation—determined by objective criteria—to support a common EU military fund reduces their discretion in using their national defense budget.

The Russian invasion also pushed the common defense forward in ways that go beyond the EPF. The invasion triggered a fundamental realignment of the defense policies of key member states like Germany, made possible in part by the political cover and funding that the EU has provided. For the first time since World War II, Germany announced it would rebuild its military by sharply increasing defense investment.[31] The EU has recommitted to investing in the European defense industry through 500 million euros in common procurement of defense products.[32] NATO is experiencing its own renaissance. It remains to be seen how this emerging EU-NATO-state defense dynamic reshapes security on the continent.

These new collective defense mechanisms might impact future member state policymaking. Instead of going it alone, members could avail themselves of the resources, platforms, and political cover that collective EU military and defense action offer, gradually relinquishing power to the central EU institutions.

III. Asylum and Migration Measures

EU legal action to help those displaced by the Ukraine invasion similarly transferred powers and discretion from member states to the central EU institutions. Even considering that the EU has much more significant baseline authorities over common border policy than it does over common security or energy, its response to the Ukraine displacement applied those authorities in unprecedented and far reaching ways.

[29] Council Decision (CFSP) 2021/509, *supra* note 24, Art. 26.

[30] *Id*. Arts. 5, 10–11.

[31] Alexandra Marksteiner, *Explainer: The Proposed Hike in German Military Spending*, SIPRI (Mar. 25, 2022), *at* https://www.sipri.org/commentary/blog/2022/explainer-proposed-hike-german-military-spending.

[32] Eur. Comm'n Press Release, Defence Industry: EU to Reinforce the European Defence Industry Through Common Procurement with a €500 Million Instrument (July 19, 2022), *at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4491.

The EU has repeatedly relied on emergency measures in recent years to centralize power to decide how to allocate asylum seekers among EU member states. Those emergency measures superseded and deviated from the Dublin Regulations rules, the controlling EU instrument that typically governs responsibility for hosting and processing asylum seekers. Under Dublin, that responsibility rests with the member state of first irregular entry, which is often a peripheral country. But emergency measures that the EU adopted to address the 2015 influx of Middle Eastern migrants, as well as the current extraordinary Ukraine measures, instead promote responsibility sharing among EU member states regardless of initial point of entry.[33] They reserve a central role for EU institutions in allocating hosting and monetary obligations among the member states and in determining the rights of displaced persons.

Within days of the Russian invasion, the EU Council suspended the Dublin regime for millions fleeing Ukraine.[34] For the first time, the Council decided to activate the EU Temporary Protection Directive, a 2001 directive issued in response to the war in the Balkans to address mass influxes of persons fleeing conflict.[35] It granted Ukrainian nationals and others the right to live, work, and receive benefits in *any* EU country for at least one year and likely longer.[36] Refugees and asylum seekers have never before enjoyed this degree of choice regarding the country where they will live and work. The Ukraine temporary protection decision is also generous in defining the group of eligible individuals and the rights they would enjoy. These rights apply automatically across the EU.

Put differently, the temporary protection decision is a model of centralized administration of a mass displacement by the EU institutions. It is a collective response that replaces the default of placing all responsibility with the individual member states immediately neighboring Ukraine under the Dublin regime. The normal practice of individualized assessment to determine eligibility for protection was also suspended, reflecting the EU's recognition that individualized assessment is impracticable in a situation of mass displacement with millions fleeing Ukraine in a short timeframe. Also departing from past practice, displaced Ukrainians are not segregated in crowded refugee camps, isolated from access to work and education, but free to move and seek out opportunities.[37] In accepting free movement of Ukrainians across Europe, member states relinquished extensive powers to reject, control, and place limits on displaced persons, although they retained discretion on the scope of benefits Ukrainians may receive.[38]

The idea that EU central institutions step in to determine member states' obligations with respect to migration emergencies has a recent precedent. During the 2015 migration crisis, the EU passed a set of emergency measures to assist Greece and Italy. The Council ordered the

[33] *See* Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CAL. L. REV. 897 (2022).

[34] Council Implementing Decision (EU) 2022/382, at 1, OJ L71 (Mar. 4, 2022).

[35] Council Directive 2001/55/EC, at 12, OJ L212 (July 20, 2001).

[36] Council Implementing Decision (EU) 2022/382, *supra* note 34.

[37] *See* Dominik Hangartner, Elias Dinas, Moritz Marbach, Konstantinos Matakos & Dimitrios Xefteris, *Does Exposure to the Refugee Crisis Make Natives More Hostile?*, 113 AM. POL. SCI. REV. 442 (2019); Melissa Carlson, Laura Jakli & Katerina Linos, *Refugees Misdirected*, 57 VA. J. INT'L L. 539 (2018); Melissa Carlson, Laura Jakli & Katerina Linos, *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management*, 62 INT'L STUD. Q. 671 (2018).

[38] Jonas Bornemann, *The Selective Nature of a Pan-European Willkommenskultur*, VERFASSUNGSBLOG (July 12, 2022), *at* https://verfassungsblog.de/the-selective-nature-of-a-pan-european-willkommenskultur.

relocation of 160,000 largely Middle Eastern asylum seekers to other member states by assigning each member mandatory relocation quotas.[39] The EU calculated the quotas based on a formula that accounted for objective parameters, like population size and GDP[40]—reminiscent of the method for calculating member state contributions to the European Peace Facility in the defense and security context.[41] Unlike the Ukraine case, however, here member states retained their discretion in the processing of asylum applications. The EU did not mandate that protection be automatically granted to a whole category of protection seekers, and application grant rates varied across member states and origin countries.[42] The 2015 emergency measures only reallocated responsibility for hosting and processing asylum seekers among member states.

Similar to the security and defense context, the EU built on emergencies to make bureaucratic leaps. It suspended the normally applicable legal regime in favor of extraordinary emergency measures. It revived and scaled up a long-forgotten directive to give Ukrainians a significant package of rights. It advanced collective, integrated administration of the EU response to major global and domestic challenges, increasing the dominance of EU institutions in determining the trajectory of EU asylum policy. And it introduced technocratic criteria—a formula based on objective parameters in 2015 and clear legal definitions for eligible individuals displaced from Ukraine that all member states must follow—to reduce political haggling in the process of policy implementation.

To be sure, it is not certain that the EU will mobilize again to address a future displacement in the same way it did for Ukraine, or even as it did in 2015. Proximity and ethnicity contributed to the generosity of the Ukraine EU response, and the EU was widely criticized for applying a double standard and discriminating against Middle Eastern and Black refugees.[43] The Dublin regime remains the default, and efforts to negotiate a generally applicable responsibility sharing mechanism to replace it in the framework of the EU's New Pact on Migration and Asylum have stalled.[44]

Nevertheless, we detect a similar pattern in the last two major EU migration emergencies involving different ethnicities and origin states: the suspension of the Dublin Regime, and some form of central EU intervention to introduce a collective mechanism based on objective quantitative or legal parameters to govern the EU response. Because the EU centralized its response both to persons fleeing Middle Eastern, Muslim-majority states, and to persons

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[39] Council Decision (EU) 2015/1601, at 80, OJ L248 (Sept. 24, 2015); Council Decision (EU) 2015/1523, at 146, OJ L239 (Sept. 15, 2015).

[40] COM(2015) 451, 2015/0209 (NLE), Rec. 25. *See also* Trym N. Fjørtoft, *More Power, More Control: The Legitimizing Role of Expertise in Frontex After the Refugee Crisis*, 16 REG. & GOVERNANCE 557 (2022) (describing a similar dynamic in the expansion of the EU's border control agency Frontex's mandate).

[41] In earlier work, we compare this response to other responsibility-sharing mechanisms and find it comparatively ambitious and generous. But even then, the EU would not go as far as opening its gates to millions of displaced persons, paired with a generous package of benefits. The Ukraine response was simply off the charts. *See* Linos & Chachko, *supra* note 33.

[42] *EU Member States Granted Protection to More Than 700 000 Asylum Seekers in 2016*, EUROSTAT (Apr. 26, 2017), *available at* https://www.europeanmigrationlaw.eu/documents/Eurostat-AsylumDecisions-2016.pdf.

[43] *See, e.g.*, Jaya Ramji-Nogales, *Ukrainians in Flight: Politics, Race, and Regional Solutions*, 116 AJIL UNBOUND 150 (2022); *UNHCR Chief Condemns "Discrimination, Violence and Racism" Against Some Fleeing Ukraine*, UN NEWS (Mar. 21, 2022), *at* https://news.un.org/en/story/2022/03/1114282. *See also* Elena Chachko & Katerina Linos, *International Law After Ukraine: Introduction to the Symposium*, 116 AJIL UNBOUND 124 (2022).

[44] *See* Linos & Chachko, *supra* note 33, at 921–22.

fleeing a Christian-majority state on the European periphery, there is reason to expect that the elements of suspension, centralization, and technocratic allocation of obligations will be replicated to varying degrees in future emergencies. This is also the model that the EU is advancing as a permanent replacement for the Dublin Regime in the New Pact.[45] Opposition in local communities to hosting asylum seekers stems in part from their relegation to crowded, underserved camps that impact locals. Ukrainians' relative freedom of movement and opportunity should mitigate this source of objection this time, potentially reducing domestic opposition to future EU emergency measures to address mass displacements.[46]

IV. ENERGY INDEPENDENCE

Another major area in which the EU has used the Ukraine emergency to jumpstart longstanding projects and move toward greater EU integration is energy. Shortly after the Russian invasion, the EU Commission declared that "the case for a rapid clean energy transition has never been stronger and clearer." Russia provided over 40 percent of EU's total gas consumption, and accounts for 27 percent of EU oil imports and 46 percent of coal imports.[47] But now, Russia drastically reduced supply to Europe and has threatened to cut the EU off altogether, creating turmoil in the energy markets and an imminent risk of deep energy shortages in the upcoming winter.[48]

The Commission set in motion an ambitious energy plan, REPowerEU, to wean Europe off Russian energy by the end of the decade and diversify EU suppliers. Alongside these immediate goals, the plan leverages the Ukraine crisis to advance a broader climate agenda of gradually moving the EU toward green energy sources.[49] The Commission officially presented the plan in May 2022 at breakneck speed in EU terms, with the political blessing of the EU Council. It emphasized the advantages of the EU working as a union to accomplish the goals of divestment from Russia and energy sustainability faster.[50]

The REPowerEU plan includes a wealth of elements. Here we emphasize measures that would collectivize EU energy policy and procurement and increase the role of central EU institutions. First, the plan leverages a preexisting EU instrument called the Recovery and Resilience Facility (RRF), much like the EU did with the European Peace Facility in the defense and security context. The RRF is a coordination and investment mechanism that the EU created as part of the response to yet another emergency, COVID-19.

Originally, the RRF was designed to "mitigate the economic and social impact of the coronavirus pandemic and make European economies . . . more sustainable, resilient and better prepared for the challenges and opportunities of the green and digital transitions."[51]

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[45] *Id.*

[46] Hangartner, Dinas, Marbach, Matakos & Xefteris, *supra* note 37; Carlson, Jakli & Linos, *supra* note 37.

[47] Communication from the Commission, REPowerEU: Joint European Action for More Affordable, Secure and Sustainable Energy, COM/2022/108 (Mar. 8, 2022).

[48] *See* Proposal for a Council Regulation on Coordinated Demand Reduction Measures for Gas, 2022/0225 (NLE) (July 27, 2022), *available at* https://data.consilium.europa.eu/doc/document/ST-11625-2022-INIT/en/pdf.

[49] Communication from the Commission, *supra* note 47.

[50] Eur. Comm'n Press Release, REPowerEU: A Plan to Rapidly Reduce Dependence on Russian Fossil Fuels and Fast Forward the Green Transition, *at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131.

[51] Eur. Comm'n, *Recovery and Resilience Facility*, *at* https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en.

REPowerEU proposes to amend the RRF regulation to implement the divestment, diversification, and sustainability goals of the plan as part of the response to the Russian invasion. It includes guidance and rules that member states should follow to reshape their national "recovery and resilience" plans to incorporate REPowerEU's objectives.[52]

Second, the REPowerEU plan includes initiatives to collectivize and centralize EU energy procurement. Under the EU treaties, although the EU has competence in certain areas of internal energy policy, each member state maintains its right to "determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply."[53] But in the wake of Ukraine, the EU—not individual member states—has led the effort to reduce the bloc's dependence on Russia.

For example, the EU has already successfully negotiated with international partners on behalf of its member states to diversify energy suppliers. The Commission has institutionalized collective energy procurement by creating the EU Energy Platform,[54] which is designed to facilitate voluntary common purchase of gas, Liquified Natural Gas (LNG), and hydrogen by pooling demand, optimizing use of infrastructure, and coordinating communication with suppliers. The Commission specifically referenced the EU common COVID-19 vaccine purchasing program as the model for this common energy procurement mechanism.[55]

Notably, the REPowerEU does not stop at ad hoc procurement cooperation for Ukraine. It envisions a joint EU purchasing mechanism that will negotiate and contract energy purchases on behalf of member states that choose to opt in. While this remains a distant prospect, it is hard to exaggerate the geopolitical and economic implications of EU members collectively bargaining in the area of energy procurement.

A commitment to a common energy strategy and unified energy diplomacy undergirds these bureaucratic initiatives. REPowerEU includes a so-called "External Energy Strategy" to promote the EU's energy goals internationally.[56] The EU is also planning to allocate substantial resources for the implementation of the REPowerEU plan. The Commission estimated that the plan would require an additional investment of 210 billion euros between now and 2027, adding to 225 billion Euros already available through RRF loans and other sources of funding.[57]

REPowerEU joins other moves to place immediate limits on imports from Russia and even EU energy consumption. In June 2022, the EU imposed a partial embargo on Russian oil.[58] The sanctions ban imports of Russian crude oil by sea beginning in December 2022 and imports of petroleum products beginning in February 2023, with exemptions to

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[52] COM(2022) 231 (May 18, 2022).

[53] TFEU, *supra* note 3, Art. 194(2); *see also* Kaisa Huhta, *The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, 70 INT'L & COMP. L. Q. 991 (2021).

[54] Eur. Comm'n Press Release, Energy Security: Commission Hosts First Meeting of EU Energy Purchase Platform to Secure Supply of Gas, LNG and Hydrogen, *at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2387.

[55] *Id.*; Eur. Comm'n, *EU Vaccine Strategy*, *at* https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en.

[56] JOIN/2022/23 (May 18, 2022).

[57] Communication from the Commission, *supra* note 47.

[58] Council Decision (CFSP) 2022/884, at 128, OJ L153 (June 3, 2022).

accommodate eastern European and Balkan states. Germany and Poland agreed to voluntarily halt pipeline imports, which the sanctions measure exempts.[59]

Perhaps most significantly, in July, the EU announced an ambitious plan to require all member states to ration natural gas. The measure is based on Article 122 of the Treaty on the Functioning of the European Union (TFEU), which allows the Council to act "if severe difficulties arise in the supply of certain products, notably in the area of energy." If passed, the measure would sidestep an existing gas security regulation, which the Council deemed inadequate to prepare for major and prolonged supply disruptions. As a first step, member states will be asked to voluntarily reduce their consumption by 15 percent by spring 2023 to prepare for Russian supply manipulation. Remarkably, however, the proposed legal instrument will also grant the EU emergency authority to *mandate* rationing if voluntary measures prove insufficient, with some exceptions.[60]

The patterns we identify in the areas of security and defense and asylum and migration repeat in the energy context as well. The EU treaty default is that member states retain their right to manage their energy supply. The EU energy emergency measures create a variety of legal and bureaucratic workarounds that could in practice transfer significant elements of that power to central EU institutions. This includes a voluntary common EU energy platform, and in the future—a potential binding collective energy procurement and coordination mechanism; a top-down partial energy embargo on Russia; and even EU authority to mandate energy rationing.

The EU scaled up past policy and legal initiatives, including its COVID-19 response mechanism and the RRF, to promote an ambitious energy plan that would not only cut dependence on Russia, but also advance a broader sustainability and climate agenda that has long been an EU priority. The common purchasing mechanism, which focuses on coordination, optimization of infrastructure, and pulling demand, could make energy procurement more technical and need-based, and less affected by the individual political exigencies of member states. Centrally imposed mandatory rationing quotas to save gas are the epitome of technocratic energy supply management. The result of all these developments would be significant collectivization of EU energy law and policy, a key frontier where the EU has had limited competence and member states enjoy relative freedom to fend for themselves.

V. Conclusion

True to the cynical saying that one should never let a crisis go to waste,[61] the EU appears to grow stronger, at least in the institutional sense, from one emergency to the next. The EU entered the Ukraine crisis still reeling from Brexit and COVID-19. It nevertheless managed to build on the emergency to push through ambitious policies and legal reforms that may

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[59] Emily Rauhala & Quentin Ariès, *E.U. Agrees to Phase Out Russian Oil but Exempts Pipeline Deliveries*, WASH. POST (May 31, 2022), *at* https://www.washingtonpost.com/world/2022/05/30/eu-oil-russia-ukraine-hungary.

[60] *See* Proposal for a Council Regulation, *supra* note 48; Eur. Comm'n Press Release, Questions and Answers on the EU "Save Gas for a Safe Winter" Plan (July 20, 2022), *at* https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_4609.

[61] Katerina Linos, *Organizational Rights in Times of Crisis, Reviewing Adam Chilton & Mila Versteeg, How Constitutional Rights Matter*, 88 U. CHI. L. REV. 729, 744 (2021).

redefine the EU's security and defense role, its energy policy,[62] and perhaps how it responds to future mass displacements triggered by war or generalized violence. The EU also used the COVID-19 emergency to grow its regular budget, further increasing the capacity of its central institutions for the long term.

More broadly, the EU response to the Ukraine invasion illustrates how international institutions can use emergencies to accrue and centralize power, push through major reforms and policy ideas with implications beyond the emergency at hand, and create precedents for future action. The EU helped Ukraine militarily while creating a precedent for arming a party to an ongoing armed conflict and reviving defense investment. It vowed to divest from Russian energy but also pushed forward a broader climate agenda and, remarkably, a role for the EU in mandating energy rationing. And it welcomed those fleeing Ukraine while setting the strongest precedent yet for sharing responsibility for protection seekers who would not qualify as refugees under traditional definitions.

Years of proposals and smaller initiatives in all these areas suddenly ripened and gained the support of EU member states. If you will, it is a "garbage can" model of EU integration—in which pie-in-the-sky proposals meet a major crisis, ambitious leaders, and supportive public opinion, at just the right moment, when a window of opportunity opens.[63] Indeed, the European Parliament recently expressed support for formal amendment of the EU treaties to further empower the EU based on the lessons of recent crises. Among other elements, the European Parliament called for the adaptation of EU powers in the areas of defense and cross-border health, as well as "the completion of the energy union."[64]

Studying the EU Ukraine emergency measures has far broader implications because this case study provides a rich set of evidence on the specific techniques international institutions may deploy. We identify several recurrent patterns in all the policy contexts we discuss. The EU created legal workarounds to circumvent treaty constraints or longstanding rules without eliminating them. The military and defense, migration, and energy measures are ostensibly temporary in nature. They work around existing default rules without purporting to change them permanently, although, as we observe, they may have long-term implications in practice. The EU also dramatically scaled up past initiatives, legal authorities, and bureaucratic constructs. It pushed technocracy over politics by enshrining objective economic or legal policymaking principles in EU law to reduce political bargaining. And it used the crisis to assume powers member states previously exercised independently, with the result that key areas of EU policy previously under the control or broad discretion of member states are becoming increasingly collectivized and integrated.

Unlike critics of international organizations using emergencies to expand their power,[65] we are not alarmed by these practices. The Ukraine war spotlighted significant gaps in the EU's defense and security capacity, energy policy, and legal infrastructure related to migration and

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[62] Eur. Comm'n Press Release, Special Address by President von der Leyen at the World Economic Forum (May 24, 2022), *at* https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_3282.

[63] *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 174–75 (1984).

[64] *Parliament Activates Process to Change EU Treaties*, EUR. PARLIAMENT NEWS (June 9, 2022), *at* https://www.europarl.europa.eu/news/en/press-room/20220603IPR32122/parliament-activates-process-to-change-eu-treaties; Max Bergmann, *The EU's Next Big Deal: Enlargement for Treaty Reform*, POLITICO (Aug. 2, 2022), *at* https://www.politico.eu/article/eu-next-big-deal-enlargement-treaty-reform.

[65] *See* note 11 *supra*.

asylum. The steps that the EU took were plausible measures to fill these gaps, as evidenced by the fact that they were all adopted with the political support of EU member states.

Concerns about lack of accountability and the EU illegitimately using the crisis to accrue power and exceed its mandate therefore seem overblown. While it is true that the EU emergency measures divert certain authority to the central EU institutions in a manner that may move them away from intense political oversight, member states overwhelmingly supported these changes. What is more, the Ukraine Temporary Protection Directive and the assistance measure under the European Peace Facility both have sunset clauses, which guarantee that they will not be extended without the political support of member states. REPowerEU and the new rationing plan balance ambition with largely soft, voluntary implementation mechanisms.

It is possible, of course, that the very features that contribute to the legitimacy of the Ukraine emergency measures—such as their ad hoc nature, the fact that some of the most ambitious ones are voluntary, and the built-in time limits—will diminish their long-term effects on EU power and the division of labor between the central institutions and member states. But the precedent-setting function of these measures should not be discounted, and policy options deployed this time are bound to feature prominently in future EU consideration of emergency responses. Elements of the EU response to the debt crisis, recent pandemics, and the 2015 refugee crisis all featured—in augmented form—in the Ukraine response.

As global emergencies appear to become more frequent, understanding the emergency behavior of international institutions and its implications has never been more urgent. Although the EU response to the Ukraine war may never be duplicated exactly, it does provide tools that will likely be used in future emergencies.