



A Decolonial Agenda for EU Migration and Asylum Law

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Received 26 August 2024 | Accepted 29 October 2024 |

Published online 16 December 2024

Abstract

This article seeks to advance a decolonial research agenda in EU migration and asylum law, arguing that there is significant scope for further development within existing scholarship. It offers some theoretical tools grounded in postcolonial and decolonial literature, contending that a decolonial project for EU migration and asylum law should critically engage with the enduring epistemic foundations of colonial unequal mobilities and treatment. These include the ‘sedentary bias’ and the ‘cheap labour’ bias, as well as the ways in which these have been shaped by race, gender, class, and other epistemic formations. Building on these insights, the article outlines potential avenues for further research, especially in relation to the EU Schengen regime, the externalisation of EU borders, the construction of the ‘economic migrant’ and the Common European Asylum system.

Keywords

decolonial studies – postcolonial studies – EU migration and asylum law – race – gender – class

1 Introduction

Concerns about the colonial legacies in contemporary power dynamics and knowledge practices have gained increasing traction across fields such as literature, sociology, political science, and international law. Yet, a pervasive ‘colonial aphasia’ or amnesia continues to characterize contemporary societies and institutions.¹ This is especially visible and concerning in anti-immigrant discourses and policies, which have intensified over the past decade or so worldwide, including in the European Union (EU).

Motivated by this concern, this article seeks to advance a decolonial research agenda in EU migration and asylum law. Although some studies have explored the colonial legacies within this field, and the literature has been generally highly critical of EU policies, much work remains to be done in further advancing decolonial perspectives. For this purpose, the article offers some theoretical tools grounded in postcolonial and decolonial literature and proposes potential avenues for future research in EU migration and asylum law.

It is argued that a decolonial project is, above all, about unmasking and challenging the persistence of a set of colonial epistemic formations in contemporary knowledge practices, in an effort to advance Europe’s ‘unfinished project of decolonization.’² To explore this question in relation to migration and asylum, emphasis is put on the ways in which race, gender, class and other epistemic formations played out in the colonial ‘sedentary bias’ and the ‘cheap labour’ bias. The former presumes that the normal or expected condition for people from the colonies is to remain in their place of origin, while the latter suggests that exceptions to this sedentary bias are acceptable if these individuals can serve as ‘cheap labour’. In what ways such colonial epistemic formations, or variations of them, have been woven into EU migration and asylum law?

The remainder of this article is organized into four sections. Part 1 outlines some of the main insights drawn from postcolonial and decolonial literature on (de-)coloniality, (de-)colonization, the politics of knowledge production, and the role of law therein. Part 2 argues that a decolonial project for EU migration and asylum law should take stock with the enduring epistemic foundations

1 De Genova, N., 2016. The European question: Migration, race, and postcoloniality in Europe. *Social Text* 34(3), pp. 75–102, 78. Stoler, A.L., 2011. Colonial Aphasia: Race and Disabled Histories in France. *Public Culture* 23(1), pp. 121–156, 125.

2 Maldonado-Torres, N., 2007. On the Coloniality of Being: Contributions to the Development of a Concept. *Cultural Studies* 21(2–3), pp. 240–70, 263. See Bhambra, G.K., 2022. A decolonial project for Europe. *JCMS: Journal of Common Market Studies* 60(2), pp. 229–244, 230.

of colonial unequal mobilities and treatment. It elaborates especially on the sedentary bias and the cheap labour bias. Building on these insights, Part 3 outlines a set of directions for further inquiry in EU migration and asylum law, while assessing the relevant existing research in this field, especially on the EU Schengen regime and its implications, the externalization of EU borders, the construction of the 'economic migrant' and the Common European Asylum system. The highlighted avenues for further research are not intended to be an exhaustive list, but rather a starting point for future inquiries.

2 (De-)Coloniality, (De-)Colonization and the Politics of Knowledge Production

A decolonial approach to EU migration and asylum law implies, above all, a commitment to deepening the understanding of, and advancing, Europe's 'unfinished project of decolonization'.³ The main intellectual drivers of this agenda can be situated in postcolonial and decolonial studies. The two developed across different disciplinary fields and with divergent geographical origins and focuses, but with a shared commitment to disrupt the epistemological foundations of the colonial world order and their legacies.⁴ The term 'decolonial' has gained significant academic traction in both studies and is used in this work in the sense of unpacking the ways in which colonial matrices of power continue to shape systems of knowledge, with the objective of advancing Europe's incomplete project of decolonization.⁵

Colonialism is often understood as a model of political organization based on formal annexation of title over distant territories, typified through settler and exploitation colonies.⁶ Decolonial and postcolonial scholarship, however, are often concerned not merely with practices of formal state power, but also

³ Ibid.

⁴ Bhabra, G.K. 2014. Postcolonial and decolonial dialogues. *Postcolonial studies* 17(2), pp. 115–121, 115 (noting that postcolonial studies developed with a primary focus on the realm of the cultural and poststructuralism, first in literary studies and then in other fields, and decolonial studies developed more with a focus on the world systems theory and the Frankfurt school).

⁵ Tamale, S. (2020). *Decolonization and Afro-feminism*. Daraja Press, Ottawa, Canada. Bhabra, G.K., 2022. A decolonial project for Europe. *JCMS: Journal of Common Market Studies* 60(2), pp. 229–244.

⁶ On the distinction between formal and informal imperialism, see Koskenniemi, M., 2011. Empire and international law: the real Spanish contribution. *University of Toronto Law Journal* 61(1), pp. 1–36. See also Butt, D. (2013). Colonialism and Postcolonialism, in: *The International Encyclopedia of Ethics*, Vol. 2, pp. 892–898. Blackwell, New Jersey, USA.

more informal imperialist practices of domination in the absence of colonial title. Informal power structures would reproduce many aspects of formal colonialism, such as dispossession, resource extraction, exploitation and violence, but without formal sovereignty over non-European territories.⁷ The term 'colonial' is used in this work to refer especially to formal colonialism, with the understanding that such practices, or variants of them, have also been reproduced in the context of more informal power structures.

'Coloniality' refers here to the 'invisible power structure' intertwined with knowledge practices that perpetuate 'colonial relations of exploitation and domination long after the end of direct colonialism'.⁸ Importantly, this implies an interrelation between forms of exploitation and domination, on the one hand, and knowledge practices, on the other hand. Coloniality and decoloniality, in this sense, are interested in a specific form of politics of knowledge production centred on colonialism. Knowledge across various fields – culture, society, economy, and law – is understood in this literature to be inseparable from global power structures, both shaping them and being shaped by them.⁹

Legal arrangements are part of these sites of knowledge production that constitute, and are constituted by, world configurations of power that carry forward, at least to some extent, European varieties of colonialism. It is important to note that legal arrangements, like other sites of knowledge production, are often shaped by a set of socially constructed epistemological assumptions that they simultaneously reproduce. In the colonial context, these might include (overlapping) ideas about Western or European civilization, gender, race and religion.¹⁰ In this sense, exploring the ways in which law carries forward colonial legacies would include an inquiry into such epistemological assumptions.

Decolonial and postcolonial insights have had an important impact on the field of international law, especially the Third World Approaches to International Law movement.¹¹ TWAIL scholarship has by now developed a

7 Achiume, E.T., 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1574, 1541–1542. See also Koskenniemi, M., 2011. Empire and international law: the real Spanish contribution. *University of Toronto Law Journal* 61(1), pp. 1–36.

8 Ndlovu-Gatsheni, S.J. (2013). *Coloniality of power in Postcolonial Africa: Myths of decolonization*, p. 16. CODESRIA, UK. See also Mignolo, W.D., 2007. Delinking. *Cultural Studies* 21 (2–3), pp. 449–514.

9 Mignolo, W.D., 2007. Delinking. *Cultural Studies* 21 (2–3), pp. 449–514.

10 Ibid. See also Said, E.W. (1979). *Orientalism*. Vintage Books, New York, USA. Brah, A. (2022). *Decolonial imaginings: Intersectional conversations and contestations*. Goldsmith Press, London, UK.

11 Anghie, A. (2005). *Imperialism, sovereignty and the making of international law*. Cambridge University Press, Cambridge, UK. Chimni, B.S., 2006. Third World Approach to International Law-A Manifesto. *International Community Law Review* 8, pp. 3–27.

rich literature on the ways in which colonialism and imperialism have been constitutive of public international law and its doctrines, such as sovereignty, and how it continues to shape international legal arrangements, including international economic law, international criminal law, international refugee and migration law, and international human rights law.¹² Specifically in relation to international refugee law, it has been argued that the definition of the refugee, partly shaped by Cold War anxieties, was also Eurocentric and excluded many Global South experiences of fleeing violence in the context of neocolonial power relations.¹³ Other scholars have argued that colonial unequal regimes of mobility coexisted in international law with the ‘universal’ right to free movement, which in practice concerned mainly Europeans, given that patterns of global mobility were largely shaped by colonial logics.¹⁴ Free movement became explicitly circumscribed later, especially after World War II, to affirm States’ authority over borders, while reproducing colonial patterns of (im)mobility.¹⁵

Formal decolonization, and the right to self-determination that came to accompany it, are generally understood in TWAIL literature as having marked a

Gathii, J.T. (2011). TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography. *Trade, Law & Development* 3, pp. 26–64.

- 12 Anghie, A. (2005). *Imperialism, sovereignty and the making of international law*. Cambridge University Press, Cambridge, UK; Chimni, B.S. (2013). Critical theory and international economic law: a third world approach to international law (TWAIL) perspective, in: *Research Handbook on Global Justice and International Economic Law*. J. Linarelli (Ed.), pp. 251–273, Edward Elgar Publishing, UK; Reynolds, J. and Xavier, S. 2016. ‘The Dark Corners of the World’: TWAIL and International Criminal Justice. *Journal of International Criminal Justice* 14(4), pp. 959–983; Okafor, O.C., 2014. International human rights fact-finding praxis in its living forms: a TWAIL perspective. *The Transnational Human Rights Review* 1, pp. 59–105.
- 13 Hathaway, J.C. (2017). A reconsideration of the underlying premise of refugee law, in: *International Refugee Law*. H. Lambert (Ed.), p-65, Routledge, London, UK; Chimni, B.S., 1998. The geopolitics of refugee studies: A view from the South. *Journal of Refugee Studies* 11(4), pp. 350–374; Krause, U., 2021. Colonial roots of the 1951 Refugee Convention and its effects on the global refugee regime. *Journal of International Relations and Development* 24(3), pp. 599–626.
- 14 Mégret, F., 2021. The Contingency of International Migration Law: ‘Freedom of Movement’, Race, and Imperial Legacies, in: *Contingency in International Law: On the Possibility of Different Legal Histories*. I. Venzke and K.J. Heller (Eds.). Oxford University Press, Oxford, UK. Achiume, E.T., 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1574.
- 15 Ibid. On the role of the passport in this story, see Soomro, A., 2023. People, Paper and Power: The Birth of the Passport in International Law. *Asian Journal of International Law*, pp. 1–28.

shift from colonial empire to neocolonial empire.¹⁶ Indeed, it has been argued that the achievement of formal nation-state independence has failed to fully disrupt colonial relations of exploitation and to ensure a meaningful economic control for former colonies. It is in this sense that a decolonial project seeks to carry forward the unfinished efforts of decolonization, by inquiring, above all, into the ways in which colonialism continues to cast shadow over contemporary knowledge and configurations of power after decolonization. A rich literature has shown international law's complicity in perpetuating these dynamics, some authors having also suggested alternative transformative paths.¹⁷

Similar concerns have started to be addressed more recently in relation to EU law. In this vein, Eklund has argued that the project of building an 'ever closer union among the peoples of Europe' was conceived since its incipient stages as referring to ethnically and racially European population.¹⁸ In this sense, it excluded people from the territories then colonized by France, the Netherlands, Belgium, and Italy, four of the original six Member States that were still colonial powers in 1957, when the European Economic Community was founded.¹⁹ In a forthcoming edited collection, several works have examined the relationship between colonialism and the EU legal order from different vantage points, including the free movement of workers under the EEC, trade and development relations, migration and asylum.²⁰

A decolonial project for EU migration and asylum law must be situated in continuity with these existing works. Such a project must, at the very least, expose how EU migration and asylum law reproduces colonial epistemic formations in a manner that disadvantages people from former colonies. Particular attention should be given to colonial patterns of unequal mobility and treatment that allowed Europeans to settle, solidify imperial power, open

16 Anghie, A., 2006. The Evolution of International Law: Colonial and Postcolonial Realities. *Third World Quarterly* 27, pp. 739–753; Grovogui, S.N. (1996). *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law*. University of Minnesota Press, Minneapolis, USA. Pahuja, S. (2011). *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge University Press, Cambridge, UK.

17 Ibid. Rajagopal, B. (2003). *International Law from Below: Development, Social Movements and Third World Resistance*. Cambridge University Press, Cambridge, UK.

18 Eklund, H., 2023. Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome. *European Journal of International Law* 34(4), pp. 831–854.

19 Ibid. (noting that this was based on a distinction made in the Treaty of Rome between workers from EEC Member States and workers from associated 'overseas countries and territories').

20 H. Eklund (Ed.), (2025). *Colonialism and the EU Legal Order*. Cambridge University Press, Cambridge, UK.

markets, and suppress resistance in the colonies. To be sure, a few legal works in EU migration and asylum law have already been developed in this direction. Indeed, Silga, for example, has argued that the development-migration nexus in EU policy and legal discourse has been shaped by a colonial ‘sedentary bias’, dissuading migration to Europe, coupled with an understanding of development closely linked to the colonial ‘civilizing mission’.²¹ Spijkerboer has contended that European case law, particularly from the European Court of Human Rights and the Court of Justice of the EU, reveals a disturbing pattern of marginalizing individuals from former European colonies.²² For him, the colonial “split form of legality,” exemplified by the special status of “overseas countries and territories,” is echoed in rulings that either deny the application of EU law to ‘third country nationals’ or impose lower standards on them.²³ These insights reinforce the concerns of other scholars regarding the colonial legacies in the EU’s Schengen visa regime and its policies of managing migration through partnerships with mainly African countries.²⁴ As will be shown, however, there remains considerable scope for advancing and refining decolonial approaches to EU migration and asylum law.

In addition to the insights already exposed so far, it might be useful to highlight the role of Europe as a collective project of colonialism, not merely the product of individual European imperial states. As Bhambra has argued, colonial governance regimes might have differed across Europe, but they also intersected over time and acquired some common patterns.²⁵ Historically, efforts of setting common directions can be identified at least as early as the 1884–1885 Berlin conference, which marked European powers’ formalization of the

21 Silga, J., 2020. The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?. *UCLA Journal of International Law and Foreign Affairs* 24, p. 163.

22 Spijkerboer, T.P., 2022. Coloniality and recent European migration case law, in: *Migrants’ Rights, Populism and Legal Resilience in Europe*. S. Smet and V. Stoyanova (Eds.), p. 117, Cambridge University Press, Cambridge, UK. See also Dembour, M.-B. (2015). *When humans become migrants: study of the European Court of Human Rights with an Inter-American counterpoint*. Oxford University Press, Oxford, UK.

23 Ibid.

24 See, e.g., Nessel, L.A. (2009). Externalized Borders and the Invisible Refugee. *Columbia Human Rights Law Review* 40, pp. 625–699; Guild, E. and Bigo, D., 2005. Policing at a distance: Schengen visa policies, in: *Controlling Frontiers-Free Movement Into and Within Europe*. D. Bigo (Ed.), p. 203, Routledge, London, UK; Bosworth, M., Parmar, A. and Vázquez, Y. (Eds.) (2018). *Race, criminal justice, and migration control: Enforcing the boundaries of belonging*. Oxford University Press, Oxford, UK.

25 Bhambra, G.K., 2022. A decolonial project for Europe. *JCMS: Journal of Common Market Studies* 60(2), pp. 229–244; Bhambra, G.K., 2017. The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism. *European Law Journal* 23(5), pp. 395–405.

'Scramble for Africa'.²⁶ Similar efforts emerged in the 1920s, when European states debated how to limit the number of Africans in Europe while acknowledging their crucial role as soldiers.²⁷ These discussions also highlighted the importance of the African continent in addressing Europe's challenges related to unemployment, overpopulation, and the demand for natural resources.²⁸ The post-World War II European integration project reignited the colonial agenda, with Africa envisioned as a key supplier of raw materials.²⁹ Within the EEC framework, free movement of workers came to be understood as not applying to the overseas territories of Member States, nor to extra-Community migrants.³⁰ This bifurcated regime was carried forward in EC, and later EU, migration and asylum policies, whose objective was to 'offset' the establishment of the Single Market and EU citizenship rights with a regime that ensures the control of external borders.

In this sense, the duality of the EU legal system, which creates unequal regimes of mobility and treatment, can be linked not only to the colonial policies of individual European imperial states but also to shared colonial patterns and collective strategies. To be sure, not all EU Member States have contributed equally to the establishment of such unequal regimes, some having wielded more influence over the outcome than others.³¹ Nonetheless, such regimes reaffirm Western Europe's colonial heritage, much like the 'Europeanization' of countries that were not colonial powers but joined the EU.³² Examining the

26 Ibid.

27 Hansen, P. and Jonsson, S., 2011. Bringing Africa as a 'Dowry to Europe'. *European Integration and the Eurafrican Project, 1920–1960. Interventions* 13(3), pp. 443–463; Hansen, P. and Jonsson, S., 2011. Demographic Colonialism: EU–African Migration Management and the Legacy of Eurafrica. *Globalizations* 8, pp. 261–276; Coudenhove-Kalergi, R., 1929. *Afrika. Paneuropa* 5(2).

28 Ibid.

29 Hansen, P. and Jonsson, S., 2011. Bringing Africa as a 'Dowry to Europe'. *European Integration and the Eurafrican Project, 1920–1960. Interventions* 13(3), pp. 443–463.

30 Hansen, P. and Jonsson, S., 2011. Demographic Colonialism: EU–African Migration Management and the Legacy of Eurafrica. *Globalizations* 8, pp. 261–276. See also Eklund, H., note 18.

31 Fertikh, K., 2016. La construction du droit social européen. *Sociohistoire d'une catégorie transnationale (1950–1970). Politix. Revue des sciences sociales du politique* 115(3), pp. 201–225 (arguing that France and Belgium played a significant role in solidifying the exclusion of associated countries and territories from the freedom of movement of EEC workers, as a result of fears that access of EEC workers to their colonies would pose a threat to the stability of colonial rule).

32 De Genova, N., 2016. The European question: Migration, race, and postcoloniality in Europe. *Social Text* 34(3), pp. 75–102. See also Dzenovska, D., 2013. Historical Agency and the Coloniality of Power in Postsocialist Europe. *Anthropological Theory* 13(4), pp. 394–416.

continuities between EU migration and asylum law and European colonialism would involve confronting the unequal regimes of mobility and treatment as a possible iteration of a recurring pattern of colonial governance, constructed on the basis of a set of epistemic foundations.

3 The Epistemic Foundations of Colonial Unequal Mobilities and Treatment

European colonialism and the unequal regimes it produced were based on a system of knowledge through which Europeans constructed their civilizational superiority in opposition to the ‘uncivilized’, the ‘savage’ or the ‘barbarian’.³³ In this sense, postcolonial and decolonial literature generally engage with the ways in which such constructions of difference, or their iterations and ramifications, legitimated the subordination of ‘natives’ in the name of the ‘civilizing mission’.³⁴ Such ‘dynamics of difference’ oftentimes operated in conjunction with racialized, gendered, religionized and classed epistemic formations that organized perceptions and evaluations of the ‘natives’. Depending on the context and approach, various postcolonial and decolonial studies may focus on one or more of these epistemic formations and their legacies in contemporary knowledge and power relations.

This literature offers a rich body of work on migration and asylum, serving as a valuable resource for insights on the enduring epistemic foundations of colonial schemes of unequal mobilities and treatment. In a nutshell, these include assumptions that people from the colonies are expected either to remain in their place of origin (the ‘sedentary bias’)³⁵ and/or to serve as ‘cheap labour’,³⁶ both of which have had a variety of ramifications often intertwined

33 Anghie, A. (2005). *Imperialism, sovereignty and the making of international law*. Cambridge University Press, Cambridge, UK. See also Lemberg-Pedersen, M., and others (Eds.) (2022). *Postcoloniality and Forced Migration: Mobility, Control, Agency*. Bristol University Press, Bristol, UK.

34 Hall, C. (2002). *Civilizing Subjects: Metropole and Colony in the English Imagination, 1830–1867*. Cambridge University Press, Cambridge, UK.

35 Bakewell, O. (2008). ‘Keeping Them in Their Place’: the ambivalent relationship between development and migration in Africa. *Third World Quarterly* 29(7), pp. 1341–1358. See also Thym, D., 2017. Migrationsfolgenrecht. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 76, p. 169. Silga, J., 2020. The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?. *UCLA Journal of International Law and Foreign Affairs* 24, pp. 163.

36 Fitzpatrick, P., 1980. Really rather like slavery: law and labour in the colonial economy in Papua New Guinea. *Contemporary Crises* 4, p. 77–95; Brandon, P., and Sarkar, A., 2019.

with socially constructed ideas or structural biases on civilization, race, gender, religion, and class. In line with decolonial and postcolonial scholarship, such epistemic formations are conceived here as unstable and shifting constructions geared towards making the colonized population more “susceptible to certain kinds of governance”.³⁷

The colonial ‘sedentary bias’, woven into broader narratives of ‘civilization’, was deeply embedded in an unequal regime that privileged Europeans’ mobility while seeking to preserve the ‘civilized’ configuration of the metropole.³⁸ Europeans’ mobility was consolidated by a putatively universal right to freedom of movement in a context in which global patterns of mobility followed the colonial logics.³⁹ Such patterns involved the relocation of the surplus metropolitan population to the colonies, the placement of imperial governors and functionaries in the colonies, the use of strategies to open up markets and suppress resistance in the colonies, as well as the immobilization of the colonized population that produced and carried forward the ‘sedentary bias’.⁴⁰ ‘Foreigners’ could be then entitled to mobility precisely because they were typically thought of as ‘European insiders’ engaged in practices of colonialism. As their motives were largely economic, it has been argued that their mobility can be retrospectively conceptualized as a permissible form of racialized ‘economic migration’, constituted in opposition to the ‘sedentarization’ of the colonized population.⁴¹

As Bhambra has argued, the political and legal category of ‘the migrant’ as distinct from the citizen and its political community, however, emerged only

Labour history and the case against colonialism. *International Review of Social History* 64(1), pp. 73–109.

37 Mahmud, T., 1997. Migration, Identity, & the Colonial Encounter. *Oregon Law Review* 76, pp. 633–690. See also Mahmud, T., 2013. Cheaper than a slave: Indentured labor, colonialism and capitalism. *Whittier Law Review* 34, pp. 215–243.

38 Torsten, M., 2024. Colonial Genealogies of Immigration Controls, Self-Determination, and the Nation-State. *Critical Review of International Social and Political Philosophy* 27 (5), pp. 859–875. Ballantyne, T., 2014. Mobility, Empire, Colonisation. *History Australia* 11, pp. 7–37; Dornel, L., 1995. Les Usages du Racialisme: Le Cas de la Main d’Oeuvre Coloniale en France Pendant la Première Guerre Mondiale, *Genèses* 20, pp. 48–72; Lemberg-Pedersen, M., and others (Eds.) (2022). *Postcoloniality and Forced Migration: Mobility, Control, Agency*. Bristol University Press, Bristol, UK.

39 Mégret, F., 2021. The Contingency of International Migration Law: ‘Freedom of Movement’, Race, and Imperial Legacies, in: *Contingency in International Law: On the Possibility of Different Legal Histories*. I. Venzke and K.J. Heller (Eds.). Oxford University Press, Oxford, UK.

40 Ibid. Ballantyne, T., 2014. Mobility, Empire, Colonisation. *History Australia* 11, pp. 7–37.

41 Achiume, E.T., 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1574, 1517–1518.

later, out of processes of decolonization and racialization.⁴² Examining in particular the case of the British empire, she has shown that restrictive immigration laws emerged in response to the “movement of darker subjects of empire to the metropole from the post-war period onwards” and the related panic over the colour of those who moved.⁴³ Similar dynamics shaped other European imperial states, where decolonization meant the disintegration of political communities that extended beyond the nation-state’s territorial boundaries, yet were deeply stratified along racial lines.⁴⁴ This stratification, operationalized through the ‘seditary bias’ and the ‘cheap labour’ bias, came to be woven into national immigration laws, and later EU migration and asylum law, albeit in different forms.

The post-war category of the ‘migrant’ also emerged within a conception of sovereignty different from the one that shaped nineteenth-century international law and its right to free movement. Indeed, as Mégret has argued, with decolonization, sovereignty became increasingly associated with the need for absolute sovereign control over access to a state’s territory, drawing especially on intra-imperial racialized restrictions of mobility for ‘natives’.⁴⁵ To be sure, free movement in the nineteenth century was not conceived without exceptions, but the right to forbid access to one’s territory was perceived as requiring a reconciliation with the obligation of opening borders to European traders and settlers, understood as reflecting the needs of the ‘international community’.⁴⁶ In this sense, the contemporary conception of ‘migration’ carries with it the idea of the right to exclude non-nationals, shaped by decolonization and racialized arguments. The ‘refugee’ regime comes as a limitation to this right, but at the same time confirms that migration as such is not a right, holding ‘fixed the nonnational’s status as a political stranger’.⁴⁷

Colonial regimes of mobility came to be closely linked with citizenship laws that favoured ethnically and racially European populations, by creating distinctions that excluded ‘natives’ from full citizenship.⁴⁸ While European

42 Bhambra, G.K., 2017. The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism. *European Law Journal* 23(5), pp. 395–405, 402.

43 Ibid.

44 Ibid.

45 Mégret, F., 2021. The Contingency of International Migration Law: ‘Freedom of Movement’, Race, and Imperial Legacies, in: *Contingency in International Law: On the Possibility of Different Legal Histories*. I. Venzke and K.J. Heller (Eds.). Oxford University Press, Oxford, UK.

46 Ibid.

47 Achiume, E.T., 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1574.

48 Saada, E., 2003. Citoyens et Sujets de l’Empire Français. *Genèses* 53, pp. 4–24 (referring to colonial distinctions such as that between European citizens and colonized

populations could travel to, conduct trade in, and settle within, colonial territories, the movement of the racialized colonized population was tightly controlled, with restrictions designed to impose or preserve natives' sedentary forms of life. In this sense, the assumed desirable or standard condition of these people was to remain contained within their place of origin.⁴⁹ Exceptions to this regime of containment were typically confined to the forced or limited mobility to the metropole or other colonies for the benefit of colonial powers' labour needs and economic interests.⁵⁰

The mobility of 'natives' was generally restricted through a set of documentary requirements, some of which are reminiscent of contemporary visa regimes, with the important difference that such requirements were mainly conceived for intra-imperial mobility. Several examples can be found in historical scholarship, including in relation to the Belgian Congo, the Italian Ethiopia and the French colonial order. Within these contexts, requirements included proof of accommodation, medical certificates, a 'clean' criminal record, the possession of an identity card or other travel documents.⁵¹ In the British Empire, although mobility restrictions were often deemed unnecessary due to the predominant movement from the metropole to the dominions and colonies, they coexisted with a 'racialized hierarchy of subjecthood' and functioning of the labour market.⁵²

Race structured the labour regimes in which the 'natives' had to participate throughout European colonial empires, producing a racialized and classed 'cheap labour' bias. Since labour stood as the main exception to 'sedentary' regimes, mostly for mobility to other colonies but sometimes also to the metropole, insights on the operation of the colonial labour market also contribute to

peoples' status as nationals); Ballantyne, T., 2014. Mobility, Empire, Colonisation. *History Australia* 11, pp. 7–37.

49 Bakewell, O. (2008). 'Keeping Them in Their Place': the ambivalent relationship between development and migration in Africa. *Third World Quarterly* 29(7), pp. 1341–1358.

50 Dornel, L., 1995. Les Usages du Racialisme: Le Cas de la Main d'Oeuvre Coloniale en France Pendant la Première Guerre Mondiale, *Genèses* 20, pp. 48–72.

51 Le Cour Grandmaison, O., 2008. Colonisés-Immigrés et "Périls Migratoires": Origines et Permanence du Racisme et d'une Xénophobie d'Etat (1924–2007). *Cultures & Conflits* 69, pp. 19–32; Mégret, F., 2021. The Contingency of International Migration Law: 'Freedom of Movement', Race, and Imperial Legacies, in: *Contingency in International Law: On the Possibility of Different Legal Histories*. I. Venzke and K.J. Heller (Eds.). Oxford University Press, Oxford, UK.

52 Constantine, S. (1999). Migrants and Settlers, in: *The Oxford History of the British Empire: Volume IV: The Twentieth Century*. J. Brown and W.M. Roger Louis (Eds.), p. 163, Oxford University Press, Oxford, UK. Bhabra, G.K., 2017. The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism. *European Law Journal* 23(5), pp. 395–405, 402.

a more comprehensive understanding of colonial unequal regimes of mobility. Indeed, such insights shed light on the fact that labour exceptions were inserted in a system in which extraction and commodification of labour power from the colonies played a crucial role in the industrial development of colonial powers.⁵³ This explains why some decolonial and postcolonial debates on labour, or labour migration, or migration and asylum, turn to ‘racial capitalism’ to stress more generally that race and colonialism are embedded in the social structures produced by capitalism.⁵⁴

A few examples of colonial racialized labour mobility might be helpful here. In the French colonial empire, labour policies were often based on representations of Moroccans as the most ‘sober’ and ‘robust’, in ostensible opposition to black Africans, considered as suitable mainly for forced labour.⁵⁵ Similarly, in the British empire, African workers were constructed as “lazy, unreliable, untruthful, and unable or unwilling to understand or honor a contract”.⁵⁶ These racialized hierarchies explain why many soldiers fighting on both the French and the British sides during World War I were from Africa.⁵⁷ Such categorizations were sometimes coupled with restrictions of mobility within the metropole, either because ‘natives’ were seen as posing health risks, requiring confinement and isolation, or because of concerns of greater productivity and anxieties about mixed ethnicities.⁵⁸ Colonial labour policies led, however, more often to intra-colonies mobility, similarly shaped by racialized stratifications, to work on plantations, mines, railroads, and other similar projects.⁵⁹ Containment and labour in the place of origin was, however, the norm, and

53 Ashiagbor, D., 2021. Race and Colonialism in the Construction of Labour Markets and Precarity. *Industrial Law Journal* 50, pp. 506–531.

54 Ibid. See also Robinson, C. (2000). *Black Marxism: The Making of the Black Radical Tradition*. University of North Carolina Press, London, UK. Gutiérrez Rodríguez, E., 2018. The coloniality of migration and the “refugee crisis”: On the asylum-migration nexus, the transatlantic white European settler colonialism-migration and racial capitalism. *Refuge* 34(1), pp. 16–28.

55 Dornel, L., 1995. Les Usages du Racialisme: Le Cas de la Main d'Oeuvre Coloniale en France Pendant la Première Guerre Mondiale, *Genèses* 20, pp. 48–72, 49, 51.

56 Mahmud, T., 1997. Migration, Identity, & the Colonial Encounter. *Oregon Law Review* 76, pp. 633–690, 643.

57 Hansen, P. and Jonsson, S., 2011. Demographic Colonialism: EU–African Migration Management and the Legacy of Eurafica. *Globalizations* 8, pp. 261–276.

58 Dornel, L., 1995. Les Usages du Racialisme: Le Cas de la Main d'Oeuvre Coloniale en France Pendant la Première Guerre Mondiale, *Genèses* 20, pp. 48–72.

59 Mahmud, T., 1997. Migration, Identity, & the Colonial Encounter. *Oregon Law Review* 76, pp. 633–690.

oftentimes implied coercive or ‘semi-free’ recruitment of ‘cheap labour’ for the benefit of European farmers, planters, mine-owners, or other sectors monopolized by Europeans.⁶⁰

The ‘cheap labour’ bias, in this sense, operated both in alignment with, and as an exception to, the ‘sedentary bias’, depending on the economic needs and projects of the colonial powers. ‘Native’ labour was either non-waged or low-waged, pushing the colonized population, and especially women, into precarity and exclusion. In this sense, the racialized unequal regime of mobility and treatment was also classed and gendered. ‘Native’ women were generally perceived as a burden and would find important obstacles in accessing the official recruitment channels.⁶¹ Overcoming the sedentary bias through the cheap labour exception would prove more difficult for them, thus sustaining the conditions under which their work was made invisible. As Lugones notes, such marginalization has been the product of the intersection between racialized stratification and a patriarchal order, which gained dominance in Europe during the early modern era and was later exported to the colonies.⁶² This gave rise to constructions of colonized women as inferior and “an object of sexualized exploitation and violence”.⁶³

In many colonial contexts, these epistemic formations intersected with other constructions, such as perceived religious differences, which had to be integrated in colonial projects of knowledge for making the colonies more amenable to specific forms of governance.⁶⁴ The imperial ‘civilizing mission,’ often framed as a duty of White Christians, led to efforts to “classify and control non-white alternatives (and ‘deviants’) to (white) Christianity”, intertwining

60 Austin, G., 2010. African Economic Development and Colonial Legacies. *International Development Policy | Revue internationale de politique de développement* 1, pp. 11–32.

61 Mahmud, T., 1997. Migration, Identity, & the Colonial Encounter. *Oregon Law Review* 76, pp. 633–690. See also Ashiagbor, D., 2021. Race and Colonialism in the Construction of Labour Markets and Precarity. *Industrial Law Journal* 50, pp. 506–531.

62 Lugones, M., 2008. The Coloniality of Gender. *Worlds & Knowledge Otherwise* 2, pp. 1–17. Oyèwùmí, O. (1997). *The invention of women: Making an African sense of Western gender discourses*. University of Minnesota Press, Minneapolis, USA; Tamale, S. (2020). *Decolonization and Afro-feminism*. Daraja Press, Ottawa, Canada.

63 Gutiérrez Rodríguez, E., 2018. The coloniality of migration and the “refugee crisis”: On the asylum-migration nexus, the transatlantic white European settler colonialism-migration and racial capitalism. *Refuge* 34(1), pp. 16–28.

64 Mahmud, T., 1997. Migration, Identity, & the Colonial Encounter. *Oregon Law Review* 76, pp. 633–690.

race and religion, or mobilizing religion as a particular instance of racialized formations.⁶⁵

Some postcolonial and decolonial scholars have emphasized the value of Kimberlé Crenshaw's theory of intersectionality in understanding how these various colonial epistemic formations intersected to create and sustain unequal power structures.⁶⁶ Crenshaw has highlighted the importance of considering the unique experiences of those subject to multiple intersecting oppressive systems, without however engaging with their coloniality.⁶⁷ She has called for approaches that consider their interconnectedness instead of merely examining them in isolation from each other. While these insights are indeed helpful, it is important to note that some decolonial and postcolonial works have foregrounded the intersection of (neo-)colonial identitarian epistemic formations without relying on the theory of intersectionality.⁶⁸ In this sense, the absence of an explicit use of this theory does not necessarily indicate that intersections are not addressed.

Considering the discussed insights on (de-)coloniality, the overarching question for a decolonial agenda on EU migration and asylum law becomes: what continuities with colonial epistemic formations, and the unequal patterns of mobility and treatment consolidated by them, can be identified in EU migration and asylum law, including in processes of judicial and administrative interpretation and application? In what follows, the article assesses existing research on the colonial legacies in EU migration and asylum law and outlines a set of potential directions for future inquiry, each stemming from this central question. This is not intended to be an exhaustive list, but rather a starting point for further research, open to diverse methods such as discursive or narrative analysis, archival research, participant observation, or other relevant tools.

65 Nye, M., (2019). Race and religion: Postcolonial formations of power and whiteness. *Method & Theory in the Study of Religion* 31(3), pp. 210–237.

66 Crenshaw, K., 1991. Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review* 43 (6), pp. 1241–99. Nye, M., (2019). Race and religion: Postcolonial formations of power and whiteness. *Method & Theory in the Study of Religion* 31(3), pp. 210–237. Also Cappiali, T., and Pacciardi, A., 2024. Reorienting EU Border Externalization Studies: A Decolonial Intersectional Approach. *Geopolitics*, pp. 1–25.

67 Crenshaw, K., 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum* 1 (8), pp. 139–167.

68 See, e.g., Mahmud, T., 2013. Cheaper than a slave: Indentured labor, colonialism and capitalism. *Whittier Law Review* 34, pp. 215–243.

4 Directions for Further Inquiry in EU Migration and Asylum Law

4.1 *The EU Schengen Regime and Its Implications*

A few critical voices have highlighted the racialized unequal scheme of mobility produced by the EU Schengen visa regime.⁶⁹ Indeed, a closer examination of the countries subject to short-term Schengen visa restrictions reveals that the majority are former colonies. Virtually all African states and an important part of Asia are part of this visa 'Black list'. This produces an unequal regime of mobility that carries forward the racialized colonial sedentary bias, making it an implicit epistemic foundation of the EU Schengen visa regime. To be sure, individuals from these countries might occasionally secure visas, but the EU regime makes it more difficult for them to reach the EU by placing a heavy burden to prove that EU requirements are met. This stands in sharp contrast with the hyper-mobility regime of EU citizens within the EU.

The decision to place them on the visa 'blacklist' can be traced back to the early intergovernmental phases of the Schengen project.⁷⁰ The unequal regime was introduced by the original five States that signed the Schengen agreement in 1985, Belgium, Germany, France, Luxembourg, and the Netherlands, four of which were still colonial powers when founding the EEC in 1957. This does not imply that EU law's unequal regimes result from a straightforward formula where colonial epistemic formations are reproduced only when former colonial powers shape the decision-making process. Instead, it suggests that the colonial past of these states may have played a role, while emphasizing the reproduction of the colonial sedentary bias as a significant issue in its own right.

An important implication of these colonial legacies is the racialization of the legal category of 'irregular entry', which, as some authors have argued, has been *produced* through legal and policy choices.⁷¹ This category and its ramifications often operate within security rationales, which associate the (constructed) irregularity of migrants with EU's internal security. While such framings have intensified since 9/11 and continued to escalate in response

69 Achiume, E.T., 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1574.
Mégret, F., 2021. The Contingency of International Migration Law: 'Freedom of Movement', Race, and Imperial Legacies, in: *Contingency in International Law: On the Possibility of Different Legal Histories*. I. Venzke and K.J. Heller (Eds.). Oxford University Press, Oxford, UK.

70 den Heijer, M., 2018. Visas and Non-discrimination. *European Journal of Migration and Law* 20(4), pp. 470–489.

71 Samers, M. (2004). An Emerging Geopolitics of 'Illegal' Immigration in the European Union. *European Journal of Migration and Law* 6(1), pp. 27–45.

to other events, such as the 2015/2016 refugee ‘crisis’, their origins on the European level can be traced back to the mid-1980s.⁷² A possible future line of inquiry would be to disentangle the various ways in which the racialized and securitized category of ‘irregular entry’ shapes other regimes of EU migration and asylum law, such as the control of the Schengen external borders, the role of Frontex therein and its digitalized technologies, its interplay with the EU regime on search and rescue, the Common Security and Defence Policy, the EU Facilitation Directive, the justifications and practices of reintroducing internal border controls or disguising them as non-border checks,⁷³ the border regimes in EU asylum law, and the ‘exceptions’ to standard asylum procedures. Some of these interconnections are further outlined in the sections below. Other possible paths would be to show, through archival research, the epistemic foundations of the negotiations and debates that led to the 1985 Schengen agreement, its 1990 implementing Convention, the incorporation of the Schengen acquis into EU law, as well as the codification of the list of third countries subject to Schengen visa restrictions.

The analysis, however, should go beyond race, to explore intersections with gender, class, and potentially religion or other identity markers. The sociologist Jane Freedman has argued, for example, that EU immigration and asylum policies push “some groups of women into situations in which they are at greater risk”, thus marking a gendered dimension of the securitization of EU borders.⁷⁴ Such processes of securitization also produce trafficking and

72 Karyotis, G., 2007. European migration policy in the aftermath of September 11: The security–migration nexus. *Innovation: The European Journal of Social Science Research* 20(1), pp. 1–17.

73 Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* [2010] ECLI:EU:C:2019:363. Caruso, D. and Geneve, J. (2016). Melki in context: Algeria and European legal integration (June 15, 2015). In: *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Davies, B. and Fernanda, N. (Eds.), pp. 506–528, Cambridge University Press, Cambridge, UK (noting that “The journey of Mr. Melki connects Algeria, physically and metaphorically, with the EU – a regional entity that struggles to set aside colonial history”). See also Colombeau, S., 2017. Policing the internal Schengen borders – managing the double bind between free movement and migration control. *Policing and Society* 27(5), pp. 480–493.

74 Freedman, J., 2016. Engendering security at the borders of Europe: women migrants and the Mediterranean ‘crisis’. *Journal of Refugee Studies* 29(4), pp. 568–582. See also Matos, R., and Esposito, F., 2019. Women’s experiences of border crossing: gender, mobility and border control. *International Journal of Migration and Border Studies* 5(4), pp. 371–391; Sarkin, J.J., and Morais, T., 2024. The role of the European Union’s securitisation policies in exacerbating the intersectional vulnerability of refugees and asylum seekers. *The International Journal of Human Rights*, pp. 1–24.

smuggling networks and the need to resort to them for reaching the EU.⁷⁵ This pushes people from former colonies further into precariousness both in a 'classed' and gendered manner, enabling 'cheap labour' exploitative arrangements. Further research is needed to develop analyses of the ways in which the colonial sedentary bias and the cheap labour bias have been reproduced through the EU Schengen regime and its ramifications, with the help of intersecting epistemic constructions.

Such inquiries might benefit from analyses of the interplay between the Schengen regime and EU anti-discrimination law. Indeed, the racialization of this regime, for example, is largely obscured and sustained under the EU's Race Equality Directive.⁷⁶ In fact, the Directive does not address differences based on nationality and does not affect provisions concerning the entry and residence of non-EU nationals.⁷⁷ In this sense, EU anti-discrimination law perpetuates and conceals the racialization that underpins the unequal Schengen visa regime and the related regimes of external border controls.

4.2 The 'Externalization' of EU Borders

The reproduction of the colonial sedentary bias is further exacerbated by processes of border externalization, under which the EU and its Member States outsource securitized EU border controls or/and asylum responsibilities to 'third countries' through international agreements, informal partnerships or funding programmes.⁷⁸ One of the main objectives of these arrangements is to stem the flow of irregular migration to the EU by establishing control mechanisms in transit countries and countries of origin. Currently, the EU does not have arrangements of asylum processing in third countries of individuals that have no connection with such countries, as is the case of the UK-Rwanda and Italy-Albania partnerships, although there have been debates on this possibility.⁷⁹ The Italy-Albania framework, however, would already have the

75 Ibid.

76 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180.

77 Achiume, E.T., 2021. Racial borders. *Georgetown Law Journal* 110, pp. 445–508, 491–492.

78 Müller, P., and Slominski, P., 2021. Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean. *Journal of European Public Policy* 28(6), pp. 801–820; Frelick, B., Kysel, I.M. and Podkul, J., 2016. The impact of externalization of migration controls on the rights of asylum seekers and other migrants. *Journal on Migration and Human Security* 4(4), pp. 190–220.

79 Leclerc, G., Mentzelopoulou, M.M. and Orav, A., (2024). Extraterritorial processing of asylum claims, European Parliament Briefing, European Parliamentary Research Service, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757609/EPRS_BRI\(2024\)757609_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757609/EPRS_BRI(2024)757609_EN.pdf). Accessed 26 August 2024.

effect of ‘externalizing’ EU asylum law, as implemented in Italian law, to a third country. In this sense, while EU’s partnerships mostly concern the upscaling of border controls in third countries, its Member States’ externalizing policies might have the effect of EU law-based asylum processing in third countries.

The Schengen visa regime as such exposes who is the most affected by the externalization of borders, as this process targets mainly individuals whose mobility is restricted by EU visa requirements. Moreover, a closer examination of the countries to which the EU and its Member States have outsourced their borders confirms that these are predominantly transit or origin countries for people coming from former colonies. In this sense, processes of border externalization produce unequal mobilities in a racialized manner, in continuity with the colonial sedentary bias.

Such arrangements with third countries have existed at least since the early nineties, when migration started to be progressively integrated in EU external policies, mainly for reducing the inflow of migrants into the EU.⁸⁰ Their development has significantly accelerated since then. This became especially visible during the 2015 refugee ‘crisis’, which gave rise to the Valletta Summit on Migration for cooperation with African states, the infamous EU-Turkey Statement, and a variety of other formal or informal partnerships with countries like Libya, Sudan, Niger, Nigeria, Mauritania, Mali, Egypt, Tunisia and Lebanon.⁸¹ From providing border equipment and training to border guards, to consolidating and establishing surveillance systems and funding detention centres, the measures established by these arrangements produce more dangerous routes for those from African and Middle Eastern countries while facilitating processes of returning them back.

Silga has shown that such agreements have often operated in conjunction with EU’s development policy, providing for development aid in exchange of third countries’ efforts to secure their borders.⁸² At times, development has

80 Silga, J., 2020. The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?. *UCLA Journal of International Law and Foreign Affairs* 24, p. 163.

81 E.g. Bialasiewicz, L., 2012. Off-shoring and Out-sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean. *Geopolitics* 17(4), pp. 843–866; Pradella, L. and Taghdisi Rad, S., 2017. Libya and Europe: Imperialism, Crisis and Migration. *Third World Quarterly* 38(11), pp. 2411–2427; Casaglia, A. and Pacciardi, A., 2022. A Close Look at the EU–Turkey Deal: The Language of Border Externalisation. *Environment and Planning C: Politics and Space* 40(8), pp. 1659–1676.

82 Silga, J., 2020. The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?. *UCLA Journal of International Law and Foreign Affairs* 24, p. 163.

been associated in EU policies with a more positive conception of migration, understood as contributing to the development of countries of origin.⁸³ While the securitized approach has gained much more ground in the overall history of development of EU migration and asylum law, the ultimate objective of the two approaches is to diminish, by means of development, migrants' incentives to leave. In this sense, both have continuities with the racialized colonial sedentary bias. Moreover, discourses of development reproduce the colonial civilizational project, by assuming that 'developing countries', mostly former colonies, should follow the Western paradigm of progress.⁸⁴ Such policies have been criticized for ultimately reproducing and deepening global economic inequalities, enabling the EU to assert power over developing countries while carrying forward resource extraction and exploitative relationships.⁸⁵

Further research could explore the ways in which the colonial 'cheap labour' bias, either in countries of origin/transit or in 'host' societies, is carried forward through externalization arrangements. Moreover, although EU migration and asylum law literature has heavily criticized these arrangements, there is little engagement with colonial intersecting epistemic formations in this area, something that political scientists have recently urged to be explored more deeply.⁸⁶ From a legal perspective, a particularly fruitful question is how externalization arrangements are enabled through law, even if realized through informal partnerships, while carrying forward colonial intersecting epistemic formations and patterns of inequality. Future inquiries might also examine the ways in which such epistemic foundations have shaped the establishment and the unfolding of the migration-development, or the migration-development-security, nexus in EU policy and legal discourse.

Another possibility involves a detailed examination of each partnership between the EU, its Member States, and 'third countries', aimed at externalizing EU borders. This inquiry would not only explore the intersecting epistemic foundations of the policy and legal documents related to each partnership but also investigate how these partnerships operate within and perpetuate unequal relationships that align with colonial patterns.

83 Ibid.

84 Ibid. See also Pahuja, S. (2011). *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge University Press, Cambridge, UK.

85 Anghie, A. (2005). *Imperialism, sovereignty and the making of international law*. Cambridge University Press, Cambridge, UK; Chantal, T., 1999. Causes of inequality in the international economic order: Critical race theory and postcolonial development. *Transnational Law & Contemporary Problems* 9, pp. 1–15.

86 Cappiali, T., and Pacciardi, A., 2024. Reorienting EU Border Externalization Studies: A Decolonial Intersectional Approach. *Geopolitics*, pp. 1–25.

4.3 *The Construction of the 'Economic Migrant'*

EU law, much like international and domestic legal frameworks, relies on a distinction between economic migration, assumed to be 'voluntary', and political migration, understood as forced, although in practice it is difficult to keep such categories distinct.⁸⁷ Economic migration of 'third country nationals' to the EU is constructed as irregular unless it fits within specific EU frameworks, such as those for high-skilled and low or semi-skilled workers, or within other legal channels like family reunification. In this sense, an inquiry into the colonial legacies of the construction of the economic migrant in EU law must take into account processes of irregularization, especially the securitized and racialized schemes of unequal mobility produced by the Schengen regime, its ramifications, and the externalization of EU borders.

Among all 'third-country' economic migrants, those from former colonies face the greatest obstacles in reaching the EU. While visa exemption as such does not grant access to long-term residence or employment, it often serves as a valuable opportunity to become familiar with the labour market, attend interviews, and occasionally even secure an employment contract. The racialized unequal scheme of mobility, shaped by the colonial sedentary bias, affects in considerable ways the prospects of economic migration of people from former colonies to the EU, sometimes exposing them to deadly migratory routes. These conditions foster the development of human trafficking networks and may result in precarious statuses within the 'host society' forcing individuals into informal (cheap) labour markets.⁸⁸

As some social scientists have argued, irregularization creates systemic barriers for Global South migrants, limiting their labour prospects to precarious positions.⁸⁹ In the context of displacement, some EU official communications show a racialized dichotomy "between deserving skilled refugees and unskilled hordes from the Global South", indicating a sedentary and unskilled

87 See Thomas, C., 2010. Migrant domestic workers in Egypt: A case study of the economic family in global context. *The American Journal of Comparative Law* 58(4), pp. 987–1022. (noting that "Rather than distinct phenomena, political persecution and economic desperation may be co-effects of the same problematic environment in which political and economic instability and inequality feed into each other").

88 Tastsoglou, E., Petrinioti, X. and Karagiannopoulou, C., 2021. The gender-based violence and precarity nexus: Asylum-seeking women in the Eastern Mediterranean. *Frontiers in Human Dynamics* 3, pp. 660–682.

89 Purkayastha, D., Bircan, T., Yar, A.W.A., and Ceylan, D., 2023. Irregular migration is skilled migration: reimagining skill in EU's migration policies. *Humanities and Social Science Communication* 10 (417), pp. 1–10, 2.

bias towards the Global South.⁹⁰ While ‘cheap labour’ in such representations is not seen as a desirable form of migration to the EU, practice shows not only that ‘cheap labour’ exists in the contemporary labour market, but that it is predominantly inhabited by Global South irregularized migrants.⁹¹ In this sense, there is a continuity with the colonial ‘cheap labour’ exception to the sedentary bias, though it now operates in more subtle ways and is more deeply intertwined with the sedentary bias and processes of irregularization. Officially, the EU displays a policy of attracting mainly skilled migration, but EU processes of irregularization also push certain migrants, especially from the Global South, into ‘cheap labour’ if they manage to reach the EU. Moreover, similarly to colonial times, labour regimes are inscribed in a scheme in which possibilities of labour migration largely depend on the economic needs and projects of the EU and its Member States. EU law provides a set of ‘exceptional’ channels of legal economic migration for ‘third-country nationals’, such as schemes for highly qualified workers and seasonal workers.⁹² A closer look at the EU directives that regulate these schemes shows, however, that some provisions disadvantage those who are subject to Schengen visa requirements and, in this sense, confirm and reproduce the colonial sedentary bias. Indeed, when it comes to short-stay seasonal work, for example, nationals of countries that benefit from visa exemptions can apply directly for a work permit in the ‘host’ country, whereas others are expected to apply for a visa in their country of origin with a valid work contract or a binding job offer.⁹³ Concerning high-skilled workers under the EU Blue Card scheme, EU law allows a Member State to accept applications from persons *legally present* in its territory but who are not in possession of a valid residence permit or long-stay visa.⁹⁴ This suggests the inclusion of people who are legally present on a short-stay basis and benefit

90 Ibid. See also Hofmann, M., 2022. Getting Ukrainian refugees into work: The importance of early competence checks. International Centre for Migration Policy Development, available at https://www.icmpd.org/file/download/57235/file/ICMPD_Commentary_Getting_Ukrainian_refugees_into_work.pdf. Accessed 1 October 2024.

91 Ibid.

92 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ 2014 L 94/375 (Seasonal Work Directive). Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, OJ 2021 L 382/1 (Blue Card Directive).

93 Art 12(1)(c) Seasonal Work Directive. For long stays, the maximum duration of seasonal work being limited to a period between five and nine months, Member States can issue only a seasonal worker permit if a long-stay visa is not required under national law.

94 Art 10(3) Blue Card Directive.

from the Schengen visa exemption. Those subject to Schengen visa restrictions, even if in possession of a short-stay visa, would thus have to apply to this scheme in their country of origin and with an already valid work contract or a binding job offer.

Moreover, as some social scientists have argued, the category of ‘skilled’ migrant in EU law and policy is constructed in ways that marginalize skills acquired in the Global South.⁹⁵ These works have shown that the way in which skill is recognized in the EU undervalues knowledge and qualifications acquired in non-Western settings.⁹⁶ Indeed, while defining skill in terms of education level or occupational classification, processes of recognition privilege Western knowledge systems, which further consolidates the racialized ‘sedentary bias’ in continuity with colonial unequal mobilities. Furthermore, the skills acquired during migration, which oftentimes involve long and complex irregularized trajectories for those from former colonies, are rendered invisible in processes of recognition of skill.⁹⁷ This contributes to the downskilling of people from the Global South, forcing irregularized migrants, in particular, into exploitative survival schemes of cheap labour upon reaching the EU. Those who manage to acquire a legal status might nevertheless face “racialised encounters where their existing capabilities are dismissed and they are told to retrain, acquire local degrees, short internships or entry level jobs”.⁹⁸

The colonial legacies embedded within the EU legal construction of the economic migrant remain largely unexplored in existing legal literature. Further research could disentangle the different ways in which the racialized distinction between regular and irregular entry shapes the regimes associated to this construction, confirming and perpetuating the colonial sedentary bias while producing narrowly circumscribed exceptions of labour mobility. This research, however, should not limit itself to the EU law regimes explicitly defined as concerned with economic migration, but also consider the economic dimension of other regimes of migration, such as the Schengen border regimes, family reunification and asylum, as well as EU labour law.⁹⁹ An important aspect of EU law that warrants further consideration in relation to these regimes is the issue of recognition of qualifications for labour market

95 Purkayastha, D., Bircan, T., Yar, A.W.A., and Ceylan, D., 2023. Irregular migration is skilled migration: reimagining skill in EU’s migration policies. *Humanities and Social Science Communication* 10 (417), pp. 1–10, 4.

96 Ibid, 3.

97 Ibid.

98 Ibid. 8.

99 For colonial legacies in EU labour law, see Ashiagbor, D., 2021. Race and Colonialism in the Construction of Labour Markets and Precarity. *Industrial Law Journal* 50, pp. 506–531.

integration of third country nationals. Under EU law, foreign non-EU diplomas can be recognized for mobile EU citizens if these have been already recognized by a Member State, but this does not apply to third country nationals, whose qualifications fall under national law.¹⁰⁰ The failure to recognize these qualifications, along with the challenges of precarious or irregular status, would force third-country nationals into insecure and marginalizing conditions.

Future research should also explore the intersection of race with other epistemic formations, such as gender and class, in the EU legal construction of the economic migrant, while tracing the continuities with the colonial sedentary and cheap labour biases. Historical analyses charting the development of the construction of ‘third-country’ economic migrants in EU law since the EEC and capturing the shifts and continuities arising with decolonization, would be a valuable possible line of inquiry.

4.4 *The Common European Asylum System*

The Common European Asylum System, like many other regimes highlighted above, is also shaped by the racialized category of ‘irregular entry’ and its securitized ramifications, including externalization partnerships. Indeed, EU law provides little, if any, legal pathways to reach the EU for those seeking to apply for asylum in the EU. EU ad-hoc resettlement schemes, as well as the recently adopted resettlement permanent framework under the New Pact on Migration and Asylum, have been severely criticized for being highly insufficient.¹⁰¹ Moreover, the Court of Justice of the EU decided in 2017 that the EU has no competence over ‘humanitarian visas’ for those seeking to reach the EU as asylum seekers, who fall outside the scope of the EU regime because of the long-term nature of their stay.¹⁰² These shortcomings and limits contribute to the production of irregularity of persons fleeing persecution, as well as smuggling and trafficking networks. They disproportionately impact individuals from former colonies, who are primarily affected by the ‘irregular entry’ category, perpetuating the racialized colonial sedentary bias. Moreover,

100 Isaakyan, I., Triandafyllidou, A. (2021). “Enchanted with Europe”: Family Migration and European Law on Labour-Market Integration. In: Federico, V., Baglioni, S. (Eds.) *Migrants, Refugees and Asylum Seekers’ Integration in European Labour Markets*. IMISCOE Research Series. Springer, Cham, Switzerland.

101 Savino, M. (2018). Refashioning resettlement: from border externalization to legal pathways for asylum. In: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*. S. Carrera, A.P. Leonhard den Hertog, M. Panizzon, and D. Kostakopoulou (Eds.), pp. 81–104. Brill Nijhoff, Leiden, The Netherlands.

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

such processes produce a ramification of the sedentary bias in the form of the 'bogus refugee' bias, whose mobility is to be dissuaded and prevented.

Some scholars have argued that one of the effects of this interconnectedness between EU asylum law and the Schengen visa regime is the production of a racialized unequal scheme of treatment of the Ukrainian refugee 'crisis' and other ('bogus') refugee 'crises'.¹⁰³ Indeed, the first-ever activation of the Temporary Protection Directive, which provides for immediate and temporary protections in situations of 'mass influx of displaced persons from non-EU countries', took place in the context of mostly White displaced populations who had the advantage of Schengen visa exemptions.¹⁰⁴ While the existence of such advantage is not required by the Directive, this instrument was not triggered in the context of the 2015/2016 escalation of conflicts in Syria, and in the Middle East and Africa more generally. The response was rather dominated by a securitized approach, with efforts to upscale border controls and processes of externalization of EU borders, with violent effects on those engaging in endangered routes. The discrepancy between these two 'crises' can be seen as closely related to a decision made by the EU in 2017 to liberalize the Schengen visa regime for Ukrainian citizens, a decision taken a few years after the Russian annexation of Crimea.

Further research could investigate the ways in which the racialized category of 'irregular entry' shapes other exceptional regimes adopted in 2024 under the New Pact on Migration and Asylum, which do not fit neatly into either the 'asylum' or the 'migration' category, but concern both. These include situations of 'migratory pressure', 'crisis', force majeure and instrumentalization of migrants. A potentially valuable line of inquiry would involve comparing scenarios that fall under these different regimes with those in which the Temporary Protection Directive has been activated, with the ongoing Russo-Ukrainian war being the sole example to date.

The racialized category of 'irregular entry' can be additionally explored in relation to EU asylum procedures. In what ways do the various perceived forms of irregular entry, as institutionalized in EU law, shape asylum procedures and what does this say about the applicant's chances of being granted asylum? These might include irregular entry with false documents, without

103 Corcodel, V., and Fragkou, D., 2023. Europe's Refugee "Crises" and the Biopolitics of Risk. *European Journal of Risk Regulation*, pp. 1–15.

104 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 OJ 2001 L 212 (Temporary Protection Directive).

any documents, or without making an application for international protection “as soon as possible”.¹⁰⁵ These examples of third country nationals’ behaviours cannot be meaningfully dissociated from irregular entry and, in this sense, constitute imagined *modalities* of irregular entry, which concern mainly people from former colonies. If their effect is to reduce applicants’ chances of being granted asylum, these concepts can be seen as reinforcing the sedentary bias embedded in the racialized category of ‘irregular entry,’ while also giving rise to the related bias of the ‘bogus refugee.’

EU asylum procedures can also be analysed as disproportionately subjecting certain individuals to a high risk of rejection and return, particularly through concepts such as the ‘safe country of origin’ and ‘safe third country.’ Although these concepts are defined in EU law, the lack of a common EU list requires supplementing the analysis with an examination of national legal practices. Future investigation can explore whether such national legal practices disproportionately affect individuals from former colonies, consolidating and reproducing the racialized colonial sedentary bias.

All these possible lines of inquiry can be complemented with analyses of potential intersecting epistemic formations, such as gender, class and religion. Intersectional approaches can additionally be particularly fruitful in analysing the very definition of the refugee and its application and interpretation in decision-making processes and judicial decisions. What assumptions about race, gender, class, religion and other epistemic formations shape this definition, as well as its interpretation and application? In what ways can these assumptions be related to colonial epistemic formations?

Existing research in international law, from which EU law derives its definition of a refugee, provides valuable insights into several of these issues. Hathaway, for example, emphasizes that the original definition of the refugee, established by the 1951 Refugee Convention with geographical and temporal limitations, was designed for anti-communist refugees from Europe and, in this sense, was racialized.¹⁰⁶ While this was shaped by Cold War anxieties at the time, it also meant that those displaced by decolonization movements were largely ignored, in continuity with the colonial sedentary bias. The removal of limitations with the 1967 Protocol, while creating space for potential non-European refugees, continued, however, to marginalize people from

105 See Art 42 of Regulation 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJ L 2024/1348.

106 Hathaway, J.C. (2017). A reconsideration of the underlying premise of refugee law, in: International Refugee Law. H. Lambert (Ed.), p. 65, Routledge, London, UK.

former colonies. The definition of the refugee, as Hathaway has argued, was conceived in a manner that excluded the experiences of many persons from former colonies, often displaced by ‘natural disaster, war, or broadly-based political and economic turmoil’.¹⁰⁷ The exclusion of poverty as a ground for international protection is a particularly revealing example when considering that global economic inequalities have been shaped by development theories and practices that continued the legacies of racialized colonial exploitation and extraction.¹⁰⁸

5 Conclusion

This article has argued that there remains considerable scope for further advancing a decolonial agenda in EU migration and asylum law. It has offered some theoretical tools grounded in postcolonial and decolonial literature and has outlined some potential avenues for further research, especially in relation to the EU Schengen regime, the externalisation of EU borders, the construction of the ‘economic migrant’ and the Common European Asylum system.

It has been argued that a decolonial project is primarily about exposing and challenging the enduring colonial epistemic formations in contemporary knowledge, with the objective of pushing forward Europe’s ‘unfinished project of decolonization’. In the context of migration and asylum, this calls for an inquiry into the ways in which the colonial sedentary bias and the cheap labour bias have been reproduced in contemporary knowledge practices, as shaped by race, gender, class and other epistemic formations.

Expanding decolonial approaches on migration and asylum is especially needed in the contemporary context, which continues to be characterized by a ‘colonial aphasia’ or amnesia, visible in intensifying anti-immigrant discourses and policies in Europe. Addressing this enduring process is a crucial first step in advancing the ‘unfinished project of decolonization’, which requires confronting the continued presence of colonial biases in contemporary knowledge practices.

Although existing legal scholarship is often highly critical of EU migration and asylum law and policy, decolonial perspectives and the importance of intersecting epistemic formations therein remain underexplored. Further inquiry into these perspectives would deepen existing critiques by connecting

¹⁰⁷ Ibid.

¹⁰⁸ Kothari, U., 2006. An agenda for thinking about ‘race’ in development. *Progress in Development Studies* 6(1), pp. 9–23.

them not only to contemporary patterns of irregularization, securitization and externalization, but also to the ongoing legacies of colonial unequal mobilities and treatment. Failing to examine colonial continuities risks creating the false impression that the exclusionary effects of EU laws and policies are solely the result of contemporary dynamics. A decolonial approach would challenge this misconception by situating these issues within the broader context of European colonial projects and their lasting impacts, while seeking to overcome institutional processes of colonial aphasia or amnesia.

The racialization of the EU Schengen visa regime, which reproduces the colonial sedentary bias, has a critical importance in the decolonial agenda for EU migration and asylum law, and can be examined in relation to related regimes, such as external border controls and processes of externalization of EU borders, the construction of the economic migrant and the Common European Asylum system. Such analyses, however, can be deepened by exploring the intersection of race with other epistemic formations, something that remains largely unexplored in existing literature. They can also benefit from inquiries into the relationship between EU migration and asylum law and the colonial cheap labour bias, also generally unaddressed. This can be a particularly fruitful path for examining the construction of the economic migrant, which would have to explore not only the exceptional regimes of labour mobility in EU law, but also the economic dimension of other regimes of migration, such as asylum and family reunification, and EU labour law. Other possible avenues include archival research, for example to examine the debates that led to the Schengen regime, or to the establishment and the unfolding of the migration-development, or the migration-development-security, nexus.

These suggested directions for future research in EU migration and asylum law should be viewed as a starting point rather than an exhaustive list. Future research should be approached with an openness to diverse methodologies, including discursive or narrative analysis, archival research, participant observation, and other relevant tools. Existing decolonial and postcolonial literature on migration and asylum offers valuable insights and interdisciplinary pathways, yet the goal is to expand this work by specifically investigating how (neo-)colonial epistemic formations have been woven into EU migration and asylum law, with the objective of advancing Europe's unfinished project of decolonization.