Race and the regulation of international migration. The ongoing impact of colonialism in the case law of The European Court of Human Rights

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Abstract
In the case law of the European Court of Human Rights (ECtHR) the right of States to control migration is firmly established despite strong indications that the effects of migration control are not racially neutral. In this article we attempt to understand how it is possible that the doctrine of sovereign migration control is not considered to breach the prohibition of racial discrimination. We argue that the ECtHR’s approach to migration and racial discrimination fits a pattern in the historical development of migration law whereby the right to travel, and the power of States to restrict this right, have been consistently defined in such a way as to protect the interests of the predominantly white population of today’s global North. Hence, the ease with which the racialised impact of migration control is accepted as normal and compatible with the prohibition of racial discrimination is consistent with migration law’s long history as part of colonial and postcolonial relations.

Keywords
migration, race, racial discrimination, colonialism, postcolonialism, European Court of Human Rights

1. INTRODUCTION
In the case law of the European Court of Human Rights (ECtHR or Court) the right of States to control the entry of non-nationals into their territories emerges as a biblical truth. This right was introduced in the early 1980s as ‘a matter of well-established international law’ (as per the
Abdulaziz judgment, see Section 3.1) and has since become one of the pillars of the Court’s reasoning in cases concerning the regulation of international migration. While it may seem anodyne to hold that States can control the entry and residence of aliens, this legal competence has pervasive effects on freedom of movement. As a result of international migration control, people may be unable to enjoy family life or their right to property, or to obtain employment or protection against inhuman treatment. Migration control also affects the position of people who are on the territory of a State of which they are not nationals; as foreigners they may be denied access to housing, work, health care, marriage and other fundamental rights.

Moreover, and of particular concern to this article, there are important indications that the control of international migration is not racially neutral. When looking at maps on visa requirements, at datasets of people who have died along migration routes,1 or at refugee camps in wealthy countries, it is hard not to notice that the people who are denied legal access to the overall prosperous, developed and safe countries of the global North are largely non-white.2 Those who make their way to the global North nonetheless are often forced to live as precarious or irregularised migrants, without political rights or access to welfare provisions, while others die trying to get there without access to safe and affordable travel routes.

Considering these racialised effects of international migration control, and the fact that the prohibition of racial discrimination is widely viewed as one of the most salient norms of international human rights law,3 it seems incongruous that a human rights court such as the ECtHR would uphold the right of States to control migration as they do without much questioning or discussion.4 However, we argue that the ECtHR’s approach fits a pattern in the historical development of migration law whereby the right to travel, and the power of States to restrict this right, have been consistently defined in such a way as to protect the interests of the predominantly white population of today’s global North. In brief, the right to travel into foreign territories was conceived by European lawyers in the early modern period to enable colonial expansion. Freedom of movement remained the dominant legal framework for international migration for roughly three and a half centuries, until the end of slavery and decolonisation resulted in a reversal of (voluntary) migration flows. It was at this point that the Supreme Court of the United States (US Supreme Court) substituted the doctrine of sovereign migration control for the right to free travel, followed one century later by the ECtHR. Hence, while ECtHR case law on migration control sits uneasily with the ideal of non-discrimination, it is consistent when analysed in relation to the power relations established during colonialism.

Our argument proceeds in two parts. The first examines the historical origins of the doctrine of sovereign migration control in international law. This historical examination shows how the

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1. Tamara Last, ‘Who is the ‘Boat Migrant’? Challenging the Anonymity of Death by Border-Sea’, in Violeta Moreno-Lax and Efthymios Papastavridis (eds), Boat Refugees’ and Migrants at Sea: A Comprehensive Approach (Brill 2016) 79–116.

2. Thomas Spijkerboer, ‘The Global Mobility Infrastructure. Reconceptualising the Externalisation of Migration Control’ (2018) 20 European Journal of Migration and Law 452; Henk van Houtum, ‘Human Blacklisting: The Global Apartheid of the EU’s External Border Regime’ (2010) 28 Environment and Planning D: Society and Space 957.

3. The prohibition of racial discrimination has even been attributed the status of *jus cogens*, see Kevin Boyle & Anneliese Baldaccini, ‘A Critical Evaluation of Human Rights Approaches to Racism’, in Sandra Fredman (ed), Discrimination and Human Rights: The Case of Racism (Oxford University Press 2001) 144.

4. See also Jean-Baptiste Farcy, ‘Equality in Immigration Law: An Impossible Quest?’ (2020) 20 Human Rights Law Review 1.
right of States to control the entry of aliens developed in the US, the UK and continental Europe around 1900 and came to be considered as a tenet of international law, before being integrated into the case law of the ECtHR. It also demonstrates the role of this doctrine in shaping the relationship between European States and their former colonial subjects in the period following decolonisation. The second part of our argument focuses on the ECtHR and is based on an analysis of decisions and judgments in which the Court – and previously the European Commission of Human Rights (EComHR or Commission) – addressed claims stating that the exercise of migration control by the States Parties to the European Convention on Human Rights (ECHR) constituted (racial) discrimination. We show how the Commission and the Court have upheld the right of States to regulate the entry of aliens and have generally turned a blind eye to the racialised effects of international migration control, to the disadvantage of people from the global South.

2. THE DOCTRINE OF SOVEREIGN MIGRATION CONTROL

2.1. COLONIALISM AND THE RIGHT TO TRAVEL

In the early modern period, founding figures of international law stated that it was permissible for anyone to set forth and travel. In doing so, they worked within a tradition that can be traced back to Augustine.5 An example of this is Francisco de Vitoria (ca 1485–1546), who was an early modern Spanish academic, and an advisor to Emperor Charles V.6 In a lesson he gave in 1539,7 De Indis (On the Indians), he touched upon the question whether the Spanish colonists had the right to seize the lands of native Americans. He opens this discussion with the right to migrate. Vitoria concludes that there is a right to travel and to live in other countries, provided one does not harm the natives; the natives cannot prevent them from doing so.8 According to him, to keep people who do no harm out of the territory9 is an act of war. Vitoria argues that the Spanish colonists can defend themselves against such an act of war by the Indians by seizing their territory.10 So for Vitoria, a refusal to allow

5. Aurelius Augustinus, Quaestiones in heptateuchum (Ferdinand Schönigh 2018) 254; Jonathan Barnes, ‘The Just War’, in Norman Kretzman, Anthony Kenny and Jan Pinborg (eds), Cambridge History of Later Medieval Philosophy (Cambridge University Press 1982) 781; Alfred Vanderpol, La doctrine scolastique du droit de guerre (Pedone 1919) 164.
6. Ernest Nys, ‘Introduction’, in Fransiscus de Victoria (ed), De Indis et de iure belli relectiones (Carnegie Institution of Washington 1917) 55–100; Anthony Pagden and Jeremy Lawrence, ‘Introduction’, in Fransisco de Vitoria (ed), Political Writings (Cambridge University Press 1991) xiii-xxx. See also Anthony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2005) 13–31; Andreas Wagner, ‘Francisco de Vitoria’, in Rafael Domingo and Javier Martinez-Torrón (eds), Great Christian Jurists in Spanish History (Cambridge University Press 2018) 84–96; Annabel Brett, ‘Francisco de Vitoria (1483–1546) and Francisco Suárez (1548–1617)’, in Bardo Fassbender and Anne Peters (eds), The Oxford Handbook of the History of International Law (Oxford University Press 2012) 1086–1091.
7. Pagden and Lawrence give January 1539 as the date at which De Indis was delivered, Vitoria (n 6) 231, while Nys gives 1532, Nys (n 6) 71. As Pagden and Lawrence are more advanced in their critical work on the text (at xxxiii-xxxviii) we use their date.
8. “Hispani habent ius peregrinandi in illas provincias et illic deendi, sine aliquo tame nocemento barbaorum, ned possunt ab illos prohiberi.” De Victoria (n 6) 257, English translation ibid 151; Vitoria (n 6) 278.
9. Vitoria uses as interchangeable the terms civitas (citizenship), provincia (province, in medieval Latin: territory) and patria (fatherland), De Victoria (n 6) 257.
10. De Victoria (n 6) 151; Vitoria (n 6) 278.
the immigration of Spanish colonists may justify Spanish colonisation. Whether or not foreigners harm the interests of natives is to be decided by an objective standard (that is: by learned persons such as Vitoria), and is not the prerogative of natives.\textsuperscript{11}

More than half a century later, in 1609, Hugo de Groot (1583–1645), a member of the political elite of the Dutch Republic and legal advisor of the United East Indian Company (\textit{Vereenigde Oostindische Compagnie; VOC}),\textsuperscript{13} published \textit{Mare Liberum}. The question he addresses is whether the Portuguese have the right to deny the Dutch the use of the seas in the East Indies. De Groot asserts that there is ‘an unimpeachable rule (of the law of nations), the reason of which is self-evident and immutable, to wit: every nation is free to travel to every other nation and to trade with it’.\textsuperscript{13} This right to travel abroad logically includes the right to go ashore and erect buildings there, provided this can be done without bothering others.\textsuperscript{14} If this right of free trade, including the right to travel and reside, is refused, this is a legitimate ground for war, according to De Groot.\textsuperscript{15} In 1625, De Groot developed a similar position in his magnum opus \textit{De Jure Belli Ac Pacis}.\textsuperscript{16} These positions were not theoretical, but justified Dutch colonisation in the East Indies, which included the sort of acts of war that De Groot argued were legitimate. One of these was the extermination of most of the approximately 15,000 inhabitants of the island of Banda under the command of Jan Pieterszoon Coen in 1621. The VOC then transferred slaves to Banda in order to restore the labour force.\textsuperscript{17} It should be noted that, in contrast to Vitoria, De Groot uses terminology that emphasises the temporary character of stay.\textsuperscript{18} This may be related to De Groot’s vision of empire, which was not primarily oriented at territorial acquisition but at

\textsuperscript{11} See Vitoria’s objective arguments about preaching the Gospel as beneficial to the welfare of native Americans; and the native Americans’ interests in their territories being governed by the Spanish, De Victoria (n 6) 157, 161; Vitoria (n 6) 285, 290–291.

\textsuperscript{12} Jonathan Israel, \textit{The Dutch Republic. Its Rise, Greatness and Fall 1477-1806} (Oxford University Press 1995), 421-422, 428-429, 439-440, 501-502; Peter Haggenmacher, ‘Hugo Grotius (1583–1645)’, in Fassbender and Peters (n 6) 1098–1100.

\textsuperscript{13} Hugo Grotius, \textit{Mare Liberum} (first published 1609, Brill 2009), 25, compare 131; in the original Latin: “regulam certissimam, cujus perspicua atque immutabilis est ratio: licere cuivis genti quamvis alteram adire, cumque ea negotiari”, ibid 24. See on the colonial context of \textit{Mare Liberum}, Martine Julia van Ittersum, \textit{Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies}, 1595-1615 (Brill 2006) 283–358; Martine Julia van Ittersum, ‘The long goodbye: Hugo Grotius’ justification of Dutch expansion overseas, 1615–1645’ (2010) 36 History of European Ideas 386; Ileana Porras, ‘Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ \textit{De Iure Pradae-the Law of Prize and Booty}, or on How to Distinguish Merchants from Pirates’, (2005–2006) 31 Brooklyn Journal of International Law 741.

\textsuperscript{14} Grotius (n 13) 67 compare 75.

\textsuperscript{15} Grotius (n 13) 151–155.

\textsuperscript{16} Hugo Grotius: \textit{De Jure Belli Ac Pacis} (first published 1625, Clarendon Press 1913), Book II, XIII.1, XIII.3, XV.1, XVII. De Groot famously stipulates the right to asylum (which at that time he was himself enjoying) in Book II, XVI.

\textsuperscript{17} Anonymous, \textit{Waarachtich verhael, van ‘t geene inde eylanden van Banda, in Oost-Indien, inden jaere seisthen-hondert eenentwintich, ende te vooren is ghepasseret [True story of what happened on the Banda Islands, in East India, in the year sixteen twenty one and before]} (no publisher 1622); H.T. Colenbrand, \textit{Koloniale geschiedenis, Tweede deel [Colonial History, Volume Two]} (Martinus Nijhoff 1925), 115–118; P. Geyl, \textit{Geschiedenis van de Nederlandsche Stam, Tweede Deel 1609-1688} [History of the Dutch Tribe, Volume Two, 1609–1688] (Wereldbibliotheek 1934), 244–246; Martine Julia van Ittersum, ‘Debating Natural Law in the Banda Islands: A Case Study in Anglo–Dutch Imperial Competition in the East Indies, 1609–1621’ (2016) 42 History of European Ideas 459.

\textsuperscript{18} Vitoria constructs a \textit{ius peregrinandi et degendi}, that is a right to travel abroad and to live there, De Victoria (n 6) 257; De Groot uses the terms \textit{adire} (to go somewhere), Grotius, (n 13) 25, \textit{transire} (to travel or pass through), Grotius (n 16), Book II, XIII.1, 2, 3, and for residence uses terms that emphasise temporariness (\textit{morari}, to be somewhere for a while; \textit{turgurium momentaneum}, temporary hut), ibid Book II, XV.1.
maritime and mercantile supremacy. But the right to go to war, if De Groot’s right of free passage was violated, made permanent occupation of vanquished territories justified. De Groot, thus, reached a conclusion that is similar to that of Vitoria.

Another founding figure of international law, the Swiss jurist Emer de Vattel (1714–1767), published *Le droit des gens* [The Law of Nations] in 1758. While for Vitoria and De Groot colonial expansion was the primary context of their work, Vattel focused primarily on international law in the relationship between European States. In doing so, he develops the position of Vitoria and De Groot. Like his predecessors, Vattel acknowledges ‘the general right of traversing the earth, so as to communicate together, to enter into commerce with each other, and for other good reasons’.

However, unlike Vitoria and De Groot, instead of emphasizing only the right to travel, Vattel also argues that States have a right to exclude foreigners:

(E)very nation has the right to refuse the entry of the country to a foreigner, when he cannot enter it without putting it at evident danger, or without doing it a manifest injury. What it [the nation] owes itself, the care of its own safety, gives it this right.

But refusal of entry of foreigners has to be justified:

Property has not been able to deprive the Nations of the general right of traversing the earth, so as to communicate together, to enter into commerce with each other, and for other just reasons. The Master of a country can only refuse passage, in particular occasions, where he finds that prejudicial or dangerous. He has to allow it, for legitimate reasons, each time that this is without inconvenience to him.

19. Van Ittersum 2010 (n 13). Precisely after the extermination of the population of Banda, the VOC for the first time occupied agricultural land, David Van Reybrouck, *Revolusi. Indonesië en het ontstaan van de moderne wereld* [Revolusi. Indonesia and the genesis of the modern world] (De Bezige Bij 2020) 45.

20. Emer de Vattel, *Le droit des gens ou principes de la loi naturelle* [The law of peoples or principles of natural law] (Au dépens de la compagnie 1758).

21. I.a. Bruno Arcidiacono, ‘De la balance politique et de ses rapports avec le droit des gens: Vattel, la ‘guerre pour l’équilibre’ et le système européen’, in Vincent Chétail and Peter Haggenmacher (eds), *Vattel’s International Law from a XXIst Century Perspective* (Brill 2011) 77–100; Isaac Nakhimovsky, ‘Vattel’s theory of the international order: Commerce and the balance of power in the Law of Nations’ (2007) 33 History of European Ideas 157; Emmanuelle Jouannet, ‘Emer de Vattel (1714–1767)’, in Fassbender and Peters (n 6) 1118–1121. For an analysis of the colonial aspects of Vattel’s work see Anthony Anghie, ‘Vattel and colonialism: Some preliminary observations’, in Vincent Chétail and Peter Haggenmacher (eds), *Vattel’s International Law from a XXIst Century Perspective* (Brill 2011) 237–253. See for an analysis of Vattel’s position on commerce Tabrizi Ben Salah, ‘Le droit des relations commerciales: entre mercantilisme et libéralisme’, in Vincent Chétail and Peter Haggenmacher (eds), *Vattel’s International Law from a XXIst Century Perspective* (Brill 2011) 267–281.

22. See also Vincent Chétail, ‘Soevereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel’ (2017) 27 European Journal of International Law 901; James A.R. Nafziger, ‘The General Admission of Aliens under International Law’ (1983) 77 American Journal of International Law 804.

23. Vattel (n 20) II.132, translation ours. The original French is, “le droit général de parcourir la terre, pour communiquer ensemble, pour commercer entr’elles, et pour d’autres justes raisons”.

24. ibid I.230, translation ours. The original French is: “toute nation est en droit de refuser à un Etranger l’entrée de son pays, lorsque il ne pourroit y entrer sans la mettre dans un danger évident, ou sans lui porter un notable préjudice. Ce qu’elle doit à elle-même, le soin de sa propre sûreté, lui donne ce droit”.

25. ibid 1758, II, 132.
So according to Vattel, on the one hand, there is a right to travel for the purpose of communication, commerce and other good reasons, while on the other hand there is a right to refuse the entry of foreigners for reasons of evident danger, manifest injury, and where entry would be prejudicial or dangerous. This means that exclusion of foreigners, while certainly possible, is an abuse of the State’s right to exclude foreigners if no good legitimation is given.26 The idea that entry can be refused if foreigners will harm natives is present in the work of Vitoria and De Groot, but gets more emphasis in Vattel’s analysis. A substantive modification of the positions of Vitoria and De Groot is that Vattel says that, ‘by virtue of its natural liberty, it is to the nation to judge whether it is, or whether it is not in a position to receive this foreigner […].’27 This move – States are bound by international law, but States themselves interpret it – is characteristic of Vattel’s approach to international law in general.28

2.2. EMERGENCE OF THE DOCTRINE OF SOVEREIGN MIGRATION CONTROL

The gradual abolition of slavery during the nineteenth century led to labour force problems in the European colonies and in the new American territories in the far west. While the United Kingdom and the Netherlands introduced indentured labour predominantly by people from the Indian subcontinent in their colonies, the United States for lack of colonies could not relocate colonial subjects, and attracted Chinese (and later Japanese) labourers.29 This need to attract foreign labour can explain the conclusion of a treaty in 1868, shortly after the abolition of slavery in the US, in which China and the USA recognised the following:

the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens […] from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.30

This is an articulation of the right to migrate reflecting the spirit of Vitoria and De Groot and without Vattel’s qualifications – but this time to legitimise the migration of Chinese nationals towards the American West Coast.

However, this inherent and inalienable right of the Chinese to migrate did not last long. The success in attracting Chinese labourers to the American West Coast led to concerns about the dominance of white people. This resulted in the first immigration laws being put in place, aiming at restricting Chinese immigration. These Chinese Exclusion laws were challenged in courts, eventually resulting in a series of judgments of the US Supreme Court, often referred to as the Chinese

26. ibid 1758, I.230-231, II.132.
27. ibid I.230, translation ours. The original French is: “en vertu de sa Liberté naturelle, c’est à la Nation de juger si elle est, ou si elle n’est pas dans le cas de recevoir cet Etranger”.
28. Anghie (n 21) 241.
29. Adam M. McKeown, Melancholy Order. Asian Migration and the Globalization of Borders (Columbia University Press 2008) 66-89; Nadine El-Enany, (B)ordering Britain. Law, race and empire (Manchester University Press 2020) 42–43; Hiroshi Motomura, Americans in Waiting: The lost Story of Immigration and Citizenship in the United States (Oxford University Press 2006) 15–34; Hiroshi Motomura, Immigration Outside the Law (Oxford University Press 2014) 34–37; Thomas Piketty, Capital et idéologie (Capital and ideology) (Seuil 2019) 281.
30. Article V of the Additional Articles to the Treaty Between the United States of America and the Ta-Tsing Empire of the 18th of June, 1858, signed at Washington July 28, 1868 (commonly referred to as the Burlingame Treaty), 16 Stat. 739, Treaty Series 48.
Exclusion Cases. In one of these cases, the US Supreme Court held that ‘The power of exclusion of foreigners’ is ‘an incident of sovereignty’; therefore, the government is free to consider ‘the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security’ and to exclude them on that ground ‘whenever in its judgment the public interests require such exclusion’.31 Despite the Court’s invocation of Vattel in a subsequent case,32 this was an abrupt change of legal doctrine. Migration was not the inalienable right of man it still had been in 1539, 1609 or even in 1868, but was declared to be not a right of man at all. Quite the opposite: the right was one of States, as a function of their sovereignty, to control migration at will.

Immigration legislation modelled on the US Chinese Exclusion legislation quickly spread to other parts of the world, in some of which Chinese labour migration had led to similar concerns.33 And the new legal doctrine it gave rise to, asserting an absolute power of States to control migration, was adopted across the Anglophone world, although usually without the explicit reference to race.34 The state of the law is now, as the US Supreme Court stated in a 1972 standard case, that ‘over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens’, and as a consequence judicial supervision is marginal.35

2.3. MIGRATION CONTROL AND DECOLONISATION

After the Second World War, European colonial States were re-shaping the relationships between metropole and colonies in the direction of a federation or commonwealth. During this process, European colonial powers granted citizenship to colonial subjects. As a consequence, citizens, including citizens of African or Asian origin, could (at least nominally) move freely throughout the French, British or Dutch territories, including the metropole.36 The United Kingdom was the

31. Chae Chan Ping v United States, [1899] 130 US 581; compare Nishimura Ekiu v United States, [1892] 142 US 651; Fong Yue Ting v United States, [1893] 149 US 698; Lem Moon Sing v. United States, 158 U. S. 538, 158 U. S. 547 (1895).
32. Nishimura Ekiu v United States, [1892] 142 US 651, at 659.
33. McKeown (n 29) 318-348; Daniel Ghezelbash, ‘Legal Transfers of Restrictive Immigration Laws: A Historical Perspective’ (2017) 66 International and Comparative Law Quarterly 235; Audrey Macklin, ‘The Inside-Out Constitution’ in J. Bomhoff, D. Dyzenhaus, & T. Poole (eds), The Double-Facing Constitution (Cambridge University Press 2020), 243–276. For the distinct case of Europe see Philippe Rygiel, ‘Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War’, (2015) 1 Journal of Migration History 7; on the United Kingdom El-Enany (n 29) 46–55; on the Netherlands, Thomas Spijkerboer, ‘Freedom and Constraint in Adjudication: Dutch courts on aliens law 1945–1967’, in Anita Böcker et al (eds), Migratierecht en Rechtssociologie (Centrum voor Migratierecht 2008).
34. Ghezelbash (n 33). For case law from the United Kingdom: Musgrove v Chun Teong Toy [1892] AC 272; Poll v Lord Advocate [1899] 1 F. (Ct. Sess) 823; for Canada Attorney-General for Canada v Cain and Gilhula [1906] AC 542.
35. Kleindienst v. Mandel, 408 U.S. 753 (1972), 766, with an approving reference to one of the Chinese Exclusion cases, Lem Moon Sing v. United States, 158 U. S. 538, 158 U. S. 547 (1895). Compare for Canada Kindler v Canada (Minister of Justice) 2 S.C.R. 779 (1991) with an approving reference to the 1906 judgment in which Canada adopted the Chinese Exclusion approach cited above (n 34). This approach is called the plenary powers doctrine in Anglophone jurisdictions.
36. For France, Frederick Cooper, Citizenship between Empire and Nation. Remaking France and French Africa, 1945-1960 (Princeton University Press 2014) 125–131; for the United Kingdom El-Enany (n 29) 73–80; for The Netherlands, Gujo Jones, Tussen Onderdanen, Rijksgenoten en Nederlandsers. Nederlandse politici over burgers uit Oost & West en Nederland, 1945-2005 [Between subjects, fellow citizens and Dutch citizens. Dutch politicians on citizens from East & West and the Netherlands 1945-2000] (Rozenberg Publishers 2007) 78-79, 185–194.
first of the decolonising empires to gradually undermine this free mobility regime within the Commonwealth through legislation between 1962 and 1981. Free movement towards the UK was ended, and former colonial subjects were now treated as undesirable foreigners, and subjected to more restrictive migration laws than European or American nationals. Moreover, mobility rights were related to genealogy. Commonwealth citizens with a parent born in the United Kingdom (in practice, whites) had the right to move to the United Kingdom as citizens while others (that is, non-whites) did not because they were to be treated as immigrants. This prevented non-white people to move from African and Asian commonwealth countries to Britain. That was a reversal of the free mobility regime put in place immediately after the Second World War.37

In the process of decolonisation sovereignty was bestowed upon former colonies, with the result that from then on the doctrine of sovereign migration control could not only be relied upon by former colonial powers but also by newly independent States. Yet, this formal equality does not as such benefit immigrants from countries in the global South who seek to travel to the global North. Postcolonial scholars have argued that the formal recognition of former colonies as sovereign independent States has not been matched by actual independence as these States continue to be economically and politically intertwined with and dominated by former colonial powers – a structure of domination sustained by modern international law.38 In this situation, a lack of freedom of movement works to the disadvantage of those who are citizens of politically and economically subordinated States and cannot rely on a right to travel to gain membership elsewhere.39

It is in this context of postcolonial relations that the case law of the EComHR and ECtHR has developed since the 1960s.40 In the following section we analyse this case law to understand its role in upholding the restrictions on free movement of former colonial subjects, despite challenges grounded in the prohibition of racial discrimination.

3. MIGRATION CONTROL AND RACIAL DISCRIMINATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Since its adoption in 1950, the ECHR includes a prohibition of discrimination on the grounds of, *inter alia*, race, colour and national or social origin.41 From the 1980s onwards, the Convention organs (the EComHR and ECtHR) have been asked to interpret this prohibition in relation to State policies on immigration control, which allow some categories of aliens to enter with few or no restrictions while access is denied to others. This section analyses how the Convention organs have dealt with claims stating that the immigration rules of the respondent State were discriminatory on the grounds of race or on another ground related to race (national or ethnic origin,
nationality or immigration status). The analysis includes cases concerning admission and residence as well as cases in which non-nationals claimed equal access to rights and benefits in the respondent State.

The basis for the Convention organs’ approach to racial discrimination and immigration was laid in the early 1980s, in two decisions of the EComHR, followed by the ECtHR judgment in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom* (*Abdulaziz*). The latter judgment is well known as the founding judgment of the ECtHR’s approach to the regulation of international migration. In our analysis, we examine what the ECtHR held in *Abdulaziz* about racial discrimination and show how it upheld the doctrine of sovereign migration control previously formulated by the United States Supreme Court, despite the obvious disadvantage imposed by British immigration legislation on non-white immigrants (Section 3.1). Since the *Abdulaziz* judgment, there has been some recognition by the ECtHR that immigration rules (including rules regarding access of non-nationals to rights and benefits in the host State) can be in breach of the prohibition of (racial) discrimination (Section 3.2). However, we argue that the scope of this recognition is limited and that to date the ECtHR has left the right of States to control migration largely intact, including the right to restrict the mobility rights of predominantly non-white immigrants.

### 3.1. Founding Cases: British Immigration Restrictions and the ECtHR’s Response in *Abdulaziz*

From the 1960s to the early 1980s, the United Kingdom adapted its immigration and nationality legislation, making it nearly impossible for immigrants from its former colonies in Africa and Asia to be legally admitted to its territory unless they were born in the UK or descended from a parent born in the UK. This development, and its contestation by, among others, the Women in Immigration and Nationality Group, culminated in several applications to the EComHR. In 1982, two complaints were brought before the Commission, both concerning Pakistani nationals who lived unlawfully in the United Kingdom and were faced with deportation and separation from their (legally residing) families. In addition to the right to family life, the applicants relied on the prohibition of racial discrimination. The Commission rejected their claims as manifestly ill-founded, stating with regard to the alleged discrimination that:

> [...] the difference in immigration rights between a Commonwealth citizen and an alien in the United Kingdom has an obvious objective and reasonable basis i.e. in acknowledging the right of a country to

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42. Search in HUDOC database, judgments and decisions with search terms ‘Article 14 ECHR’ + ‘race OR racial OR ethnic OR “national origin” + ‘discrimination’ + ‘nationality OR citizenship’ + ‘immigration OR immigrant OR alien’. Cases in which no discrimination ground was specified have been included if it emerged from the facts that they concerned discrimination on any of the grounds mentioned. The search included cases published before 1 November 2020 and yielded 43 results, including 10 decisions of the EComHR, 19 admissibility decisions by the ECtHR and 14 ECtHR judgments.

43. *Abdulaziz, Cabales and Balkandali v. the United Kingdom* App no 9214/80, 9473/81 and 9474/81 (ECtHR (plen.), 28 May 1985).

44. For example Dembour (n 40) 96.

45. Jacqueline Bhabha, Francesca Klug, Sue Shutter and Women, Immigration and Nationality Group, *Worlds Apart: women under immigration and nationality law* (Pluto Press 1985). See also Dembour (n 40) at 109.

46. *X. v the United Kingdom* App no 9088/80 (EComHR, 6 March 1982); *X., Y. and Z. v the United Kingdom* App no 9285/81 (EComHR, 6 July 1982).
limit the number of foreign persons who are entitled to reside in its territory, a State may reasonably give priority to the citizens of those countries with whom it has the closest links. Furthermore, the Commission finds that the measures taken against the applicant were in no way based on race, but on the particular circumstances of his case.47

A few years later, the State prerogative to control migration was confirmed by the ECtHR in *Abdulaziz*. The applicants in this case were three women of foreign origin, all lawfully residing in the United Kingdom, who appealed the British immigration rules which denied legal residence to their husbands. In this judgment the ECtHR stipulated that ‘as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory’.48

The respondent State claimed that British immigration and nationality legislation had been made more restrictive with the aim of ‘protecting the domestic labour market at a time of high unemployment’, ‘advancing public tranquillity’ and ‘securing good community relations’.49 The applicants claimed a violation of their right to family life as well as discrimination on the grounds of sex, race and birth. Regarding the claim of race discrimination, the applicants argued that the British immigration rules had a disproportionate impact on people of colour and that the legislative history showed that their purpose had been to ‘lower the number of coloured immigrants’.50 The ECtHR granted the claim of sex discrimination but found that the British legislation did not discriminate on the grounds of race or birth.

### 3.1.1. The doctrine of sovereign migration control: freedom to differentiate

The Commission’s decisions and the judgment in *Abdulaziz* incorporated the doctrine of sovereign control over migration, as developed by the US Supreme Court in the late 19th century, into the ECHR, at the time the principal European human rights document. In these three cases, the Convention organs established that States have a right to control migration, which entitles them to restrict the entry of non-nationals in the public interest of the host State and to differentiate between aliens of different nationalities.

Neither the Commission’s decisions nor the *Abdulaziz* judgment refer to the origins of the doctrine of sovereign migration control in the case law of the US Supreme Court. The ECtHR’s qualification of the doctrine as ‘a matter of well-established international law’ obscures the fact that international law recognised the right to travel until well into the nineteenth century. Moreover, the ECtHR does not allude to the fact that the doctrine was conceived of to enable the exclusion of ‘foreigners of a different race’ (Section 2.2).

Unlike the US Supreme Court, however, the ECtHR and the EComHR did not perceive the right to control migration as an absolute right. This follows from the Court’s statement that States may control immigration ‘subject to their treaty obligations’ and is illustrated by its finding that the British immigration rules constituted sex discrimination in violation of Articles 8 and 14 of the ECHR. Regarding the claim of sex discrimination, the ECtHR did not find that the sovereign

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47. *X. v the United Kingdom* (n 46). The wording in the case of *X., Y. and Z.* was nearly identical.
48. *Abdulaziz* (n 43) para 67.
49. ibid para 21.
50. ibid, para 84.
right to control migration includes the right to favour female over male candidates for family reunion. Instead it subjected this difference in treatment to strict scrutiny and found that it was not a suitable or necessary measure to safeguard the British labour market.\(^{51}\) Lastly, the Court agreed with the majority of the Commission in *Abdulaziz* that Contracting States ‘could not implement “policies of a purely racist nature”’.\(^{52}\)

It would thus be wrong to conclude that the Court in *Abdulaziz* discarded the prohibition of racial discrimination altogether in favour of the right to control migration. Nevertheless, the determination by the Court and Commission of whether the British immigration legislation contained racial criteria or amounted to a ‘racist policy’ was conducted at such an abstract level as to render the prohibition largely meaningless. In *X. v. the United Kingdom*, *X., Y. & Z.* and *Abdulaziz*, the Commission accepted that the States Parties could differentiate in their immigration policies between foreign nationals of different nationalities and give priority to nationals of ‘countries with which they had the closest links’.\(^{53}\) To this, the Court added in *Abdulaziz* that the United Kingdom was justified to give preferential treatment to family members of persons whose links with the country stemmed from birth within it. In the Court’s view such preferential treatment could ‘in general’ be justified by ‘persuasive social reasons’.\(^{54}\)

Although the British immigration legislation did not explicitly differentiate between immigrants on the grounds of ‘race’ or skin colour, the immigration restrictions put in place between the 1960s and early 1980s were carefully defined so as to label non-white Commonwealth citizens as immigrants while defining white Commonwealth citizens as nationals (Section 2.3).\(^{55}\) Movement of Commonwealth citizens who were not British nationals to the United Kingdom was largely brought to a halt, but this restrictive immigration regime did not apply to nationals of other Member States of the European Economic Communities nor to nationals of the former British colonies (Commonwealth citizens) who were born or had a (grand)parent born in the United Kingdom.\(^{56}\) Moreover, a minority of the Commission had accepted that the legislative history showed that the aim of the immigration restrictions was ‘to lower the number of coloured immigrants’.\(^{57}\) Yet, the ECtHR held that the United Kingdom had been justified in granting preferential treatment to immigrants who had ‘close links’ with it, either by virtue of their nationality or of their UK ancestry. In so doing, the Court neglected the fact that these criteria had been introduced with the foreseeable and, in all likelihood, intended consequence of restricting the immigration of non-whites. The freedom thus left to the States Parties to differentiate between immigrants on the grounds of their nationality or descent granted them ample room to implement selective immigration policies, including on the grounds of racial or ethnic origin. The only restriction that appears to follow from *Abdulaziz* is that immigration rules could not expressly select immigrants based on the colour of their skin.

\(^{51}\) *ibid* paras 78–83.

\(^{52}\) *ibid* para 84.

\(^{53}\) *X. v. the United Kingdom* (n 46); *X., Y. & Z. v. the United Kingdom* (n 46); *Abdulaziz* (n 43) para 85.

\(^{54}\) *Abdulaziz* (n 43) para 88.

\(^{55}\) ‘The British Immigration Act 1971 used the terms ‘non-patrials’ and ‘patrials’.

\(^{56}\) *Abdulaziz* (n 43) para 20.

\(^{57}\) *Abdulaziz* (n 43) para 84. On the legislative history see also Dembour (n 40) 109 and El-Enany (n 29).
3.1.2. The irrelevance of colonial history

The ECtHR in Abdulaziz failed to look at the legislative history and policy context surrounding the adoption of the British immigration restrictions, which allowed it to conclude that those restrictions were not aimed at limiting the arrival of people of colour. A related point, but one that merits to be discussed separately, is that the EComHR and ECtHR also denied relevance to the colonial history of the United Kingdom in determining which standards – if any – followed from the prohibition of racial discrimination regarding British immigration policy.

This is particularly visible with regard to the Commission’s statement in the cases of X. and X., Y. and Z. that ‘a State may reasonably give priority to the citizens of those countries with whom it has the closest links’ (Section 3.1). The applicants in both cases were nationals of Pakistan, a country which had been a British colony until thirty years before the events which gave rise to their complaints before the Commission. The applicant in X., Y. and Z. was born in 1957 and thus belonged to the first generation of Pakistanis without first-hand experience of living under British rule. Nevertheless, the Commission accepted that – for the purpose of immigration control – Pakistan could be categorised as a country with which the United Kingdom did not have close links.

This negation of British colonial history is also notable in the Abdulaziz judgment. The principal claim advanced by the applicants in that case regarding racial discrimination was not that the British immigration rules were overtly discriminatory but rather that their effect was to prevent immigration from the New Commonwealth and Pakistan. In response, the Court acknowledged that immigration measures could indirectly distinguish on the grounds of race or ethnic origin and even accepted that the British immigration rules in fact affected ‘fewer white people than others’. However, it did not consider this relevant to establishing the discriminatory nature of those rules. It stated:

That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.59

This quote shows how, in the rendering of the ECtHR, the large number of citizens of the New Commonwealth countries and Pakistan seeking entry into the United Kingdom was presented as something outside the sphere of influence of the British government; a coincidence rather than a likely consequence of four centuries of British colonial relations which formally had been abolished only a few decades earlier.

Possibly, the ECtHR’s finding that the British immigration rules were not racially discriminatory, despite their acknowledged effect on people of colour, must be put down to the Court’s rejection (at the time) of the doctrine of indirect discrimination (also called ‘disparate impact’). It was not until 2007 that this doctrine was expressly embraced by the Court (Section 3.2.2). However another interpretation is that, whether or not the Court was willing to accept that discrimination could take the form of disparate impact, it was in any case unwilling to hold the British government responsible for the fate of those who, following the independence of Pakistan and other former colonies,
no longer fell under British jurisdiction. On this view, the Court would not have found a violation of Articles 14 and 8 of the ECHR on account of racial discrimination even if it had acknowledged that discrimination could also include the disparate impact of a measure on a particular group.

The approach adopted by the Court and the Commission thus appears to have been founded on the idea of a decolonised world order, in which former British colonies had attained independence, the ties developed during colonialism had been cut, and the United Kingdom no longer bore any responsibility for its former colonial subjects. In this manner, the undeniably ‘close ties’ between the States as well as the populations involved are ignored.

For the purposes of our article, the significance of the Abdulaziz judgment (and the Commission decisions preceding it) lies in the fact that the Court and the Commission applied the prohibition of racial discrimination without paying attention to the context of the British immigration rules. The fact that these rules served to exclude mostly coloured migrants, whose connection to the United Kingdom had been established through British colonial rule, played no role in establishing their compatibility with the ECHR. At a time when former colonial powers sought to limit migration from parts of the world they no longer controlled directly, the doctrine of sovereign migration control was interpreted broadly, disallowing only policies of an explicitly racist nature.

3.2. AFTER ABDULAZIZ, CHALLENGES TO THE DOCTRINE

The doctrine of sovereign migration control, including the right of the States Parties to the ECHR to differentiate between immigrants of different nationalities, was confirmed in later case law. This includes the well-known judgment Moustaquim, where the ECtHR decided that Member States of the European Union may grant preferential treatment to each other’s nationals in their immigration policies. In the decades following Abdulaziz, several other unsuccessful complaints were made to the Commission and the Court alleging the discriminatory nature of European immigration regimes. Most of these complaints were not very elaborate or specific and received little attention from the Convention organs.

Nevertheless, there have also been occasions on which the ECtHR took a stricter approach to immigration rules in relation to the prohibition of (racial) discrimination. As of 1996, the Court has regularly found discrimination based on nationality to be in breach of the ECHR and in the cases Kuric and Biao the Grand Chamber accepted that the immigration policies of the respondent States amounted to indirect discrimination on the grounds of national or ethnic origin. These are

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60. See also Dembour (n 40) 128.
61. Moustaquim v Belgium App no 12313/86 (ECtHR, 18 February 1991) para 49. See also Patel v the United Kingdom App no 14069/88 (EComHR, 14 December 1988); C v Belgium App no 21794/93 (ECtHR, 7 August 1996) para 38; Öztürk and others v Norway App no 32797/96 (ECtHR (dec), 21 March 2000); Aftab and others v Norway App no 32365/96 (ECtHR (dec), 4 May 2000).
62. We identified seven claims, of which three were found to be unsubstantiated: Patel v the United Kingdom App no 16009/90 (EComHR 6 September 1991); H.M. and J.M. v the United Kingdom App no 19153/91 (EComHR, 1 July 1992); Nessa and others v Finland App no 31862/02 (ECtHR (dec), 6 May 2003); two were dismissed on procedural grounds: Kochieva and others v Sweden App no 75203/12 (ECtHR (dec), 30 April 2013); G.J. v Spain App no 59172/12 (ECtHR (dec), 21 June 2016), and two were discontinued after the dispute was settled at the national level (M. and M. v the United Kingdom App no 11273/84 (ECtHR, 5 March 1986); Singh and others v the United Kingdom App no 60148/00 (ECtHR (dec), 3 September 2002).
63. Kuric and others v Slovenia App no 26828/06 (ECtHR (GC), 26 June 2012); Biao v Denmark App no 38590/10 (ECtHR (GC), 24 May 2016).
significant developments but, as we argue below, their effect has not been to substantially limit the scope of the right of States to regulate international migration.

3.2.1. Strict approach to nationality discrimination

In 1996, the ECtHR established an exception to the doctrine that States may justifiably differentiate between nationals and non-nationals. In Gaygusuz v Austria the Court found that Austria had violated the prohibition of discrimination by refusing unemployment benefits to a Turkish citizen solely because of his foreign nationality. In contrast with the apparent ease with which it had dismissed discrimination claims in several other cases not long before, the ECtHR stated in Gaygusuz that ‘very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention’. This strict approach to nationality discrimination was confirmed in a series of later judgments, mostly concerning access of legally residing non-nationals to social benefits.

The ECtHR thus confirmed that the Convention does limit the power of States to decide on the status of non-nationals. However, it did not explain this limitation in terms of the need to fight racial discrimination. There is nothing in Gaygusuz or its follow-up judgments to suggest that the Court struck down the disputed measures because it considered that they worked to the disadvantage of people of colour. Instead, race and nationality remain constructed in ECtHR case law as separate discrimination grounds.

The potentially far-reaching scope of the Gaygusuz judgment was moreover narrowed in several later cases, where the Court distinguished the discrimination ground ‘nationality’ from ‘immigration status’. This happened in Bah v the United Kingdom, where the applicant was denied priority access to social housing because her son was a foreign national with a conditional residence permit; the ECtHR specified that the difference in treatment was not based on the son’s nationality or national origin (although a British national would have been eligible) but on the fact that he did not have a strong residence status. The Court then added, in general terms, that States are entitled to restrict access to ‘resource hungry public benefits’ for immigrants with irregular or temporary residence. It follows that the strict test for nationality discrimination, as formulated in Gaygusuz,

64. Gaygusuz v. Austria App no 17371/90 (ECtHR, 16 September 1996).
65. Notably Moustaquim v Belgium and C. v Belgium (n 61).
66. Gaygusuz (n 64) para 42.
67. For example Koura Poirre v France App no 40892/98 (ECtHR, 30 September 2003); Andrejeva v Latvia App no 55707/00 (ECtHR (GC), 18 February 2009); Zeibek v Greece App no 46368/06 (ECtHR, 9 July 2009) (in French only); Dhaoudi v Italy App no 17120/09 (ECtHR, 8 April 2014); Ribac v Slovenia App no 57101/10 (ECtHR, 5 December 2017). See also A. and others v the United Kingdom App no 3455/05 (ECtHR (GC), 19 February 2009) (detention on suspicion of terrorism) and Rangelov v Germany App no 5123/07 (ECtHR, 22 March 2012) (conditions of imprisonment).
68. This was confirmed by the ECtHR itself in the case of the British Gurkha Welfare Society and others v the United Kingdom App no 44818/11 (ECtHR, 15 September 2016). The applicants complained about discrimination on the grounds of both race and nationality, and the British government contended that the claim of race discrimination was inadmissible because it had been dropped during the domestic proceedings. The ECtHR accepted that both grounds could be ‘strongly connected in a given case’ but nevertheless labelled them as distinct discrimination grounds, declaring the race discrimination claim inadmissible (paras 58–59).
69. See also Marie-Bénédicte Dembour, ‘Gaygusuz Revisited: The Limits of the European Court of Human Rights’ Equality Agenda’ (2012) 12 Human Rights Law Review 689, 711–715.
70. Bah v the United Kingdom App no 56328/07 (ECtHR, 27 September 2011) para 44.
does not apply if the applicant is an irregularly or temporarily residing foreign national.71 Finally, the relevance of the Gaygusuz line of case law is diminished by the fact that immigration restrictions for non-white immigrants from the global South are increasingly based on economic and meritocratic criteria instead of nationality.72 Although the racialised effects of such criteria could qualify as a form of indirect discrimination, the following paragraph will show that the ECtHR’s use of this concept in the context of immigration remains limited.

3.2.2. Indirect racial discrimination

In 2007, the ECtHR accepted in D.H. and others v the Czech Republic that Article 14 of the ECHR covers situations of indirect as well as direct discrimination.73 Although this case did not concern migration, it did significantly broaden the Court’s definition of discrimination, including racial discrimination, which has also affected the right of States to exercise migration control. In 2012, the ECtHR, sitting as a Grand Chamber in the case of Kuric v Slovenia, accepted for the first time that an immigration measure could amount to indirect discrimination on the grounds of ethnic or national origin. The applicants were Slovenian residents who had previously held Yugoslavian citizenship and were ‘erased’ from the population register after Slovenian independence, resulting in a lack of legal status and a loss of fundamental rights.74 The Grand Chamber decided against the Slovenian government’s position that it was entitled to deny legal status to persons who were not Slovenian nationals, by holding that an unlawful and discriminatory distinction had been made against former citizens of the Yugoslav Republic. Unlike other non-nationals, former Yugoslav citizens were not eligible to stay in Slovenia as legally residing permanent residents. According to the Grand Chamber, this distinction was based on the applicants’ national origin and constituted a violation of Articles 14 and 8 of the ECHR.

Several years later, in Biao v Denmark, the Grand Chamber again found that a State Party’s immigration policy amounted to indirect ethnic discrimination. The case concerned Danish immigration rules which restricted family reunification for Danish nationals who had not held Danish citizenship for at least 28 years.75 The Biao case clearly shows the Court’s struggle with race and immigration. Before it came before the Grand Chamber, the judges sitting in the Chamber were divided over the question whether the ‘28 years of citizenship’ criterion led to indirect ethnic discrimination and, if so, whether this meant that the policy was a racist policy of the kind that had been deemed unlawful in Abdulaziz.76 The Grand Chamber resolved this dispute by applying a fairly straightforward indirect discrimination approach, which led it to conclude that the measure disproportionately affected Danish citizens by naturalisation and therefore, Danish citizens of foreign ethnic origin. It then applied the very strict level of scrutiny commonly applied by the Court in cases of racial discrimination.77

71. See also Ponomaryov v Bulgaria App no 5335/05 (ECtHR, 21 June 2011); Dhahbi v Italy App no 17120/09 (ECtHR, 8 April 2014); Yeshtla v the Netherlands App no 37115/11 (ECtHR (dec.), 15 January 2019).
72. Farcy (n 4) 5–7.
73. D.H. and others v the Czech Republic App no 57325/00 (ECtHR (GC), 13 November 2007).
74. Kuric (n 63).
75. Biao (GC) (n 63).
76. Biao v Denmark App no 38590/10 (ECtHR, 25 March 2014), including the joint dissenting opinion by Judges Sajó, Vučinić and Kūris.
77. Biao (GC) (n 63) para 114.
The judgment in *Biao* shows the ECtHR’s willingness to acknowledge that neutrally formulated immigration rules can constitute indirect racial discrimination. Still, the judgment does not significantly alter the *Abdulaziz* doctrine. The situation in *Biao* differed from that in *Abdulaziz*, in that the alleged discrimination concerned an applicant who was already a Danish citizen and who, despite his Danish citizenship, was treated differently from Danish citizens who were not of foreign origin. This weighed heavily in the reasoning of the Grand Chamber, which considered that States should move towards equal treatment of naturalised citizens and citizens by birth. Although the *Biao* judgment provides important protection, for example, against citizenship deprivation policies that predominantly affect persons of immigrant origin, it does not address the racialised impact of migration controls on people who have not attained citizenship or legal residence in an affluent European State.

What about the *Kuric* case? In this judgment the ECtHR Grand Chamber held that the right of Slovenia to deny legal residence to foreign nationals was secondary to its obligation to respect the prohibition of racial discrimination. Of particular interest, for the purpose of this article, is the parallel that can be drawn between the ‘erased’ of Slovenia, who lost their status as Yugoslav citizens following Slovenian independence, and immigrants from the global South who lost their status as British (or French, or Dutch) subjects as a result of decolonisation. Thinking along this parallel, the message that can be read in *Kuric* is that, in the case of a breakup of a federal State (or empire), the successor States keep a responsibility towards former citizens of that State (or empire) who are no longer their citizens but who are connected to it by ties formed before the breakup. Where residence rights are denied to former citizens of a particular national origin (or belonging to a racialized group), this amounts to prohibited racial discrimination.

Evidently, the geopolitical context of the *Kuric* case differs significantly from the context of migration between the global South and the global North. The applicants in *Kuric* belonged to a relatively small group of people who were already living in Slovenia when the Socialist Federal Republic of Yugoslavia ceased to exist and had been eligible for Slovenian citizenship immediately after Slovenian independence. It is therefore, unlikely that the approach taken in *Kuric* signals an imminent departure from the doctrine of sovereign migration control established in *Abdulaziz*. Nevertheless, the *Kuric* judgment does confirm that this doctrine is not impermeable, and it may serve as an invitation to the ECtHR to explain if, or how, the situation of irregularised migrants from former European colonies in the global South compares to that of the applicants in *Kuric*.

4. CONCLUSION

In the historical part of this article we sketched how the right of States to control the entry of aliens developed in the US, the UK and continental Europe around 1900 and came to be considered as a tenet of international law. It was shown how the right to visit other States for peaceful commerce,
developed in the early modern period by international lawyers such as Vitoria and De Groot, came to be replaced in the eighteenth and nineteenth centuries by the notion that States have a qualified right to exclude foreigners. Purportedly on the basis of that doctrine, the US Supreme Court around 1890 formulated an unqualified right to exclude non-nationals when it justified the Chinese Exclusion legislation. The Supreme Court’s position, with minor qualifications and sanitised of its explicit racial content, subsequently spread to European States and remained in place when, after decolonisation, those States defined the relationship with their former colonial subjects. At this point, the doctrine of sovereign migration control implied that former colonial powers could redefine their relations with former subjects in ways that were evidently racialised.

In the second part of the article we explored how the doctrine of sovereign migration control fared in its confrontation with the prohibition of racial discrimination, given that the effects of migration control by States of the global North (including the States Parties to the ECHR) are mostly felt by people of colour arriving from the global South. Our analysis showed how the doctrine of sovereign migration control was incorporated into the ECHR and how it has been upheld by the ECtHR over the past fifty years against challenges grounded in the prohibition of racial discrimination. It emerged from our case law analysis that the ECtHR applies the prohibition of racial discrimination without taking into account the historical context of migration control, leaving ample space for States to restrict migration and to differentiate between aliens of different nationalities and races. In recent years, this space has been slightly narrowed by case law which prohibits discrimination on the ground of nationality against lawfully residing long-term residents, and as a result of the ECtHR’s recognition that the regulation of international migration can result in indirect racial discrimination. Nevertheless, to date the prohibition of racial discrimination in the ECHR has not played any significant role in addressing the racialised impact of international migration control.

We conclude that the ease with which the racialised impact of migration control is accepted as normal and compatible with the prohibition of racial discrimination is consistent with migration law’s long history as part of colonial and postcolonial relations. In the colonial era, the right to travel legitimated European expansion. Yet, when former dependent countries achieved sovereignty under international law, the right to control migration became one of the mechanisms through which the economic interests of the global North are preserved and the onus of redressing global inequality is shifted towards States in the global South. Without acknowledgement by the ECtHR of the relationship between migration control and colonial history, this effect cannot be captured by the prohibition of racial discrimination.

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