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ARTICLE

Europe's Refugee "Crises" and the Biopolitics of Risk

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Abstract

This paper provides an analysis of the legal and policy foundations of the different approaches adopted by the European Union (EU) in relation to the 2015/2016 and 2022 refugee "crises". Its main objective is to show how a risk-based biopolitical framework can bridge the gap between EU institutional narratives and the critique of Europe's racialised governance schemes. The two "crises" have been largely shaped by a perceived need to manage risk, yet this has produced very different institutional responses, in ways that concealed their racialised dimension. Analysing how risk has been understood in the two contexts, the paper shows how their legal and policy foundations (re-)produce a racialised differential scheme. Amidst ongoing debates on reforming EU migration and asylum law, the paper also shows how the current proposals further consolidate this scheme.

Keywords: Biopolitics; EU migration and asylum law; race; refugee crisis; risk; Russo-Ukrainian War

I. Introduction

Shortly after Russia invaded Ukraine, the European Union (EU) opened its borders to those fleeing the Russo-Ukrainian war. On 3 March 2022, the Council of the EU unanimously agreed with the European Commission's proposal to activate the EU Temporary Protection Directive (TPD), a mechanism that has never been triggered before.[1] The Directive allows for the application of an exceptional protective scheme in case of a "mass influx of displaced persons" associated with the existence of a risk for the efficient operation of asylum systems.[2] While this has been a significant step for the protection of many lives, it is regrettable that the same mechanism had not been triggered in the context of the 2015/2016 so-called refugee "crisis".[3]

Critical academic and media voices have argued that the differences between the institutional approaches to the two "crises" are paradigmatic of Europe's racialised double

[1] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212 (Temporary Protection Directive).

[2] Temporary Protection Directive, Art 2(a).

[3] "Crisis" is used in this paper with quotation marks to refer to the institutional understanding of each of the two contexts as a "crisis". The choice of referring to *refugee* "crisis" instead of *migration* "crisis" reflects our intention to avoid a potential misreading of implying that the persons concerned by the two "crises" do not deserve international protection. While focusing mainly on how the 2015/2016 "crisis" relates to the 2022 activation of the TPD, we acknowledge that other "crisis" situations prior to 2022 can be also approached from a similar perspective. However, the 2015/2016 "crisis" deserves special attention, as many of the emergency mechanisms put in place then have had an important impact on the current proposals of reforming EU migration and asylum law.

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"standards".[4] In other words, it would show that White Christian individuals are perceived as more "deserving" than the "Others" who flee Middle Eastern and North African (MENA) countries. EU institutions have not remained silent in relation to these critiques. Ylva Johannson, for example, stated that "one difference [when compared to the 2015/2016 'crisis'] is that people are now fleeing directly from Ukraine, when people are coming from a little bit far away, they are usually using smugglers".[5] This paper seeks to develop an analytical framework that would facilitate bridging the gap between EU institutional narratives and the critique of Europe's racialised governance schemes. It argues that one way of bringing institutional perspectives closer to the critique of racism is by looking at how the idea of risk, approached from a Foucauldian biopolitical perspective, has shaped the two crisis approaches.

For these purposes, this paper provides an analysis of the legal and policy foundations of the different approaches that the EU has adopted in relation to the two "crises", with a particular emphasis on how risk has been understood. It is argued that a biopolitical risk-centred analysis shows that EU legal and policy responses have been shaped by – and produced – representations of people fleeing conflicts in the MENA region as potentially "risky" individuals, in contrast to those fleeing the Russo-Ukrainian war being implicitly perceived as *less* threatening. In this sense, it is shown that the governance approaches to the two "crises" have been less concerned with geographical considerations than with the biopolitical and racialised question of the groups of individuals that Europe is willing to accept or keep afar. This analysis complements existing critiques of Europe's racialised borders and refugee regimes, foregrounding the operation of technologies of risk in legal and policy choices and their effects.[6]

Acknowledging that such ideas have shaped EU legal and policy responses is ever more significant in the contemporary context when the institutional debate on reforming EU migration and asylum law is still ongoing. Initiated in 2016 with a set of eventually abandoned proposals put forward by the European Commission, the debate was relaunched in September 2020 with the New Pact on Migration and Asylum.[7] Under the New Pact, the Commission proposed a regime largely built upon the 2015/2016 model, casting doubt upon a more welcoming approach being introduced in the near future. Hoping to renew the ongoing institutional debates on reforming EU migration and asylum law, the paper provides a brief analysis of how risk is understood in the reform proposals of 2020 and 2021 and reflects upon their possible future implications.

In Section II, this paper introduces its main argument and theoretical framework. It contends that a biopolitical risk-based approach to EU migration and asylum law and policy paves the way to a greater consideration of the racialised dimension of policy and legal choices, as well as of their effects. Section III examines how the idea of risk animates the Common European Asylum System (CEAS), both under its "regular" and exceptional

[4] M Jackson Sow, "Ukrainian Refugees, Race, and International Law's Choice between Order and Justice" (2022) 116(4) American Journal of International Law 698; C Costello and M Foster, "(Some) refugees welcome: when is differentiating between refugees unlawful discrimination?" (2022) 22(3) International Journal of Discrimination and the Law 244; V Corcodel, "Migração: dois pesos e duas medidas para responder à 'crise dos refugiados'" (*Publico*, 26 March 2022) <https://www.publico.pt/2022/03/26/opiniao/opiniao/migracao-dois-pesos-duas-medidas-responder-crise-refugiados-2000174> (last accessed 10 December 2022).

[5] O Crowcroft, "'Europe has learned from 2015', EU migration chief says, as millions flee Ukraine" (*Euronews*, 11 March 2022) <https://www.euronews.com/my-europe/2022/03/11/europe-has-learned-from-2015-eu-migration-chief-says-as-millions-flee-ukraine> (last accessed 10 December 2022).

[6] ET Achiume, "Racial borders" (2021) 100(3) Georgetown Law Journal 445, 467; Jackson Sow, supra, note 4; Costello and Foster, supra, note 6.

[7] European Commission, "Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020" (2020) <https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en> (last accessed 10 December 2022).

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regimes, with a particular emphasis on how the exceptional regime relates to the Russo-Ukrainian context. Section IV elaborates on how the idea of risk has shaped the 2015/2016 "crisis" and argues that the two "crises" are part of a single biopolitical differential scheme that produces racialised hierarchies between different groups of people. Section V provides some thoughts on the reforms of EU migration and asylum law proposed in 2020 and 2021 and their approach to risk. Finally, Section VI provides some concluding remarks.

II. Managing risk in EU migration and asylum law: a biopolitical perspective

Displacement generally being a matter of life and death, the overall CEAS can be approached from a Foucauldian perspective as part of the EU's power to manage life and death.[8] Such power "to make live and let die", the practice of which is captured under Foucault's notion of "biopolitics", is exercised in relation to the population in its multiplicity. Risk assessment and management, understood here as a set of technologies to predict events or compensate for their effects, are part of the mechanisms through which such power operates.[9] This understanding of risk is not so much interested in the existence or proliferation of "objectively" identifiable risks but in the argumentative and normative practices that use risk as a technology of governmentality. Its specificity lies in the logic of anticipating, preventing and managing possible futures. In this sense, a biopolitical risk-based approach invites an analysis of the ways in which EU migration and asylum law and policy – operating at the level of generality and not merely the individual level – are used to channel power exercised in relation to the population through pre-emptive or preventative strategies. Such an approach, as it will be argued here, also implies exposing the differential legal and policy choices that produce hierarchies between different groups, thus facilitating a better understanding of their racialised dimension and effects.

To be sure, EU migration and asylum law and policy also operate on the individual level, exerting power over individual bodies in a "disciplinary" way.[10] In other words, individuals are also disciplined through legal categories, most evidently via the figure of the "irregular" migrant, to produce individuals that conform to a set of rules. Biopolitics, however, while being often intertwined with disciplinary power, refers to processes through which risk groups or events, as well as their effects, are anticipated, prevented or managed.[11] The individual does not vanish from this scenario, but the dangerousness or riskiness of individuals is approached not so much at the level of the actual violations of legal rules as at the level of the "*behavioural potentialities they represent*".[12] Biopolitics would thus operate based on the perceived threats of specific individuals, seen as part of a group ("population") that represents potential dangerousness. This often leads to processes in which individual characteristics are inputted on the basis of group membership, something that lies at the core of stereotyping and racism.[13] Biopolitics, in this sense, is also a differential politics that produces hierarchies between different groups and the

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[8] M Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978–1979* (London, Palgrave Macmillan 2008); M Foucault, *Society Must Be Defended: Lectures at the College de France 1975–1976* (London, Palgrave Macmillan 2003).

[9] Foucault, *Society*, supra, note 8, 249.

[10] Sovereignty, discipline and biopower (including biopolitics, the form of government that governs populations through biopower) constitute Foucault's "triangle of power", whereby each form emerged in different historical periods of modernity without, however, replacing each other. See M Dean, *Governmentality: Power and Rule in Modern Society* (Thousand Oaks, CA, Sage 2010).

[11] B Ajana, "Surveillance and biopolitics" (2007) 7 Electronic Journal of Sociology.

[12] M Foucault, "Truth and Juridical Forms" in JD Faubion (ed), R. Hurley et al (trans), *Power: The Essential Works of Michel Foucault 1954–1984. Vol. 3* (New York, New Press 2000) p 57; JW Crampton, "The Biopolitical Justification for Geosurveillance" (2007) 97(3) Geographical Review 389.

[13] JW Crampton, supra, note 12; M Tazzioli, "Governing migrant mobility through mobility: containment and dispersal at the internal frontiers of Europe" (2020) 38(1) Environment and Planning C: Politics and Space 3.

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perceived values of their lives.[14] It is also a "dispositif de sécurité", as it aims at *securing* the lives of "deserving" groups, inevitably demarcating others as less worthy.[15]

This approach can be situated in continuity with existing critical scholarship on Europe's racialised borders and refugee regimes. An important contribution in this vein has been Achiume's work that recentred race in the contemporary border regimes of the international order.[16] She has shown how racialised dynamics of inclusion and exclusion are produced through "facially neutral legal categories" and regimes, such as visas, citizenship and asylum.[17] Costello and Foster, drawing on Achiume's insights, have explored possible venues for applying existing anti-discrimination legal instruments to the differential treatment of refugees.[18] More specifically in relation to the Russo-Ukrainian context, Jackson Sow has argued that the treatment of persons fleeing the war shows that international refugee law is used by States to "negotiate their national whiteness contracts and to secure racially hegemonic geopolitical ordering".[19] A risk-based biopolitical approach complements these insights by foregrounding how the idea of risk plays out in the differential schemes governing Europe's refugee "crises". Institutional narratives often integrate the idea of managing risk in more visible ways than race, yet they conceal its racialised dimension. In this sense, showing how ideas of risk contribute to racialised choices and effects would facilitate bridging the gap between institutional narratives and critiques of racism.

Biopolitical risk-based approaches are not altogether absent in migration and refugee studies, having been primarily developed in relation to technologies of surveillance.[20] Such technologies were part of the EU's schemes of managing the two "crises". Indeed, the very perceived need to manage a large number of displaced persons requires certain knowledge that is gained through border surveillance and statistics.[21] In this sense, the knowledge obtained on the actual and estimated future numbers of such persons, as well as their trajectories, produces the idea of a "crisis" and the need to manage the perceived risks in relation to it. However, a full account of how surveillance practices operated within the two contexts is beyond the scope of this paper. Its primary focus is rather on the ways in which the biopolitical risk-based schemes of governance are structured and produced by EU legal and policy arrangements. Such schemes are not confined to situations of "crisis" but animate more generally the CEAS, and even the overall EU migration and asylum law. In what follows, the paper examines the ways in which the idea of risk animates the CEAS, under both its regular and exceptional regimes, for ultimately situating better the "crisis" regimes within the biopolitical operation of the CEAS.

III. The biopolitics of risk in the Common European Asylum System

The CEAS regime is shaped by – and produces – at least two categories of persons that are worth considering here: (1) persons believed to be at risk because of the threats they would face in the country of return; and (2) persons who constitute a risk. In this sense, the EU asylum regime produces a biopolitical differential scheme on the basis of which some people deserve protection, while others would pose risks from which the EU ought to be

[14] D Lorenzini, "Biopolitics in the Time of Coronavirus" (2021) 47(Suppl 2) Critical Inquiry S40.

[15] M Foucault, *History of Sexuality, an Introduction* (New York, Vintage 1985); Foucault, supra, note 8.

[16] Achiume, supra, note 6, 648.

[17] ibid.

[18] Costello and Foster, supra, note 4.

[19] Jackson Sow, supra, note 4.

[20] Crampton, supra, note 12; Btihaj, supra, note 11.

[21] On the importance of statistics and other forms of knowledge in biopolitics, see Foucault, *Birth of Biopolitics*, supra, note 8. See also C Ruelle, "Population, milieu et normes – Note sur l'enracinement biologique de la biopolitique de Foucault" (2005) 22 Labyrinthe 27.

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protected. Within the regular regime, asylum applications are to be examined on an individual basis in relation to persons claiming to be "at risk", but such examinations are often intertwined with restrictive group-based categories or effects. The CEAS also contains an exceptional regime of temporary protection for groups identified as being "at risk", which has been central in the management of the 2022 "crisis".

Since biopolitics implies an analysis of how power is exercised in relation to the population in its multiplicity, it is the group dimension that would be particularly relevant for a biopolitical approach to the CEAS. Concerning the regular asylum procedure, the group dimension is primarily visible in the inadmissibility criteria and the grounds justifying an accelerated procedure, which respectively deny or reduce the individual examination of the application.[22] Under these provisions, EU law allocates a set of characteristics to individuals who become a managed "population" through this very allocation.[23] At the same time, the population of the EU implicitly appears as in need of being protected from the risks associated with these individuals, given that their chances of being included in European societies are reduced or eliminated. Among these individuals are those who are perceived as posing a "danger to the national security or public order of the Member State" or as "abusing" the asylum system in some (other) way by not presenting a timely application, destroying identity documents, refusing to submit to fingerprinting procedures or presenting false information or documents.[24]

While the actual violation of legal rules appears significant in these provisions – thus creating a disciplinary dimension in the CEAS – the biopolitical aspect is equally substantial. Indeed, since the application of these provisions has the effect of diminishing or eliminating individuals' chances of staying in the EU, European societies appear in need of being protected from the category to which they belong and the "*behavioural potentialities*" it represents. Such potentialities include future violations of Member States' public order and security regulations and/or the use of Member States' public resources in ways that would pose unjustified burdens (or risks) to their functioning.[25]

A similar analysis can be applied to the concepts of "first country of asylum", "safe third country" and "safe country of origin". The first two trigger the inadmissibility of the application, based on the assumption that some asylum requests should be examined outside the EU, regardless of their substance. Concerning the notion of "safe country of origin", it allows justifying an accelerated procedure, with shorter limits and fewer procedural safeguards, with the underlying idea that some applications would have little chance of succeeding. The three concepts produce the idea that a group of persons would be less deserving of having their requests thoroughly (if at all) examined based solely on their origin, trajectory or previously granted protection. These concepts create categories of people whose chances of being included in EU societies are reduced or eliminated in biopolitically significant ways. The system implicitly recognises the potential deservingness of protection somewhere else (including in the "safe country of origin"), "*but not*

[22] E Guild, "From Persecution to Management of Populations: Governmentality and the Common European Asylum System", Nijmegen Migration Law Working Papers Series (2012) 3; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180 (Asylum Procedures Directive), Arts 31(8) and 33. In addition to these criteria and grounds, it is also relevant to consider the required degree of "individuation" in the examination of asylum applications, which generally leads to restrictive approaches to asylum seekers as a group. C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford, Oxford University Press 2016).

[23] Guild, supra, note 22, 5.

[24] Asylum Procedures Directive, Arts 31(8) and 33.

[25] Once registered, asylum seekers have a set of rights, the realisation of which relies on public resources. See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180 (Reception Directive).

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here". In this sense, it suggests a rationale under which the risk to be managed is one of using Member States' public resources in unjustified ways.

Under the exceptional regime of the CEAS, encapsulated in the TPD and applied in the Russo-Ukrainian context, the group-based rationale appears mainly in relation to persons *at risk*, the number of which would justify the need for a special status. Risk also appears in the perceived need to manage the potential effects that a "mass influx" would have on the asylum systems of Member States. Indeed, the Directive refers to situations where these systems' "efficient operation" would be potentially affected, considering "the interests of the persons concerned and other persons requesting protection".[26] The definition of "mass influx" is fairly vague, as the Directive merely indicates that this should be understood as "a large number of displaced persons". This implies a biopolitical scheme under which the knowledge gained on the number of displaced persons and their trajectories produces the idea of a future risk that must be managed.

To be sure, a person's state of being "at risk" is a significant but insufficient consideration for activating the temporary protection mechanism. It is the high number of such persons that creates the need for a temporary solution outside the regular procedures of international protection. In contrast to the regular regime, temporary protection would not require an individual examination of the conditions under which displaced persons have fled. It is a group-based status established to manage – in conjunction with a population "at risk" – the risks posed for the efficient operation of Member States' asylum systems.

One of the main implications of this regime is that those who are concerned by it are entitled to residence permits in host Member States for the entire duration of the temporary protection, which can last up to three years.[27] In the context of the Russo-Ukrainian war, the Council's decision to implement the TPD covered a relatively large portion of those fleeing Ukraine, including stateless persons and beneficiaries of international protection, as well as their family members.[28] Being conceived as a temporary solution, protection under this scheme remains, however, a precarious status, in the sense that it merely suspends – but does not remove – the standard asylum procedures. Outside situations that trigger the TPD, or as soon as beneficiaries of temporary protection apply for asylum, or when the duration of temporary protection comes to an end, the CEAS regains its full relevance, not without the other risk-based mechanisms of managing life outlined above.[29]

IV. Two "crises", one biopolitical differential scheme

Having painted in broad strokes how the idea of risk is integrated into both the regular and the exceptional regimes of the CEAS, the question arises as to how the management of the 2015/2016 refugee "crisis" fits in this picture. The TPD was not activated then, yet EU

[26] Temporary Protection Directive, Art 2(a).

[27] Unless explicitly terminated, temporary protection is automatically renewed for six months and up to one year (two six-month extensions). If the reasons for temporary protection persist, then a Member State can request the extension of the TPD for another year (Temporary Protection Directive, Art 4).

[28] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71 (Council Decision) Art 2. Member States must also provide "adequate protection" – TPD or another status under national law – to permanent residents of Ukraine who are unable to return to their country of origin. There is no obligation to grant protection to short-term residents, such as exchange students, although Member States can choose to do so.

[29] Guild, supra, note 22. See also E Guild, "Conflicting identities and securitisation in refugee law: lessons from the EU" in S Kneebone et al (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Abingdon, Routledge 2014) p 151.

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policy documents referred consistently to the large number of migrants and sometimes even to the idea of "mass influx".[30] Indeed, such rhetoric was then used to justify the very understanding of displacement of persons, mainly from the MENA region, as a "crisis", but it was not used to activate the TPD. The Commission's European Agenda on Migration of 2015, by now seen as reflecting the EU's approach to the 2015/2016 refugee "crisis", laid the groundwork for a set of emergency measures and justified them in terms of the perceived high number of arrivals. Such measures included the creation of "hotspots" in frontline Member States, stronger cooperation with third countries for reducing "irregular" migration, consolidating the security of external borders, fighting against smuggling and trafficking networks and the creation of an ad-hoc resettlement scheme for those in "clear need of international protection".

It is mainly the figure of the irregular migrant and the security risks or threats associated with it that shaped the 2015 "crisis" approach, in contrast with the TPD regime.[31] The idea of protecting persons "at risk" has also been present to some extent, but the alleged threat of irregular migration occupies a prominent place, facilitating a more restrictive regime shaped mainly by security concerns.[32] While this scheme has an individual disciplinary dimension, the category of the irregular migrant also creates a population from which the EU allegedly ought to be protected. The biopolitical dimension lies in the perceived threats associated with the *group* of individuals to which EU law allocates the characteristic of potential dangerousness. Such a characteristic results from the alleged "choice" of reaching the EU through irregular means.

In 2015, such threats were perceived as requiring the creation of mechanisms allowing authorities to "swiftly" distinguish between "irregular" migrants and those "in clear need of international protection", together with policies that sought to reduce incentives for irregular migration.[33] While under the 2022 TPD-based regime the high number of displaced persons justified a group-based status of temporary protection, in 2015 it justified selection and dissuasion, leading to increasing returns and the production of more dangerous routes. To be sure, the risks that Member States' asylum systems operation would face are mentioned in both the 2022 and 2015 legal and policy documents. In the 2015 texts, however, such risks are not understood as requiring a group-based protection status, mainly because of the perceived threats associated with irregular migration.[34]

Notably, the approach to the 2015/2016 "crisis" conceals that potential asylum seekers often have no other choice but to reach the EU through irregular means. Indeed, the right to asylum is generally understood as not including the right to arrive on the territory of the destination State.[35] Moreover, the Court of Justice of the EU decided in 2017 that EU

[30] EU Commission, "A European Agenda on Migration", COM(2015) 240, 13 May 2015.

[31] D Davitti, "Biopolitical Borders and the State of Exception in the European Migration 'Crisis'" (2018) 29 European Journal of International Law 1173, 1179. See also D Ghezelbash et al, "Securitization of search and rescue at sea: the response to boat migration in the Mediterranean and offshore Australia" (2018) 67 International & Comparative Law Quarterly 315, 351.

[32] Security is used here in the sense of a discursive process of "securitisation" – in line with the Copenhagen School – through which actors claim the existence of a threat associated with migration and the possibility of taking extraordinary measures to deal with such a threat. Such a process is also part of a "security apparatus" in the Foucauldian sense as it inscribes itself within a scheme of securing the lives of deserving groups at the expense of other groups perceived as dangerous. On the theory of securitisation of the Copenhagen School, see B Buzan et al, *Security: A New Framework for Analysis* (Boulder, CO, Lynne Rienner Publishers 1998); SJ Baele and CO Sterck, "Diagnosing the securitisation of immigration at the EU level: a new method for stronger empirical claims" (2015) 63 Political Studies 1120, 1139.

[33] EU Commission, supra, note 30, 4 and Annex (those "in clear need of international protection" conceived as falling under relocation and resettlement schemes).

[34] Ibid, 6 (referring to "a robust fight for irregular migration").

[35] VM Lax, "Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees" (2008) 10(3) European Journal of Migration and Law 315.

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law does not apply to humanitarian visas and, therefore, does not create an obligation for Member States to issue such visas for those seeking to apply for asylum.[36] In this sense, the 2015 restrictive policies that claimed to deal exclusively with irregular migration inevitably affected potential asylum seekers, creating more dangerous routes for them as well. The number of arrivals in the EU in 2015 and 2016, among which approximately 2.5 million asylum applicants were registered, can only be considered in relation to these policies.[37] So must be the number of deaths in the Mediterranean, at an estimated *minimum* of 26,851 since 2014.[38] In this sense, the 2015/2016 biopolitical risk-based scheme implied keeping afar or triggering the deaths of a group of individuals who might have benefitted from international protection had they managed to reach the EU.

These effects were exacerbated by the consolidation of securitised policies and their "externalisation".[39] Irregular migration was perceived as a security threat, and the security–migration nexus was increasingly outsourced to third countries through partnerships, such as the infamous EU–Turkey Statement.[40] In other words, the securitised figure of the risky irregular migrant led to restrictive policies not only in the EU's geographical space and at its external borders, but also in certain third countries, Europe's "new border guards". Under the EU–Turkey Statement, the resettlement of Syrians to the EU, while as such a welcome solution, was inserted into a scheme in which the risky irregular migrant was conceived as the main threat to address.[41] Indeed, resettlement would occur only in proportion to the number of Syrians returned to Turkey. To this date, many African states continue to receive funding, training and equipment for preventing irregular migration in continuity with 2015 programmes funded by the EU Emergency Trust Fund for Africa, now under the "Neighbourhood, Development and International Cooperation Instrument – Global Europe" scheme.[42] If displaced persons managed to overcome these restrictive measures with a global reach, they were to be subjected to a selection process in "hotspots" under the 2015/2016 approach. The implementation of this scheme, which aimed at distinguishing between "deserving" and "undeserving"

[36] Case C-638/16 PPU, *X and X v Etat Belge*, ECLI:EU:C:2017:173.

[37] "Asylum and first time asylum applicants – annual aggregated data" (*Eurostat Data Browser*, 2022), <https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en> (last accessed 10 December 2022).

[38] See "Missing Migrants Project" (*International Organization for Migration*, 2022), <https://missingmigrants.iom.int/ > (last accessed 29 May 2023).

[39] On securitisation, see supra, note 32.

[40] European Council, Press Release, EU–Turkey Statement, 18 March 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement> (last accessed 10 December 2022); M Akkerman, "Expanding the fortress: the policies, the profiteers and the people shaped by EU's border externalisation programme" (*The Transnational Institute Report*, May 2018), 34 <https://www.tni.org/en/publication/expanding-the-fortress> (last accessed 10 December 2022). See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (European Commission),*The Global Approach to Migration and Mobility*, /*COM/2011/0743 final*/. EC [2011]; Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new partnership framework with third countries under the European Agenda on Migration, 7 June 2016, COM/2016/0385 final, EC [2016].

[41] M Savino, "Refashioning resettlement: from border externalization to legal pathways for asylum" in S Carrera et al (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Leiden, Brill Nijhoff 2018) pp 81–104. For other critiques of the EU–Turkey Statement, see O Ulusoy and B Hemme, "Situation of readmitted migrants and refugees from Greece to Turkey under the EU–Turkey statement" (2017) 15 VU Amsterdam Migration Law Series; M Gkliati, "The Application of the EU–Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee" (2017) 10 European Journal of Legal Studies 81.

[42] Valletta Summit on Migration, Action Plan, 11–12 November 2015 <https://www.consilium.europa.eu/media/21839/action_plan_en.pdf> (last accessed 10 December 2022); European Commission, "Factsheet – Global Europe: Neighbourhood, Development and International Cooperation Instrument" (9 June 2021) <https://international-partnerships.ec.europa.eu/funding/funding-instruments/global-europe-neighbourhood-development-and-international-cooperation-instrument_en> (last accessed 10 December 2022).

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individuals, exacerbated the effects of the "externalised" restrictive measures. Not only were Member States reluctant to implement the Council decisions on the relocation of "deserving" migrants, but the conditions in hotspot centres have been decried for amounting to inhuman and degrading treatment with little access to asylum procedures.[43]

This is not to say that the protection rationale was altogether absent from 2015/2016 institutional debates and policies. However, a certain understanding of it has obscured the EU's – and its Member States' – role in the production of that which it claimed to fight against. Indeed, the very schism between refugeehood (for those "in clear need" of protection) and irregular migration (justifying securitised responses and externalisation measures) masked the fact that no straightforward legal pathways were created in 2015 for those fleeing war and violence.[44] They were to be kept as far away as possible from Europe. In other words, restrictive policies of externalisation and securitisation *produced* more irregularity, with an inevitable impact on those to whom protection was promised. In this sense, the effects of the 2015/2016 biopolitics of risk are in sharp contrast with those of the 2022 approach.

This contrast shows a differential biopolitical scheme that produces a hierarchy between those fleeing the Russo-Ukrainian war and those fleeing the conflicts in the MENA region. Both are part of a "security apparatus" in the Foucauldian sense, as together they seek to *secure* the lives of deserving groups at the expense of other less worthy groups. The perceived threat of irregular migration appears as the primary discursive facilitator of this hierarchy. Both "crises" were understood as creating the need for an emergency response because of a "large number" of displaced persons, but the TPD was triggered only in a context that was not perceived as raising issues of irregular migration. In this sense, the persons fleeing the Russo-Ukrainian war appear as *less* – if at all – threatening than those fleeing the conflicts in the MENA region. This might also explain the celerity with which Member States applied the decision of the Council to implement the TPD.[45] This has been especially surprising for Poland, one of the most reluctant States to comply with the mandatory relocation quotas decided by the Council in the context of the 2015/2016 refugee "crisis".[46] According to the United Nations High Commissioner for Refugees (UNHCR), at the time of writing, Poland has granted temporary protection to 1.6 million people fleeing the Russo-Ukrainian war, making it the most welcoming Member State in relation to the 2022 context, in sharp contrast with the previous largest "crisis".[47]

To be sure, the figure of the risky individual is not altogether absent from the TPD. Indeed, the Directive allows for excluding displaced persons from protection if there are "reasonable grounds" for considering them as a security threat or "serious reasons" for believing that they committed certain crimes defined in international instruments, a "serious non-political crime" or have acted against "the purposes and principles of the United Nations".[48] In contrast to the 2015 Agenda on Migration, the risks attached to

[43] European Council on Refugees and Exiles, "The Implementation of the Hotspots in Italy and Greece. A Study" (2016) <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf> (last accessed 10 December 2022). See also G Campesi, "Seeking asylum in times of crisis: reception, confinement, and detention at Europe's southern border" (2018) 37(1) Refugee Survey Quarterly 44, 70.

[44] The main legal pathway provided is resettlement. The procedure, however, relies on the cooperation of multiple actors – such as domestic authorities in the transit and host states – and the critical participation of UNHCR. Subject to a lengthy and complicated procedure, a few people eventually resettled. See Savino, supra, note 41.

[45] Council Decision, supra, note 28.

[46] For these reasons, the European Commission initiated legal proceedings against Hungary, Poland and the Czech Republic. See Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C- 715/17 *Commission v. Poland*, C-718/17 *Commission v. Hungary* and C-719/17 *Commission v. Czech Republic*, ECLI:EU:C:2020:257.

[47] See UNHCR, Operational Data Portal, "Ukraine Refugee Situation" <https://data2.unhcr.org/en/situations/ukraine> (last accessed 29 May 2023).

[48] Temporary Protection Directive, Art 28(1).

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individuals must be managed under the TPD only *after* the Member States accept them on their territory. In other words, the threat is conceived here more in relation to individual behaviours and not to those of the group of persons fleeing the Russo-Ukrainian war as a whole. Security risks, in this sense, were not used in 2022 as a justification to devise restrictive migration policies in relation to the overall group of persons, but they were understood as considerations to be potentially addressed after their arrival.

The figure of the risky migrant thus appears with much greater force in relation to nationals of MENA countries, producing a hierarchy between White and Christian populations and their Others. The threat associated with irregular migration might appear as "objectively" justifiable when considering that a pre-existing visa regime was applicable to almost all MENA countries, while Ukrainian nationals benefitted from a prior regime of visa-free travel to the Schengen Area.[49] However, the EU short-term visa regime has its own productive effects and racialised dimension and, in this sense, contributes to the racialisation of the differential scheme produced by the two crises. Indeed, it creates a selective system under which almost all African nations, nearly all of Asia and part of Latin America are on the visa "black list", whereas North America and an important part of Oceania are on the "White list".[50] Some nationals from the "black list" might be able to overcome the restrictive regime through successful visa applications, but they have been and continue to be constructed as exceptions to the categorisation of the overall group of nationals as posing risks to the EU.[51]

This scheme is the product of legal and political choices in which a set of allegedly neutral criteria played out, which are listed in the EU Regulation 2018/1806.[52] Interestingly, "illegal immigration" is one of the first criteria mentioned in the Regulation for justifying visa restrictions. As Samers convincingly argues, this visa regime produces more irregularity while concealing that "illegality" was, in the first place, fabricated through restrictive immigration policies.[53] The original justification behind such restrictive policies was based on biopolitical risk assessments deriving from foreign nationals' socio-economic characteristics and the likelihood of "mass migration".[54] In this sense, visa requirements are ultimately part of a racialised scheme based on the desirability or undesirability of certain populations in the EU.[55] The category of the "irregular" migrant not only refers mainly to a non-White population from the Global South, but has been historically produced through racialised geopolitical choices in continuity with colonial schemes of unequal mobility.[56]

The pre-existing racialised EU visa regime served as a justification for allowing the persons displaced by the Russo-Ukrainian war to reach the Member State of their choice, in stark contrast with the application of the infamous Dublin III system in other contexts,

[49] The visa-free travel was granted in 2017 for a period of a maximum 90 days within any 180-day period. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77 (Schengen Borders Code), Art 6(1).

[50] Achiume, supra, note 6, 470.

[51] ibid, 469. See also D Bigo and E Guild, "Policing at a Distance: Schengen Visa Policies" in D Bigo and E Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Abingdon, Routledge 2005).

[52] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1.

[53] M Samers, "An Emerging Geopolitics of Illegal Immigration in the European Union" (2004) 6 European Journal of Migration and Law 27, 32; Costello, supra, note 22, 67.

[54] Samers, supra, note 53.

[55] Achiume, supra, note 6, 468. M Tesfahuney, "Mobility, racism and geopolitics" (1998) 17(5) Political Geography 499.

[56] F Mégret, "The Contingency of International Migration Law: 'Freedom of Movement', Race, and Imperial Legacies" in I Venzke and KJ Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford, Oxford University Press 2021); Achiume, supra, note 6.

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including the 2015/2016 “crisis”.[57] In this sense, the racialised visa regime produced unequal mobilities not only from “third countries” to the EU, but also within the EU. Nationals from the MENA region were and continue to be subject to the Dublin III criteria for determining the Member State responsible for examining their asylum application. If they move to a different Member State, they become transferrable and detainable and, in this sense, they are treated as “quasi-irregulars”. Under the Dublin III regime, they are often allocated to southern European countries, while those fleeing the Russo-Ukrainian war have been allowed to move to the Member State of their choice. Such unequal mobilities are the product of a single biopolitical scheme that differentiates in racialised ways between White Christian individuals and its non-White Others.

The racialised dimension of this scheme has been exacerbated by the discriminatory practices of some authorities in relation to people fleeing the Russo-Ukrainian war. Indeed, several media sources have reported practices of exclusion of Africans and Romas, either from protection and the rights associated with it or at the border.[58] Such practices are in contradiction with the EU regime of temporary protection itself. Even if some of those who were not allowed to cross the border might have been short-term residents with no access to protection under the TPD, their entry in the EU was not to be rejected. Indeed, under the Council’s implementing decision, they should be able to enter the EU, with or without valid travel documents, at least for preparing their return trips to their countries of origin.[59] While contradicting the EU temporary protection regime, such practices confirm and exacerbate the racialised scheme through which the two “crises” have been managed.

The consequences of the 2015 Agenda on Migration have been and continue to be dramatic, creating a stark contrast between the effects of the 2022 activation of the TPD. As shown in this section, this racialised differential scheme cannot be dissociated from biopolitical ideas that certain groups of individuals are riskier than others. Yet the management of risks associated with migration and asylum is integrated into EU policy and legal documents in ways that conceal its racialised dimension. As argued here, a biopolitical perspective provides an analytical framework that facilitates bridging the gap between EU institutional narratives and the critiques of Europe’s racism. Exposing the link between the two also prompts the question of the ways in which risk is conceptualised in the ongoing discussions on reforming EU migration and asylum law and its possible future implications.

V. EU migration and asylum reform proposals: what next?

Almost three years after the proposed New Pact on Migration and Asylum, the content of the next reforming phase of the CEAS, as well as other proposals on migration, are still

[57] Parliament Briefing, supra, note 40. This is probably also something that motivated the Council decision not to apply Art 11 of the TPD, which suggests that a “take-back” procedure would be in order if the person was granted temporary protection in a Member State but “remains on, or, seeks to enter *without authorisation* onto, the territory of another Member State” (emphasis added).

[58] M Pronczuk and R Maclean, “Africans Say Ukrainian Authorities Hindered Them from Fleeing” (*New York Times*, 1 March 2022) <https://www.nytimes.com/2022/03/01/world/europe/ukraine-refugee-discrimination.html> (last accessed 9 December 2022); A-F Rotman “They Called Ukraine Home. But They Faced Violence and Racism When They Tried to Flee” (*Time*, 1 March 2022) <https://time.com/6153276/ukraine-refugees-racism/> (last accessed 9 December 2022); W Nattrass, “Roma refugees from Ukraine face Czech xenophobia” (*EU Observer*, 17 May 2022), <https://euobserver.com/world/154968> (last accessed 10 December 2022); S Ellena and V Makszimov, “Faced with discrimination, Ukrainian Roma refugees are going home” (*Euractiv*, 14 April 2022) <https://www.euractiv.com/section/non-discrimination/news/faced-with-discrimination-ukrainian-roma-refugees-are-going-home/> (last accessed 10 December 2022).

[59] Council Decision, supra, note 28, Preamble, para 13.

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awaiting agreement.[60] It is beyond the scope of this paper to provide a comprehensive picture of the ongoing EU migration and asylum reform proposals. However, it is worth examining whether these proposals reproduce or challenge the understandings of risk that shaped the 2015/2016 and 2022 contexts and the racialised biopolitical scheme (re-)produced by them. While some of these proposals seem to have been rejected by either the Council or the European Parliament, it is unclear at this stage whether and how they might be reintegrated in a different form during the current reforming phase, or whether they might regain importance later in a new reforming phase. In this sense, it is worth including them in the analysis, while keeping in mind their potential transformation or rejection in the near future.

According to the relevant Commission Proposals, within the 2020 New Pact, a revised version of the TPD – with an "immediate protection" status – would be absorbed under a proposed "Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum" (Proposed Crisis Regulation).[61] In 2021, following Belarusian authorities' encouragement of individuals to cross the border with Poland, similarly to Turkish strategies in 2020 regarding its border with Greece, an additional exceptional instrument was proposed to tackle "situations of instrumentalization in the field of migration and asylum".[62] Such situations have been characterised as "hybrid attacks" at the EU border requiring responses different from "pure" situations of "mass influx".

These two proposed exceptional regimes, at least as conceived when introduced by the Commission in 2020, are inserted into a scheme whose starting point is a pre-entry screening procedure aiming at selecting "deserving" and "undeserving" migrants. This procedure appears as common to regular and exceptional regimes and is outlined in a separate instrument, the proposed Screening Regulation.[63] To be sure, "immediate protection" – the status proposed for replacing the current "temporary protection" – is similarly understood as a group status, but it does not concern all "crisis" situations. Indeed, the Proposed Crisis Regulation confines it to a mass influx of "displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin".[64]

This scenario, which pertains to a mass influx of persons eligible for subsidiary protection under the regular regime, is part of a broader understanding of "crisis", which concerns a mass influx of *mixed flows*. Indeed, the Proposed Crisis Regulation refers to a large number of "persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations".[65] In this sense, the proposed regime is based on the idea that "crisis" situations *generally* entail mixed flows, and only exceptionally would it trigger the group protection status. The figure of the irregular

[60] The Parliament has agreed on partially reforming EU migration and asylum law until the end of the present political cycle, in April 2024. Therefore, not all of the proposals are moving forward equally. For example, the Parliament has opposed the *force majeure* concept and has proposed other important modifications of the Proposed Crisis Regulation. See European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Report on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum," Report A9-0127/2023, 7 April 2023 <https://www.europarl.europa.eu/doceo/document/A-9-2023-0127_EN.html> (last accessed 29 March 2023).

[61] European Commission, "Crisis Instrument: Proposal for a Regulation Addressing Situations of Crisis and *Force Majeure* in the Field of Migration and Asylum" (2020) 2020/0277 (Proposed Crisis Regulation).

[62] European Commission, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum*, COM/2021/890 final, 14 December 2021 (Proposed Instrumentalisation Regulation).

[63] European Commission, "Screening Regulation: Proposal for a Regulation Introducing a Screening of Third Country Nationals at the External Borders" (2020) 278.

[64] Proposed Crisis Regulation, supra, note 61, Art 10.

[65] Proposed Crisis Regulation, supra, note 61, Art 1(2).

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migrant, and the risks associated with it, is thus central in the "standard" "crisis" situation. This explains why the situation of "mass influx" is understood as posing risks of inefficient operation not only for Member States' asylum systems, but also for their *return* systems. Protection, in such scenarios, seems to be conceived from the outset in conjunction with the need to return the "undeserving" individuals to their countries of origin or residence. This is also reflected in the proposed creation of "return sponsorships" in "crisis" situations, a new "solidarity" mechanism under which Member States would assist each other in carrying out returns of irregular migrants.[66]

Evoking the 2015 hotspot approach, the proposed scheme assumes that most "crisis" situations should be treated as involving both irregular migrants and persons who would potentially qualify for protection.[67] In this sense, the regime under the New Pact is shaped by the figure of the irregular migrant in ways that are similar to the emergency responses in the context of the 2015/2016 refugee "crisis".[68] The biopolitical dimension lies in the perceived threats associated with the group of individuals that EU law categorises as irregular migrants, while concealing the ways in which it produces irregularity and dangerous routes for reaching the EU. Moreover, since irregularity is (re-)produced through the EU visa regime in racialised ways, the New Pact carries forward – instead of challenging – the contemporary racialised differential scheme. In this sense, the Proposed Crisis Regulation, at least in its 2020 version, is based on a differential scheme that produces a racialised hierarchy between undeserving and deserving migrants.

The figure of the irregular migrant appears as a risk to be addressed in conjunction with the risk posed to Member States' asylum and return systems' efficient operation. This explains why the Commission in its explanatory memorandum for the Proposed Crisis Regulation explicitly refers to "the need to sustain a reduced pressure from irregular arrivals and strong external borders".[69] The idea of persons *at risk* is not altogether absent under the New Pact, but, similarly to the 2015/2016 context, it coexists with the figure of the risky irregular migrant in ways that would affect those to whom the regime promises protection. To be sure, the proposed reform also normalises the hotspot approach by conceiving the pre-entry screening procedure as applicable both to "standard" "crisis" and "non-crisis" situations. In this sense, the (racialised) figure of the irregular migrant occupies a central place in the overall 2020 proposed reforms of EU migration and asylum law.

Since 2020, the EU legislative procedure has led to a set of modifications and debates, whose future outcome remains uncertain at the time of writing. One of them is the European Parliament's suggestion to replace "immediate protection" with a wider "*prima facie* international protection" status, understood as concerning displaced persons who would qualify *prima facie* for international protection "based on circumstances in their country of origin or the country of former habitual residence … or on the basis of other readily apparent, objective and well-defined criteria drawn from" the EU regime on

[66] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]" (610) Final 2020, Art 55.

[67] In the amendments proposed by the Parliament, the Proposed Screening Regulation is still directly connected to the Proposed Crisis Regulation. See European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Report on the proposal for a regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817" A9-0149/2023, 14 April 2023.

[68] For example, border detention, which results from the "multidimensional expansion of border procedures"; see M Mouzourakis, "More laws, less law: the European Union's New Pact on Migration and Asylum and the fragmentation of 'asylum seeker' status" (2020) 26 European Law Journal 171.

[69] Proposed Crisis Regulation, supra, note 61.

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qualification.[70] While such an approach seems more similar to the current regime of temporary protection, it remains nevertheless inserted within a system in which pre-entry screening procedures are normalised and the risk posed to the efficient operation of Member States' return systems is considered in conjunction with its asylum systems. In this sense, the idea that a group protection system would be triggered (this time by the Commission alone) only in exceptional "crisis" situations, as opposed to other "crisis" situations, remains in place. If the Commission decides not to activate it, a selective approach would prevail, evoking the 2015 hotspot scheme and the biopolitical scheme produced by it.

In 2021, the Commission proposed a new regulation that would create an additional exceptional regime in situations of "instrumentalisation in the field of migration and asylum", complicating the overall reforming phase and further threatening the right to asylum. The system draws inspiration from the Proposed Crisis Regulation while tackling the alleged need to deal separately with "situations where the Union's integrity and security is under attack as a result of the instrumentalisation of migrants", regardless of the size of the "influx".[71] It proposes the creation of an "emergency migration and asylum management procedure" with longer registration deadlines, as well as the possibility of selecting at the border between those who qualify for international protection and those who must be returned. Evoking the 2015 hotspot approach, the proposal also introduces some new elements. Perhaps the most striking novelty is that the (racialised) risk of irregular migratory flows seems to take an even more threatening dimension. Indeed, in the context of the instrumentalisation concept, irregular migration becomes associated with the risk of affecting "essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security".[72] In this sense, the biopolitical differential scheme seeks not only to keep an undesirable population afar, but also to prevent a perceived threat to peace posed through the instrumentalisation of this population.

In December 2022, the Council could not reach a majority on the Proposed Instrumentalisation Regulation, something that has been welcomed by many civil society actors.[73] However, it is unclear at this stage how the legislative procedure will unfold and whether the concept of instrumentalisation will be reintegrated in a different form. As legislative procedures are ongoing, both for the 2020 New Pact and for the 2021 Proposed Instrumentalisation Regulation, we hope that this paper can contribute to greater institutional awareness of the ways in which the two carry forward a racialised biopolitics of risk and of the need to rethink the proposed reforms towards a more welcoming approach.

VI. Conclusion

The above analysis has exposed the centrality of the notion of risk in the CEAS, under both its exceptional and regular regimes. Risk, however, is a fluid notion and is not always understood in the same way. From persons at risk, to persons as risk, to risks posed to the efficient operation of Member States' systems, these ideas are part of a larger biopolitical scheme that seeks to manage populations through preventative strategies while producing hierarchies between different groups. It is this differential scheme that brings EU institutional narratives closer to the critiques of EU's racialised legal and policy choices

[70] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Report on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum," Report A9-0127/2023, 7 April 2023 <https://www.europarl.europa.eu/doceo/document/A-9-2023-0127_EN.html> (last accessed 29 March 2023).

[71] Proposed Instrumentalisation Regulation, supra, note 62.

[72] ibid.

[73] ECRE, "ECRE Reaction: No Majority for Instrumentalisation Regulation" (2022) <https://ecre.org/ecre-reaction-no-majority-for-instrumentalisation-regulation/> (last accessed 29 May 2023).

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and their effects. EU legal and policy instruments often integrate the idea of managing risk in more explicit ways, but they conceal its racialised dimension. It has been argued here that a biopolitical approach facilitates a better understanding of how the technology of risk operates in racialised ways.

This paper has looked more specifically at the ways in which risk has been understood in the 2015/2016 and the 2022 "crises". In the context of the Russo-Ukrainian war, a group-based protection regime has been activated for the first time, with the idea of providing solutions to persons *at risk* when their numbers pose *risks* for the efficient operation of Member States' asylum systems. In the 2015/2016 context, which concerned individuals mostly fleeing conflicts in the MENA region, the response was largely shaped by the figure of the irregular migrant and the risks associated with it, with the consequence of creating more dangerous – even lethal – routes into the EU. The idea of protecting persons at risk was not altogether absent, but the imagined risks of irregular migration produced a more restrictive regime with an impact even on those to whom protection was promised. Such risks are not visible in the EU legal and policy documents related to the persons displaced by the Russo-Ukrainian war, and, in this sense, they appear as *less* – if at all – threatening.

While under the 2022 TPD-based regime the high number of displaced persons justified a group-based status of temporary protection, in 2015 it justified dissuasion and selection between "deserving" and "undeserving" migrants. The contrast between the two contexts shows that they are inserted into a differential biopolitical scheme that produces a hierarchy between those fleeing the Russo-Ukrainian war and those fleeing the conflicts in the MENA region. Such a hierarchy is also based on a pre-existing racialised EU short-term visa regime, under which mobility from "third countries" appears as a privilege of citizens from North America and an important part of Oceania.

With CEAS entering its third phase, future debates and reforms cannot stay indifferent to the ways in which risk has been apprehended in 2015/2016 and 2022 with contrasting implications and effects. Current proposals of reforming EU migration and asylum law do not provide hopeful solutions. Indeed, the figure of the "risky irregular migrant" shapes the exceptional regimes in ways that are more similar to the 2015/2016 approach, generally requiring a screening procedure prior to entering the EU. The two also explicitly address concerns in relation to irregular flows and the need to ensure swift return procedures for those who do not qualify for protection. The Proposed Instrumentalisation Regulation has gone so far as to associate the risk of irregular migration with threats of peace posed to Member States when migrants are instrumentalised for political purposes.

As discussions on reforming EU migration and asylum law are still ongoing, we hope that the insights developed in this paper will facilitate bridging the gap between EU institutional narratives and the critiques of Europe's racialised governance choices. A biopolitical perspective allows for approaching risk in more complex ways, as a technology that produces hierarchies between different groups of people. Such hierarchies produce a differential scheme that exacerbates the pre-existing racialised EU visa regime through which the irregular migrant is constructed. Future reforms of EU migration and asylum law should rethink the current system by taking as the starting point the need to challenge – instead of reproducing, albeit in unacknowledged ways – the racialised biopolitics of risk produced by EU migration and asylum law.

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