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Contesting the EU Refugee Regime

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ABSTRACT

The European Union (EU) is increasingly contested. This paper explores the contestations of the EU by zooming in on the European migration crisis. Migration and asylum are at the core of the new cleavage, which counters liberal ideas of Europe embodied by the values of enlightenment, such as human rights, democracy, rule of law, and market economy, with nationalist and xenophobic ideas of Europe based on an essentialist interpretation of the continent's Christian heritage. Eurosceptic populist forces on the radical right of the political spectrum have exploited this cleavage to challenge core principles of international refugee law, not only contesting the EU's liberal authority, but a constitutive part of the liberal international order. At the same time, the paper shows that member states have chosen different strategies of contestation, depending on their preference regarding the EU's liberal authority and the power they wield within the EU to shape its liberal authority.

1   INTRODUCTION

The European Union (EU) is increasingly contested. During its first 40 years, European integration progressed essentially by stealth and left European citizens largely detached from the EU. Their "permissive consensus" (Lindberg/Scheingold 1970) was sufficient for European and national elites to move forward with integration. This started to change with the completion of the Internal Market in the early 1990s. The deepening of integration brought structural differences in member state interests to the fore and European citizens became aware of how much "Europe hits home" (Börzel/Risse 2000). As a result, the EU has become increasingly politicized.

The growing politicization of the EU is part of the broader contestation of the liberal international order (Lake et al. 2021). In our SCRIPTS Working Paper No. 3, Michael Zürn and I argue that the 1990s saw a systemic shift from the liberal post-World War II international order of *liberal multilateralism* (LIO I) to a post-Cold War international order of *postnational liberalism* (LIO II). LIO II has not only been rule-based but openly pursued a liberal social purpose with a significant amount of authority beyond the nation state. While postnational liberal institutions helped increase overall well-being globally, they favor Western societies and elites and regularly violated the principle according to which like cases should be treated alike. These institutional features of postnational LIO II led to legitimation problems, which explain the current wave of contestations (Börzel/Zürn 2020).

The EU is the paradigmatic case for the contestations of postnational liberalism at the regional level. After the end of the Cold War, the Maastricht Treaty not only complemented the Single European Market with an Economic and Monetary Union. It also established a political union seeking to integrate external and internal security. Subsequent treaty reforms in 1998, 2001, and 2010 deepened the authority of the EU, e.g., by making majority rule the default in the Council and by extending the jurisdiction of the Court of Justice of the EU (CJEU) to justice and home affairs. With the introduction of the Euro as the common currency, the European Central Bank obtained the exclusive authority to make monetary policy. The reforms also broadened the liberal purpose of the EU. The

borderless Schengen Area became part of the Treaties and required the development of a common asylum and migration system. The Charter of Fundamental Rights also became legally binding. The EU can bring sanctions against any member state that even risks breaching fundamental liberal values, such as democracy and the rule of law. The more the EU reached into the core powers of its member states, the more its citizens started not only to become aware of the EU and its policies. They increasingly mobilized against the technocratic logic of EU policy-making (de Wilde/Zürn 2012: 140; cf. Chalmers et al. 2016). By taking joint decisions at the EU level or delegating them to non-majoritarian decision-making bodies, member states have tried to isolate controversial issues from domestic politics. Effective EU policies were to compensate for the lack of democratic legitimacy. With the Euro crisis and the migration crisis, many citizens, particularly in the countries hit hardest by the two crises, no longer saw the EU as the solution to but part of their problems. The attempts of member state governments to avoid political conflict over the redistribution of money (bail-outs) and people (refugees and asylum seekers) by taking decisions by majority or delegating them to non-majoritarian institutions increasingly turned contestations of EU policies, e.g., on budgetary discipline and the mandatory relocation of refugees, into contestations of the EU's liberal values, including solidarity, liberty, and humanity, by authoritarian populist parties (Börzel/Risse 2018).

This paper explores the contestations of the EU and its increasing liberal intrusiveness by zooming in on the European migration crisis. Migration and asylum are at the core of the new cleavage, which counters liberal ideas of Europe embodied by the values of enlightenment, such as human rights, democracy, rule of law, and market economy, with nationalist and xenophobic ideas of Europe based on an essentialist interpretation of the continent's Christian heritage (Kriesi et al. 2008; de Wilde et al. 2014; Hooghe/Marks

2018). Eurosceptic populist forces on the radical right of the political spectrum have exploited this cleavage to challenge core principles of international refugee law, not only contesting the EU's liberal authority but a constitutive part of the liberal international order. At the same time, member states have chosen different strategies of contestation, depending on their preference regarding the EU's liberal intrusiveness and the power they wield within the EU to shape its liberal authority. The varieties of contestations have important implications for the future of the EU's postnational refugee regime discussed in the conclusion of this paper.

2 CONTESTATIONS OF LIBERAL INTERNATIONAL AUTHORITY AND THEIR VARIETIES

Börzel and Zürn observe a systemic shift in the international order after the end of the Cold War with international institutions gaining both much more authority and a much stronger liberal purpose (Börzel/Zürn 2020). Not only have international institutions expanded their powers to set the agenda, make rules, monitor compliance, or adjudicate conflict. They have also extended their liberal features, such as human rights, the rule of law, democracy, and the free movement of people. The steep rise of the liberal intrusiveness of international institutions has led to a wave of differentiated contestations with significant variation concerning what is contested and where.

Börzel and Zürn define contestations of the liberal international order as discursive and behavioral practices that come with a certain level of social mobilization and challenge the authority of international institutions, their liberal intrusiveness, or the liberal international order as a whole. Based on this general definition, they develop a typology to contrast different strategies of contestation. They distinguish four different types of strategy, which are a function of the contestants' position towards

postnational liberalism and the contestants' position within the contested institution.

Applied to the EU, the preference of member states regarding the liberal authority of the EU, on the one hand, and their power within the EU to shape its liberal authority, on the other, pre-determine their strategy of contestation. Some member states contest the specific way in which the EU exercises its liberal authority. Others defy the EU's liberal international authority altogether. The power of the member states to act upon their preference depends on their decision-making power in the EU. The formal dimension of decision-making power refers to the voting power a member state holds in EU. Large member states have significant voting power under qualified majority voting (QMV) in the Council of the EU. They cannot be ignored by others in EU decision-making (Thomson et al. 2006). The institutional power of the largest member states reflects the size of their populations and their economies. The post-Brexit EU's "big three" (Germany, France, Italy) are not only able to block the adoption of EU laws in the Council. As the largest economies in the EU (measured by GDP), Germany, France, and Italy pay more than 50 percent of the EU budget. Shaping EU decisions does not merely depend on votes or budget contributions, though. It also entails a more informal dimension being related to the extent to which the member state is part of background talks prior to decisions or is stigmatized as a trouble-maker that needs to be regulated as opposed to be recognized as an order-maker that regulates others.

The combination of the formal and informal dimension of decision-making power leads to four different types of strategies member states may pursue to contest the EU.

Pushback describes the strategy of powerful member states that seek to reduce the liberal authority of the EU and return to the prior condition of less liberal intrusiveness. This typically involves the scaling back of supranationalism in favor of intergovernmentalism by reducing the role of the Commission, the European Parliament, and the CJEU. This can also take the form of individual opt-outs as the United Kingdom (UK) obtained them in the case of the Euro and Schengen.

Reform is the strategy of powerful and smaller yet still influential member states that are dissatisfied with the way the EU exercises its authority. They do not reject the EU's liberal authority as such. Their reform demands tend to aim at strengthening the EU's liberal authority, e.g., by delegating more decision-making powers to supranational institutions (Commission, European Central Bank, European Border and Coast Guard Agency/FRONTEX) in order to make them more effective.

Withdrawal is chosen by member states that do not have enough power to affect change in the way in which the EU exercises its liberal authority. A typical form is the disregard of and non-compliance with EU decisions and policies without openly challenging their validity.

Dissidence, finally, refers to the strategy by which member states aim at the destruction of EU institutions because they reject any liberal international authority but lack the power to defy it. A common form of dissidence in the EU are attempts at the full repatriation of EU authority by transferring sovereignty rights back to the national level. Alternatively, member states may choose to exit the EU altogether as the UK did in 2020.

The next section will demonstrate how the EU's emerging postnational liberal refugee regime has been increasingly contested by the member states. Depending on their preference on the EU's liberal authority and their power to change it, however, member state strategies vary.[1]

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3 CONTESTING INTERNATIONAL REFUGEE LAW IN EUROPE

The international regime on refugees built around the 1951 Convention Relating to the Status of Refugees (Geneva Convention on Refugees) and its 1967 Protocol (New York Protocol) is a corner stone of international refugee law and, as such, forms a constitutive part of the liberal international order. The Geneva Convention was inspired by and designed on the experience of massive refugee flows during and immediately after World War II. Several states had denied admission to Jews fleeing the Holocaust. After the war, millions of refugees from the Soviet Union were forcibly returned despite concerns they would face retaliation from the Soviet government. The refugee status as defined in the Convention therefore pertains to people persecuted in their home country; it does not cover people fleeing from poverty or natural disasters. The core principle of the Geneva Convention is *non-refoulement*. The prohibition of collective expulsions forbids a country receiving a refugee from expelling or returning this person "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" (Geneva Convention 1951: Art. 33 1.). Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on certain categories of persons, non-refoulement refers to the generic repatriation of people, such as refugees, into war zones and countries in which they would face persecution. It is considered a principle of customary international law, so it applies even to states that are not parties to the Geneva Convention or the New York Protocol (Allain 2001). The Geneva Convention of 1951 was limited to persons fleeing events occurring before 1 January 1951 and within Europe. The New York Protocol of 1967 removed these geographic and temporal limitations. The universal coverage of the Convention is fortified by regional protection

regimes, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights/ECM) of 1953, the Organization of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration on Refugees of 1984. Asia is the only region that has refrained from developing regional refugee regimes despite having the largest refugee population in the world. This reflects the contestation of international refugee law by the majority of Asian countries that reject it, among other reasons, as Eurocentric (Davies 2008: 9).

3.1 THE EU'S GROWING LIBERAL INTRUSIVENESS

The European Union took almost 50 years to set up its own refugee regime. However, all member states are party to the 1951 Geneva Convention and its 1967 Protocol. Moreover, the European Convention on Human Rights protects the human rights of refugees. In case of violation, a state can be taken to the European Court of Human Rights (ECtHR). The court's judgments are binding and have to be executed. With the Amsterdam Treaty of 1997, the EU finally obtained the authority to develop its own regional refugee regime, the Common European Asylum System (CEAS). Between 1999 and 2004, the EU adopted minimum standards in relation to the reception of asylum seekers. It determined which member states would be responsible for registering asylum seekers and handling their applications. EU legislation also specified procedures for granting and withdrawing refugee status and made provisions for temporary protection in the event of a massive influx. What the member states failed to agree on was the harmonization of their national standards and procedures. This is what the Treaty of Lisbon of 2009 gave the EU the authority to do: create a single European system built around a uniform status of asylum and subsidiary

protection, a common system of temporary protection for displaced persons, uniform procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, and common standards concerning reception conditions (Treaty on the Functioning of the European Union/TFEU: Article 78). Article 80 TFEU also explicitly provides for the principle of solidarity and fair sharing of responsibility, including financial implications, between member states.

Not only did the Lisbon Treaty extend the liberal content of the EU's authority with regard to asylum and refugee policies. It also made it more intrusive by making co-decision the ordinary legislative procedure for the adoption of EU asylum laws. This grants the Commission the sole right of tabling legislation, has the Council decide by majority rule, and gives the European Parliament an equal say in the adoption of new laws. Finally, the CJEU obtained extended judicial oversight giving it the possibility to develop more case law on asylum.

Between the end of September 2015 and end of April 2016, the member states invoked the EU's new powers and agreed on a whole set of joint measures aiming at "sharing the responsibility" (Council of the European Union 2015b) for the over one million refugees who had already entered the territory of the EU, on the one hand, and managing future migration flows, on the other (Monar 2016). Core measures comprise the Asylum, Migration and Integration Fund (AMIF) set up for the period from 2014 to 2020 with a total of €2.4 billion for the management of migration flows by the member states, including registration, integration and return; the adoption of a common list of safe countries of origin; the reallocation of 120.000 "persons in clear need of international protection"; the establishment of additional hot spots in Italy (five) and Greece (six); and the deployment of additional 165 FRONTEX experts to Greece and Italy to help with the registration of refugees.[2] The

three EU agencies operating on migration-related issues (FRONTEX, the European Asylum Support Office/EASO and Europol) also received staff reinforcement (European Commission 2015e: 6).

Regarding the stronger protection of the EU's external border, the rescue of refugees and the fight against human trafficking and smuggling, the EU created a new military operation (EUNAVFOR MED) in the Mediterranean Sea in May 2015, and tripled the budget for its already existing operations, "Triton" and "Poseidon", in December 2015 (Council of the European Union 2015a; European Commission 2015g).

To support third countries that host refugees or are located at major migration routes to the EU, the EU earmarked more than €2 billion within the framework of its European Neighbourhood Policy and Development Cooperation, respectively, including the launching of the Madad Trust Fund for Syria (€654 million) in December 2014, and the Emergency Trust Fund for Africa (€1.8 billion) in November 2015.[3] To help Greece and other member states struggling with the influx of refugees, in March 2016, the Commission unveiled plans for a refugee emergency fund of €700 million to be disbursed over a period of three years. Rather than national governments, the assistance targets aid organizations on the ground, such as United Nations (UN) agencies and non-governmental networks (Zalan 2016).

In October 2015, the EU agreed to assist transit countries in the Western Balkans, which are current or potential candidates for EU membership, with a plan containing no fewer than 17 points,

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2   Council of the European Union (2015b); European Commission (2015a, 2015b, 2015c, 2015d, 2015e); European Parliament/European Council (2014, 2015).

3   Directorate General for Developmental Cooperation of the Italian Ministry of Foreign Affairs and International Cooperation and the European Commission on Behalf of the European Union (2014); European Commission (2015f).

aimed at building additional reception capacities along the Western Balkan route and stepping up national and coordinated efforts to return migrants not in need of international protection with the help of EU financial and technical assistance (Commission and the Heads of State or Government of Albania 2015). The member states also agreed on a EU-Turkey Joint Action Plan, negotiated by Germany, to help Turkey host, register, and readmit migrants and control its borders with Greece and Bulgaria in return for financial assistance, visa liberalization, and the opening of new chapters in Turkey's accession process, which has stalled for almost 10 years. The original €1 billion for setting up six additional refugee camps in Turkey were stepped up to a €3 billion Facility for Refugees at the EU-Turkey summit on 29 November 2015, when the Joint Action Plan was activated (European Commission 2015h). In 2016, the EU promised an additional €3 billion funding for the Facility (Council of the European Union 2016).

These are only the most important measures, the vast majority of which the EU adopted in less than three months under EU primary and secondary law. The coordinated European response, however, failed to reach a fair sharing of responsibility for "register[ing] and process[ing] those in need of protection, and to swiftly return those who are not to their home countries or other safe third countries they have transited through" (European Commission 2016: 3).

The massive influx of refugees in 2015 induced the EU to make comprehensive use of its new competencies in the fields of migration and asylum. At the same time, the migration crisis of 2015/2016 made the EU's liberal intrusiveness felt in the member states, giving rise to increasing contestations of the EU's liberal authority. The dropping numbers of first time asylum applications by 86% in 2019 compared to 2016[4] and the start

of the Fridays for Future climate change protests in 2018 had muted these contestations (Eurostat 2020). Yet, they intensified in 2020 when thousands of migrants and refugees sought to cross the Turkish-Greek border after Turkey's president Erdoğan had announced that his border guards would no longer stop them. He decided to break the EU-Turkey agreement due to the EU's lacking support for a safe zone to accommodate almost a million Syrian refugees that fled from the unfolding humanitarian crisis in Idlib towards the Turkish border. Erdoğan also accused the EU of not complying with its commitment to resettle Syrian refugees and for not fully disbursing the promised €6 billion (Rettman/Nielsen 2020).

3.2 CONTESTING THE EU'S GROWING LIBERAL INTRUSIVENESS

Contestations of the EU's growing liberal authority have centered around three issues: the returning of refugees, the relocation of refugees, and external border security. As the ensuing analysis will show, contestants have pursued different strategies depending on their position towards the EU's liberal authority and their position within the EU's decision-making institutions.

Not all member states have been equally affected by the refugee influx. Finland, Luxembourg, Ireland, Portugal, and Spain, which are not major first entry, transit, or destination countries, have little ground to contest the EU's liberal authority.[5] Among the remaining member states, principled rejection has formed where authoritarian populist parties (APPs) have seized control over the government (e.g., Austria, Denmark, Hungary,

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4   Numbers fell from around 1.2 million in 2016 to 171.300 in 2019.

5   Spain faces most migration pressure due to its two enclaves in Morocco, Ceuta and Melilla. A recent ruling of the ECtHR strengthened Spain's control over its borders. The court confirmed that Spain did not violate the principle of non-refoulement by returning asylum seekers that had entered Spanish territory. It considered their entry illegal because the asylum seekers had climbed the border fence despite being safe and legally present in Morocco (European Court of Human Rights 2020).

Italy, Poland).[6] Where APPs have remained in opposition but substantially gained in electoral support during the heights of the crisis, governments tend to take issue with the way the EU exercises its liberal authority (e.g., France, Germany, Greece, Netherlands).

When it comes to their power to shape the EU's liberal authority, France, Germany, Italy, and the UK form the core of EU decision power. However, the UK is not part of the Schengen Area and opted out of the EU's Common Migration and Asylum System, thereby removing itself from the core before leaving the EU altogether. Italy's position has been weakened by its role as a troublemaker, starting with Berlusconi, who has governed Italy on and off since 1994. Likewise, Poland as the largest among the Eastern European member states has marginalized itself by overtaking Viktor Orban's Hungary as the main democratic backslider in the EU. Other countries of first entry, including Greece, Croatia, Cyprus, Malta, and Latvia, are too small and poor to affect changes. The Northern Europeans (Denmark, Netherlands, Austria), in contrast, yield more influence in EU decision-making due to their economic and political performance (Börzel 2002; Panke 2010).

The classification of member states along the two dimensions of the Börzel and Zürn conceptual framework allows to formulate expectations regarding the different strategies of member states contesting the EU's refugee regime. As the liberal power houses of the EU, France and Germany, supported by the Netherlands, should seek *reform* to strengthen the EU's authority in dealing with the influx of refugees. Denmark and Austria should *push back*, seeking to return to the more restrictive pre-2015 Dublin regime, which places the responsibility of rejecting or accepting a

refugee on the member states where s/he (could have) filed his or her claim. We expect Greece, Croatia, Cyprus, Malta, and Latvia to *withdraw* from the EU's refugee regime by not applying its rules and procedures for receiving refugees. Finally, Italy, Hungary, Poland, and the UK should opt for *dissidence* seeking to destroy the Common European Asylum System altogether by demanding to return full control to the member states.

In order to probe our expectations, the following section provides an overview of the strategies the various member states pursued in contesting the three core issues of the EU refugee regime. We leave aside the UK, which decided to leave the EU altogether after the member states, among other issues, refused to grant it an opt-out from the freedom of movement, a constitutive element of the EU's liberal authority.

(1) Returning refugees

The principle of non-refoulement as defined by the Geneva Convention grants states little room for expelling refugees or refusing them at the border. The ECtHR has interpreted Article 3 (prohibition of torture) of the European Convention on Human Rights in such a way as to extend the scope the principle to include criminal offenders. Moreover, individuals must not be sent back to countries in which they will face inhumane conditions.[7] The prohibitions even hold within the European Union. The Dublin regime provides that member states transfer refugees back to the country through which they first entered the EU (European Parliament/European Council 2013). However, returning refugees to Greece as a country of first entry has not been possible since 2010. Both the ECtHR and the CJEU raised concerns about the human rights situation in the

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6   For data on the share of votes of authoritarian populist parties see the Parliament and Government Composition Database (Manow/Döring 2019).

7   Apart from torture, Article 3 also applies to cases of severe police violence and poor conditions in detention. The ECtHR ruled that the prohibition was made in "absolute terms – […] irrespective of a victim's conduct" (European Court of Human Rights 1997).

so-called reception centers for refugees (European Commission 2016: 10).

The rulings of the ECtHR and the CJEU extend the EU's liberal authority by case law (European Court of Human Rights 2017b, 2014, 2012). There is no need for reform of EU or national law.[8] The issue rather is whether member states comply. France is returning refugees to Italy (Amnesty International 2007: 167), which is no violation of Article 3. Germany, in contrast, sought to return refugees to Greece. In September 2019, a German court ordered to bring back an Afghan refugee. The German government pledged to respect the ruling (Stempfle 2019; Bathke 2019). The Netherlands also accepts that returning people to countries like Libya is not compatible with non-refoulement (Pijnenburg/Rijken 2017). Austria, in contrast, invokes the Dublin rule to justify the forceful return of irregular refugees, including criminal offenders, to Hungary or Greece as countries of first entry even though they face the risk of inhumane treatment (Amnesty International 2007: 81). Likewise, Denmark refers to Dublin when refusing to admit any refugees, since it is not a country of first entry and is surrounded by member states that are safe (Støberg 2016). Hungary built razor-wire fences and established so-called transit zones on its border with Serbia where people have to wait for months to file for asylum. In 2019, the Great Chamber of the ECtHR revoked its earlier ruling that these transit zones constituted a deprivation of liberty, which would violate Art. 5 of the European Human Rights Convention stating that applicants were not forced to enter the transition zones and could leave any time for Serbia, where they would be safe (European Court of Human Rights 2017a, 2019). However, the court still

found Hungary in violation of Art. 3 by not assessing the risks of the applicants not having proper access to asylum proceedings in Serbia. Nor does Hungary ensure that applications are not subjected to chain-refoulement, which could have seen them being sent to Greece, where the court had already found conditions in refugee camps to be in violation of Art. 3 because of inhumane or degrading treatment. The European Commission referred Hungary to the ECJ in 2018 for violating the EU's Return Directive and the Charter of Fundamental Rights of the European Union because Hungary keeps asylum seekers in transit zones for excessively long periods denying them any food and fails to provide proper access to asylum procedures, including to check whether refugees had first entered EU territory through another member state.[9] In March 2020, Hungary suspended admission to its transit zones linking "the coronavirus and illegal migration" (SBS News 2020 citing György Bakondi). It closed them down entirely after the CJEU classified the keeping of asylum seekers in transit zones as unlawful detention and demanded their immediate release.[10] Another case is still pending in which the Commission referred Hungary to the CJEU in July 2019 regarding the so called "Stop Soros" law because it criminalizes assistance to applicants for asylum and residence and further restricts the right to request asylum.[11]

Croatia sends back refugees and migrants which moved on the so called Western Balkan route (Slente 2020). Malta allowed the Libyan coastguard to return a boat of migrants from Maltese waters to Libya (Rettman 2020). Rejecting any EU authority on asylum and migration, the Italian government has closed its ports and criminalized rescue missions by non-governmental

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8   Yet, the ECtHR ruled that both the Greek and the Belgian governments violated the European Convention on Human Rights by applying the EU's own law on asylum seekers and were given fines of €6,000 and €30,000, respectively (European Court of Human Rights 2011; see also United Nations High Commissioner for Refugees 2009).

9   Commission v Hungary, C-808/18.

10   Judgement of 14 May 2020, PPU FMS and Others, Joined Cases C–924/19 and C–925/19.

11   Commission v Hungary, C-66/18.

organizations (Butini 2019). When Italian courts ordered the government to allow immediate assistance to people in need in Italian territorial waters, the Italian Home Secretary and leader of the authoritarian populist Lega threatened to curb their independence (Frigo 2019). Greece, finally, has de facto stopped registering refugees and processing their applications since 2015 (European Commission 2016: 9-10). In March 2020, the Greek government officially announced that it suspends accepting asylum applications invoking the emergency clause of Article 78.3 of the TFEU.[12] The UN Refugee Agency denounced the suspension as a violation of both the Geneva Convention and EU law (United Nations High Commissioner for Refugees 2020). It also criticized the use of force by Greece in stopping around 17.000 people from crossing the border from Turkey and expelling them, respectively, after detaining them in extrajudicial secret sites (Stevis-Gridneff et al. 2020).[13] The EU has supported Greece in repelling refugees, asylum seekers, and migrants, and returning home rejected ones. Greece received financial assistance and hosts three FRONTEX rapid intervention missions. The EU justifies its support for Greece's violation of the non-refoulement principle by its legal obligation to stand by its member states in fighting the Covid-19 pandemic (Nielsen 2020a). Despite substantial technical and financial support from the EU, Greece has not provided for the basic needs of refugees (sufficient food, hot water, sanitation, medical supplies) in its overcrowded reception centers. Being designed for 6.000 people, they host more than 40.000, half of them on the Greek island of Lesbos.

(2) Relocating refugees

The Geneva Convention does not contain any provisions on the relocation of refugees as a way to share the responsibility of protecting refugees among states. The Lisbon Treaty introduced the principle of solidarity and authorized the EU to adopt appropriate measures to ensure a fair sharing of responsibility between the member states. Based on this provision, the Council adopted by qualified majority a temporary but mandatory mechanism in 2015 to relocate 120.000 Syrian refugees in clear need of international protection from Greece and Italy to the other member states (Börzel 2016).

Ever since the temporary relocation scheme expired in 2017, Germany and France have sought to institutionalize a mechanism for sharing the responsibility of receiving and integrating refugees. Their most recent reform proposal obliges a coalition of the willing to accept a certain quota of refugees rescued in the Mediterranean (Gotev 2019). The Netherlands is willing to accept a fair share of refugees under such a relocation scheme (Pijnenburg/Rijken 2017). Denmark and Austria are at most prepared to accept a voluntary scheme outside EU law.[14] So would Croatia, Hungary, and Poland.[15] Hungary, which had been outvoted in the Council together with Slovakia, the Czech Republic, and Romania, filed a court case against the temporary reallocation of 120.000 refugees from Italy and Greece to other member states over two years, on top of the 40.000 the member states had already decided

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12   Article 78.3 TFEU states that "[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

13   The EU, in contrast, defended Greece's security forces (Stamouli/Herszenhorn 2020).

14   Denmark is not part of EU's judicial cooperation and will, therefore, not be subject to any relocation of asylum seekers within the EU anyway (Walter-Franke 2019: 5–6; Rasche 2019a: 11; EURACTIV 2018a).

15   Neither Denmark nor Austria nor Poland nor Hungary have joined the voluntary relocation scheme for 1.600 unaccompanied minors from Greece on which Croatia, Finland, France, Germany, Ireland, Luxembourg, and Portugal agreed in March 2020 (Nielsen 2020b).

to relocate.[16] Poland supported the lawsuit; it refuses to be part of any relocation scheme. The attempt to test the EU's authority in court failed.[17] Together with Hungary and the Czech Republic, Poland was convicted again by the ECJ in April 2020 for the continued non-acceptance of relocated refugees.[18] Italy, despite being a major beneficiary, rejects the French-German proposal on principle since it would allow the EU to mandate Italy which countries to send the refugees to (Osborne 2019). Greece, in contrast, would accept any relocation mechanism (Smith 2019).

All attempts to institutionalize a permanent solution to deal with the continuing influx of migrants have failed so far. After the new Commission President Ursula von der Leyen had promised a "fresh start on migration" (von der Leyen 2019: 15), the Commission announced that it would shelve its attempts at replacing the rule of first entry by a relocation mechanism due to the resistance of the Czech Republic, Hungary and Poland (Nielsen 2020c). Its proposal for reforming the Common European Asylum System has focused on fortifying the EU's external border by increasing the budget and the personnel of the European Border and Coast Guard (EBCG). After Italy and Malta had closed their ports for non-governmental search and rescue vessels in summer 2019, France, Germany, Croatia, Ireland, Lithuania, Finland, Luxembourg, and Portugal agreed on the relocation of rescued people among themselves. Yet, they realized less than 50% of pledged relocations until January 2020, when the agreement was suspended due to the rush of Syrian refugees from Turkey towards the Greek border (Rasche 2019b).

Amid the outbreak of the Covid-19 pandemic, Italy and Malta declared their ports unsafe, as a result of which rescue boats cannot disembark refugees and migrants (Nielsen 2020d). The other ad hoc and selective relocation agreement struck in March 2020 by the same coalition of the willing on receiving 1.600 unaccompanied minors stuck in Greek refugee camps has been delayed by the Covid-19 pandemic (von der Leyen 2020; Becker 2020). At the time of writing, fewer than 10% of the 1.600 minors have been able to leave Greece for Belgium, Germany, Luxembourg, and Portugal.[19]

(3) External Border Security

Twenty-two of the 27 member states participate in the Schengen Area abolishing any types of border control between them. This puts the member states at the external borders of the EU solely in charge of border control. To help Greece, Italy, or Spain cope with their responsibility of dealing with a massively growing number of refugees, the EU transformed its European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU into the EU Border and Coast Guard Agency (EBCG). Besides assisting member states in securing their borders, the EBCG has also coordinated the EU's operations to rescue refugees and to fight against human trafficking and smuggling in the Mediterranean (Börzel 2016).

France and Germany supported the original proposal of the Commission for the reform of migration and border control that envisioned the creation of an EU Border and Coast Guard standing corps with the authority to interfere with national border control, e.g. by doing identity checks or admitting and refusing people (Gammelin/Kirchner 2018). Hungary, Italy, and Poland rejected any EU interference in their national border control (About Hungary 2019; Riegert 2019;

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16   Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

17   Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, ECLI:EU:C:2017:631.

18   Judgment in Joined Cases C-715/17, C-718/17, and 719/17 Commission v Poland, Hungary, and the Czech Republic; ECLI:EU:C:2020:257.

19   https://euobserver.com/tickers/148331 (accessed 2 June 2020).

EURACTIV 2018b). So does Austria, which, however, backed the increase of EBCG operational staff to 10.000 until 2027, within the limits of their coordinating competencies under the Dublin regime (Gotev 2018). Greece adopted a similar position refuting any interference in its sovereignty (Nielsen/Zalan 2018). However, it accepted three FRONTEX rapid intervention missions in February 2020 to help it secure its land and sea border with Turkey (Nielsen 2020e). The Netherlands and Denmark did not have a strong position on this issue. In November 2019, the Council and the European Parliament adopted a Regulation to reinforce the EBCG's standing corps to 10.000 border guards until 2027. The control of external borders remains with the member states.[20]

EU's military operation "Sophia", which the EU established in 2015 to counter "the business model of human smuggling and trafficking networks" by identifying and disposing of vessels used by migrant smugglers or traffickers in the Southern Central Mediterranean, was scaled down in January 2019.[21] The EU suspended its ship patrols due to concerns of Austria and Hungary against "Sophia" becoming a search and rescue mission. "Sophia" expired in February 2020, as Italy refused to let refugees rescued under the obligation of international maritime law disembark at its ports and other member states were not willing to receive them.[22] The EU launched a new operation called "Operation EU Active Surveillance" ("Irini"). "Irini", the Greek word for peace, is a Common Security and Defence Policy military operation that involves the deployment of European warships to monitor the arms embargo the UN

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20   Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

21   https://www.operationsophia.eu/wp-content/uploads/2019/03/Factsheet-about-Mission-EUNAVFOR-MED-Operation-SOPHIA-1.pdf (accessed 2 June 2020).

22   "Sophia" rescued more than 50.000 people in distress (European Council on Refugees and Exiles 2019).

Security Council imposed on Libya (Council of the European Union 2020). Austria and Hungary ensured that the warships will be withdrawn if they engaged in too many sea rescues turning them into a pull factor for migration (Nielsen 2020f).

4   CONCLUSION

The contestations of the EU's refugee regime were triggered by the massive influx of refugees in 2015, which made the extension of the EU's liberal authority visible and felt in the member states. The member states, however, pursued different strategies of contestation depending on the political strength of authoritarian populist parties defining their preferences on the EU's liberal authority, on the one hand, and their decision-making power to change the EU's liberal authority, on the other.

Their preferences and power divide the member states and prevent them from agreeing on how to move forward with the common asylum and migration system. At the same time, the member states are stuck with the status quo, as any attempt to renationalize asylum and migration or to dismantle the EU's liberal refugee regime altogether requires unanimity.

Meanwhile, withdrawal and dissidence have not only rendered the EU's response to the migration crisis ineffective and resulted in serious violations of international and European refugee law. These contestation strategies also undermine compliance with other EU laws and agreements.

Practices that are not consistent with EU law do not necessarily weaken the functioning of the EU. In fact, a liberal polity seeking to integrate 27 states, which are ever more heterogeneous, may need a certain amount of non-compliance or "institutionalized hypocrisy" (Iankova/Katzenstein 2003) to balance unity and diversity.

Non-compliance, however, turns into a systemic risk of disintegration when member states dodge compliance costs, contest the authority of the Commission and the CJEU to monitor and enforce EU law, or question the authority of the EU to set law in the first place. Nationalist populist politicians deny the EU the authority to make and enforce rules on issues that interfere with national sovereignty, from relocating refugees to large-scale logging in one of Europe's last primeval forests (Nielsen 2020g). At the same time, the EU's failure to come up with common solutions to major crises further fuels nationalist populism.

Nationalist, exclusionary discourses and non-compliance practices reinforce each other in creating potential for disintegration. Pitching "the sovereign people" against "the liberal establishment" undermines the social cohesion between as well as within member states. Advocating the return to the nation state does not only render agreement on new EU policies and institutions difficult. It threatens member states' existing legal commitments to the liberal values around which the EU has been built. The failure of the member states to arrive at and comply with common European solutions has emboldened the calls of populists to restore the sovereignty of the member states as the most effective way to protect citizens against financial markets, migration, civil rights activism, or terrorism.

There is no easy way out of this dilemma. EU and national decision-makers could start by stopping to accommodate populist governments and parties that contest the EU and its policies by appealing to illiberal, nationalist ideas of Europe as a fortress against globalization and "foreign" cultures in referenda or electoral campaigns on EU membership, on the allocation of political authority between the EU and the national level, or on the relocation of refugees and funds. If this

means "core Europe"[23] so be it. More likely, however, we might see more differentiated integration (Schimmelfennig/Winzen 2014). Rather than excluding them altogether, member states that prefer national unilateralism over cooperation on and compliance with EU policies and institutions should be given the opportunity to exit parts of the EU, e.g., Schengen, the Euro, or the European Research Area. This might render the EU more complex, but it will certainly not be its ultimate demise. On the contrary, putting a price-tag on contesting the fundamentals of the EU as a liberal community of law might help unite the *reformers*, the *withdrawers*, and the *push backers* behind solidarity, liberty and humanity against the *dissenters*.

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23   https://www.bundesfinanzministerium.de/Content/DE/Downloads/schaeuble-lamers-papier-1994.pdf?__blob=publicationFile&v=3 (accessed 25 February 2020).

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