TERRITORIAL PRESENCE, LEGAL ABSENCE:

LEGAL FICTIONS IN THE EU NEW PACT ON MIGRATION AND ASYLUM

A TWAIL Analysis of Non-Entry and Postcolonial Bordering in European Migration Law

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ABSTRACT

The EU's New Pact on Migration and Asylum reshapes legal boundaries through the concept of the 'fiction of non-entry' and thereby reinforces postcolonial hierarchies of exclusion within contemporary European migration governance. Taking the theoretical perspectives of Third World Approaches to International Law (TWAIL) and legal geography, this thesis analyzes how the EU constructs legal spaces to displace migrants from legal recognition, allowing Member States to limit their human rights obligations while maintaining their international commitments. The research employs Critical Discourse Analysis to analyze the New Pact's selected legal files, namely the Screening Regulation (SR), the Asylum Procedure Regulation (APR) and the Border Return Procedure Directive (BRPD), and how these legal texts reproduce power relations in migration law. Future research should explore how international law can be harnessed to challenge these exclusionary practices and advance equality in migration governance.

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CHAPTER 1: INTRODUCTION

"Different places are formed of distinct nodes of relations, distinct positionings, within the wider global spaces," writes Doreen Massey in her book For Space (2005). The geographer understands places as relational, where territorial boundaries do not just reflect geography but articulate different histories of domination, connection, and exclusion (Massey 2005).

This thesis examines how EU migration governance, specifically the legal fiction of non-entry, manipulates spatial and legal boundaries to sustain an unequal 'Global Mobility Infrastructure' (Spijkerboer 2018). With the introduction of the New Pact on Migration and Asylum (New Pact hereafter), which entered into force in June 2024, the EU claims to improve the Common European Asylum System (CEAS). Yet, human rights organizations and legal scholars have expressed concern about its reliance on legal constructs that allow migrants to be physically present within EU territory while remaining legally 'outside' (e.g. Mitsilegas 2022, Cassarino and Marin 2022, Soderstrom 2022).

I argue that the New Pact's spatial and procedural arrangements are not neutral legal tools but reproduce colonial hierarchies of inclusion and exclusion by zooming in on the fiction of non-entry. These legal arrangements rely on what Third World Approaches to International Law (TWAIL) scholars have called the civilizing mission of international law, where European law was historically grounded in racialized distinctions between the 'civilized' and the 'uncivilized' to justify imperialism (Anghie 2005). Today, the spatiality of EU law continues to rely on such distinctions by displacing rights and responsibilities away from EU territory toward zones of legal ambiguity but only for some. Although stricter migration control is often understood as a consequence of the 2015 'migration crisis' (e.g. Gambazza 2024), in this research, I aim to historicize these recent developments through the following question: how does the fiction of

non-entry in the EU's New Pact on Migration and Asylum manipulate space to reinforce postcolonial patterns of exclusion?

To do so, this thesis begins by outlining the legal and political developments leading to the New Pact to contextualize the legal developments. I then review the literature on legal fictions and shifting borders, followed by an exploration of Third World Approaches to International Law (TWAIL) and legal geography. These theoretical frameworks provide my understanding of how the law produces spatial dislocations that reinforce a global migration regime marked by inequality. Applying this lens to the New Pact, I argue that the EU's border regime operates through juridical fictions that reproduce colonial modes of control while being able to maintain international obligations to human rights and international protection.

CHAPTER 2: CONSOLIDATING EUROPE'S BORDERS

The goal of this section is to provide a brief overview of Europe's migration governance and the political crisis that led to the ratification of the New Pact. The New Pact came into force in June 2024 and will be fully implemented across all EU Member States by June 2026. Its ratification in April was supposed to represent a solution in response to Europe's so-called 'migration crisis' (Gambazza 2024). However, this crisis was not characterized by an unparalleled 'wave' of migrants: irregular boat crossings have existed since the 1990s, and these movements did not surpass global migration trends or historical events, such as the post-World War II displacement or the Yugoslav Wars (Crawley et al., 2018). Although the number of arrivals was notably higher within a shorter period, most of those fleeing conflict sought refuge in neighboring countries, making up only a small portion of the global displaced population (Crawley et al. 2018). Nevertheless, the images of refugees arriving on Greek shores in 2015, driven by the Arab Spring and the Syrian Civil War, dominated the discourse (Crawley and Skleparis 2017). Rather than a 'migrant crisis,' this moment exposed a crisis of Europe's borders, where elite policy discourse and media narratives framed 'irregular migrants' as a threat to the EU's economy, identity, and solidarity as a sovereign political entity (Vaughan-Williams 2015). This narrative fueled the rise of populist and anti-EU parties, exemplified by Brexit, which strongly or moderately opposed EU policies (Gambazza 2024).

The EU's migration policy has evolved significantly, starting with the Schengen Agreement in 1985, which abolished internal borders between Belgium, Luxembourg, the Netherlands, France, and Germany (Walters 2002). It was only in the Tampere Council (1999) that Member States formally established the CEAS, aiming to create common asylum and border security standards across the EU (Vaughan-Williams 2015). The Hague Programme (2004) sought to align legal frameworks for asylum and external border control, blending migration management

with border security. This was further reinforced with the creation of FRONTEX in May 2005, which coordinated border security efforts across Member States (Gambazza 2024). Over time, organizations like the Trevi Group (1989) and the Schengen Convention (1990) integrated immigration and asylum with broader security concerns, including counter-terrorism, setting the stage for a complex and interconnected border management system. Scholars highlight a paradoxical cycle where stronger border security regimes lead to an increased number of 'irregular migrants', reinforcing the perceived need for further border control (Andersson 2016, Vaughan-Williams 2015, Tsourdi and Costello 2021).

The 2015 'migration crisis' resulted in varied approaches by EU Member States, such as reinstating internal border controls and overall rhetoric in which migrants were seen as threats to national security. The Dublin Regulation, assigning asylum responsibility to the first country entered, was supposed to act at least partially as a resolution, yet revealed significant limitations in cooperation (Tsourdi and Costello 2021). The EU also reached bilateral agreements, such as the EU-Turkey deal (Ovacik et al. 2024), to lessen 'irregular flows' by returning migrants from Greece to Turkey in exchange for resettling refugees and financial contributions. Yet, investigations revealed how Syrian and Afghan refugees in Turkey were subjected to abuse and torture in EU-funded centers before being deported to dangerous conditions, with the EU complicit in funding this deportation infrastructure (Bulman et al. 2024). Although returning home was unsafe for applicants, the EU instead let Turkey prevent their entry into Europe in exchange for financial support (Bulman et al. 2024). This externalization has become a central pillar of EU migration management, evidenced by return and readmission agreements and aid deals that address the 'root causes' of migration (Niemann and Zaun 2023).

In 2020, Member States relaunched negotiations to reform the CEAS, aiming to overcome divisions over responsibility-sharing and asylum procedures at Europe's external borders (Mouzourakis 2021). After the difficult negotiations of the 2015 Agenda on Migration, the

revised package of legislation was intended as a 'fresh start,' ensuring migration management would be 'fair, efficient, and sustainable' (European Commission 2020). However, internal divisions remained, with Hungary and Poland opposing the New Pact and voting against the legislation, arguing that it would force them to host migrants (Liboreiro 2024). Despite their opposition, the New Pact was ratified with a qualified majority, structured around four key pillars: Secure external borders, Fast and efficient procedures, Effective solidarity and responsibility, and Embedding migration in international partnerships (European Commission 2024). Multiple legislative files have been adopted, such as the Screening Regulation (SR), where asylum seekers must undergo health, vulnerability, and security checks before being considered for asylum or return procedures, reliant on the fiction of non-entry. The revised Asylum Procedures Directive (APR) continues the reliance on the fiction of non-entry, ensuring that asylum seekers are not considered to have entered the EU until their claims are processed. Border procedures can even extend beyond physical borders to other areas within the EU territory, effectively keeping asylum seekers in a 'space of exception,' where they are not legally recognized as having entered European territory (Mouzourakis 2021).

The governance of borders and the shaping of international migration in the EU is formed through legal mechanisms, from the Schengen Agreement to the newest iteration in the form of the New Pact. Some of these new legislative files rely on the fiction of non-entry, which will be further explored in the next section. Additionally, that these legal constructs are not neutral or new but interwoven with exclusionary practices stemming from Western European empires and their global imperial control of mobility, will be further examined through TWAIL scholarship, as well as legal geography. This provides further insight into how recent EU migration governance is not just about the 'migration crisis' but formed by historical processes reflecting colonial legacies.

CHAPTER 3: LEGAL FICTIONS AND SHIFTING BORDERS

The literature review that follows will start with examining legal fictions and its role in shaping borders as socially constructed and politically contested spaces. Then, I will further highlight how TWAIL critiques these mechanisms, showing that they are not only a product of modern state interests but also a continuation of colonial power dynamics. The work of legal geography scholars further underscores how spatial practices, such as the externalization of borders and the use of 'buffer zones,' are central to understanding how borders are not just geographic but politically dependent. The literature review will explore the intersections between migration law, sovereignty, and global inequalities to analyze how these continue to define the EU's migration regime.

Legal Fictions and the Mapping of EU Border Control

To understand the manipulation of space within the EU's New Pact on Migration and Asylum, the exploration of legal fictions is necessary, particularly the fiction of non-entry in EU migration law. Legal fictions, while not grounded in objective reality, are tools employed in the legal systems to achieve practical objectives while suspending reality momentarily. This section will review the theory of legal fictions as well as their use in migration law and how they appear in EU asylum policy.

Legal Fictions and Borders

In the legal literature, several functions of legal fiction have been proposed with diverging objectives. Often cited is the work by Lon Fuller (1930), who defines a fiction as a statement put forward while being aware of its falseness yet acknowledged for its practical applicability. Importantly, this is not an exception. Instead, he argues that the law is 'founded upon fictions' (Fuller 1930, 363). This definition is close to the one provided by theorist Pierre Olivier (1975),

who sees them as legally mandated assumptions that contradict reality but are applied to enforce or clarify legal rules (81). The difference here is in the way that Fuller views legal fictions as knowingly false statements justified by their practical usefulness, while Olivier treats it as a more rigid legal tool. This distinction is important as it shows that legal fictions are not always seen as falsehoods to be discarded but rather as pragmatic tools for legal reasoning and adaptation. This is further exemplified by the definition given by Del Mar (2013). Instead of understanding legal fictions as intentionally misleading, they can be tools for courts to pilot new legal ideas and adapt the law slowly accordingly (Del Mar 2013).

One clear example of legal fictions in practice is the concept of borders, which are shaped by legal assumptions rather than physical realities. The use of legal fictions to define borders is not a particularly new phenomenon. While they are often taught in classrooms as fixed lines on the world map, many scholars have highlighted the social and legal fluidity of borders (Walters 2002, Massey 2005, Casas-Cortez et al. 2014). The border is here defined through the process of governmental actions such as administration, security, and the governance of populations (Walters 2002). Instead of sovereignty being fixed and synonymous with territory, it is something that moves inward and outward to regulate the mobility of people (Casas-Cortez et al. 2014). Recognizing the evolving nature of lawmaking and enforcement helps reveal its dual role in both reinforcing border controls for some and dismantling these for others (Gazzotti 2023).

Ayelet Shachar builds upon these insights while focusing specifically on the role of law in guiding the multidirectionality of the 'shifting border' (2020). Borders are redefined not physically but in terms of legal and political power, shaping who can and cannot access them. Shachar emphasizes how the regulation of mobility through the application for visas, asylum laws, and citizenship creates distinctions in access, rights, and protections within specific jurisdictions (2020). Countries such as Canada, Australia, and the United States have relied on

these legal tools to securitize their borders and complicate or halt the movement of people, with the goal of protecting their sovereignty (Foster and Pobjoy 2011: Maillet 2018).

As Basaran (2008) argues, law plays a constitutive role in the creation of border zones by defining where rights apply and enabling states to assert territorial boundaries as the limits of their jurisdiction. Through legal constructions that treat certain individuals as having not 'legally entered,' states produce zones of diminished rights designed to restrict procedural safeguards and external oversight. These are not zones of legal vacuum but spaces where jurisdictional responsibility is contested or deliberately obscured (Basaran 2008). However, while states may attempt to sever the link between physical presence and legal accountability, international law does not always allow jurisdiction and the corresponding human rights obligations to be defined solely by territorial admission. The implications of this tension will be further explored in the next section.

Excision and Jurisdiction: The Legal Manipulation of Space

One such legal mechanism of border control is excision, where certain areas are formally withdrawn from the authority of the state (Gammeltoft-Hansen 2013). This mechanism highlights the complexities of the relationship between the state, law, and territory. Jurisdiction is traditionally understood as being tied to a state's control over a specific geographical area (Gammeltoft-Hansen 2013). However, legal scholars have emphasized that the legal framework of jurisdictions exists out of exceptions to this. According to Maillet et al. (2018), states use jurisdiction to enforce exclusion and strategically shape legal boundaries that extend beyond physical territory. These border zones, while shifting geographically, are never lawless; exclusion is always legally structured, though in varying ways (Maillet et al. 2018). Some examples the authors focus on are enforcement practices pushing outward and restricting mobility earlier in migrants' journeys (Maillet et al. 2018). However, in contrast to moving the

border outward, excision is better understood as the deliberate reclassification of territory, transforming certain areas into legally withdrawn spaces with the purpose of avoiding legal liability (Rondine 2024). Australia's use of excision zones, extensively documented since 2001, has redefined its territorial boundaries by designating many coastal islands as areas where asylum seekers arriving by sea are classified as 'unauthorised maritime arrivals' and are legally considered outside Australia's migration zone (Vogl 2014). As a result, people are barred from applying for asylum through the country's onshore visa process, as outlined in the Migration Act. While international frameworks such as the 1951 Geneva Convention relating to the Status of Refugees still apply, Australia shifts responsibility for asylum claims away from its jurisdiction (Foster and Pobjoy 2011). This approach is not unique to Australia; many European countries have, for example, established 'international transit zones,' such as airports, where arrival does not legally constitute entry into a country's territory, creating the ability to restrict access to asylum procedures (Rondine 2024). Hathaway and Gammeltof-Hansen (2015) argue that practices of non-entree allow states to uphold the principle of refugee protection and, more importantly, to maintain the appearance of compliance with international legal frameworks while minimizing their actual responsibility.

In contrast to excision, the fiction of non-entry does not designate parts of a state's territory as falling outside its legal jurisdiction. Instead, it constructs a legal condition in which individuals who have physically crossed the border are not deemed to have legally entered. As Saskia Sassen (1996) argues, the state exerts its power not merely over territory but through the classification of individuals as subjects of enforcement by regulating entry and controlling legal recognition. By withholding that recognition, the state can deny access to procedural rights and protections otherwise triggered by presence on the territory (Sassen 1996). Yet this strategy of legal denial is not unchallenged: the jurisprudence of the European Court of Human Rights

(ECtHR) has, at times, held that effective control, rather than formal entry, is the relevant threshold for triggering state responsibility under human rights law.

In the case of Amuur v. France, four Somali nationals arrived at the international airport of Paris and were sent back to Syria without access to legal or social assistance (ECtHR 1996). The Court ruled that Article 5(1) of the European Convention on Human Rights was violated and emphasized that despite the designation of the airport as a transit zone, France still exercised sovereignty over its operations (ECtHR 1996). Despite these rulings, the broader trend of non-entry practices, for example, in Spain's pushback policies as seen in N.D. and N.T. v. Spain, highlights a more ambiguous legal strategy where migrants are treated as if they have never entered a country when their entry is seen as 'illegal,' thereby limiting their access to asylum procedures. In N.D. and N.T. v. Spain, the Court upheld Spain's border pushback practices, finding them lawful on two conjunctive grounds: the use of force and violence during the crossing (para. 231) and the availability of alternative 'accessible legal pathways' for seeking asylum[2] (para. 212; ECtHR 2020). This ruling emphasized that if people cross the border 'illegally,' they can be considered as not legally entered and therefore limit their possibility to apply for asylum. Some have argued that these judgments illustrate how courts have increasingly aligned with political realities at the borders (Lang 2024). While others argue that this does not create an absolute legal void where asylum claims become impossible, overall concerns persist about the gradual erosion of rights (Jakuleviciene 2024). Rondine (2024) contends that this is precisely why the EU has turned to more complex mechanisms to restrict access to protection by relying on a legal fiction of non-entry.

[2] Importantly, the Court emphasized the possibility of entering the EU legally. However, pathways for legal entry are not as clear-cut and easily accessible. As highlighted by Daniel Thym, humanitarian visas are only available to refugees, and the limited number of work visas available for people from countries in West-Africa, makes these options practically unattainable for migrants from that region (2020).

The New Pact: A Legal Fiction of Non-Entry

Amid ongoing trends of border externalization, detention practices, and hotspot approaches, the EU introduced the New Pact in September 2020 to reform the migration system (Cornelisse 2022). The Communication from the Commission on a New Pact on Migration and Asylum outlines that it aims to guide the European migration process to create a sense of stability and manage migration in an 'effective and humane way, fully in line with our values' (COM(2020) 609 final). The full implementation of the different legislative files is expected by July 2026. Before examining how the fiction of non-entry is operationalized in the New Pact, I first situate this concept within the pre-Pact legal framework, which does not explicitly adopt the fiction of non-entry but implicitly relies on it (Rondine 2024). The EU currently has different sets of laws that apply to the border procedures and have the aim to exclude 'unadmitted Third Country Nationals.' These are the Schengen Border Code (2016/399, hereafter SBC), the Asylum Procedure Directive (2013/32/EU, hereafter APD), and the Return Directive (2008/115/EC, hereafter RD). The SBC requires border checks for individuals crossing into a country, temporarily limiting freedom of movement and giving member states discretion in how to manage these checks (Art. 8). In combination with Article 14, which concerns refusal to member states' territory when people do not fulfill the entry conditions, it presumes that only people fulfilling certain conditions are present on European territory[3] (14(1)). The APD outlines that decisions should be made within four weeks under the border procedure, but applicants are not considered to have entered the country until a decision is made[4] (Art. 43(2). Lastly, the RD permits member states to exclude cases from its application at the border, enabling quicker

[3] These arguments are based on the analysis of the fiction of non-entry in the EU pre-New Pact legislation by Francesca Rondine (2024).

[4] Applicants have a right to not be formally expelled during the assessment but are also not considered as formally having entered Schengen. In Case C-606/10, it was concluded that someone can legally remain without being admitted (CJEU 2012, par. 68), showing the legal limbo at the EU external borders.

removal of individuals who cross irregularly and allowing simplified return procedures at external borders while affecting detention and legal remedies for deportation (Art. 2(2)(a)).

The New Pact builds on these existing regulations, arguably allowing for a swifter regime where people are isolated from legal protection at the borders (Mitsilegas 2022). Various scholars have highlighted the detrimental impact the New Pact most likely will have on asylum seekers' rights. The border procedure will exist out of the pre-entry screening, an asylum procedure as well as a return procedure when applicable (Vedsted-Hansen 2020). The Screening Regulation relies on the fiction of non-entry, as it introduces a transit zone where people are not 'authorised to enter the territory of a member state' (Regulation (EU) 2024/1356, Article 4(1), hereafter SR). According to Vedsted-Hansen, the SR aims to streamline the asylum procedure but risks the possibility of access to fair asylum procedures as acceleration procedures and admissibility decisions will lead to a rushed process (2020). Furthermore, others have argued that because the pre-entry screening regulation allows states to detain irregular migrants, it will create new detention centers or camps, therefore reinforcing the problematic present situation (Cassarino and Martin 2020, Cornelisse 2022).

However, the fiction of non-entry extends beyond the screening phase. The Asylum Border Procedure (ABP) under the Asylum Procedure Regulation (Regulation (EU) 2024/1348, hereafter APR) covers the application of international protection for people who did not fulfill the SBC conditions. These could be, for example, people who have disembarked from search and rescue operations or if there was an 'unauthorized crossing of the external border' (APR, Art. 43(1)). The new ABP, applicable from 2026, assumes that applicants have not entered European territory either and allows detention up to 12 weeks, four times longer than current practices (Art. 51(2)). This fiction further extends to the Border Return Procedures (Regulation (EU) 2024/1349, BRP hereafter) where rejected applicants are similarly decided to be outside of EU territory, reinforcing a framework that limits their rights (Tsourdi 2024).

Furthermore, other recent legislative instruments under the New Pact, such as the Crisis and Force Majeure Regulation (Regulation (EU) 2024/1359), expand states' possibilities to derive from procedural standards. The latter explicitly allows exceptions during situations of 'instrumentalization' of migration, where people are politically framed as tools of pressure by, e.g., other states (Art. 4(1)(b)). These provisions deepen the legal normalization of exclusion, entrenching the fiction of non-entry as a governing logic in both ordinary and exceptional migration management scenarios.

The following section will focus on how fictions of non-entry are not neutral legal tools but are embedded in a historical pattern of organizing global mobility. The fiction of non-entry is not merely a strategy by states to derogate migrants' rights. Instead, through the lens of TWAIL, I hope to show that it is morally problematic because it uses law as a tool of exclusion in a manner that mirrors the colonial logic through which international law itself was historically constituted.

Third World Approaches to International Law

Having explored the mechanisms of legal fictions in migration law, I am now turning to the critical theoretical framework of Third World Approaches to International Law (TWAIL). I aim to show that while TWAIL scholars have critiqued the racialized and colonial nature of migration regimes, not much attention has been paid yet to how legal fictions, particularly the fiction of non-entry, manipulate spatial boundaries within the context of the EU's New Pact. By introducing broader concepts of modernity and legal geography, I hope to address how legal fictions and colonial legacies shape migration law today.

The Emergence and Core Tenets of TWAIL

TWAIL originated in response to the hierarchies in the international legal system (Bianchi 2016). Early scholars highlighted the role of the law in facilitating and legitimizing colonialism and saw the system itself as a potential way to achieve independence and sovereignty for formerly occupied nations (Anand 1987; Gong 1984). This developed into a more critical stance, arguing how international law marginalizes vulnerable groups and perpetuates colonial legacies while claiming neutrality (Anghie and Chimni 2003). For example, scholarly work has drawn attention to an unequal political economy, pointing out issues such as intellectual property rights and the exploitation of national resources through the international legal order, as well as the unequal foundations of human rights law (Eslava and Pahuja 2011, Gathii 2022). Others, such as Anghie (2005) and Buitendag (2022), have drawn attention to the legal language of borders and sovereignty used during the Berlin Conference of 1884-85 to justify the exploitation and denial of sovereignty to colonized people under the pretense of humanitarian missions.

Central to the TWAIL approach is the understanding that international law is not an objective legal system but is shaped by powerful states and disproportionately affects people from the Global South (Bianchi 2016, Bendel 2021). TWAIL scholars have highlighted how central legal doctrines such as sovereign equality and human rights have not been formulated in isolation but in relation to colonialism (Gathii 2022). A criticism of TWAIL has been for its lack of a clear solution-oriented approach. However, scholars like Eslava and Pahuja (2011) argue that its aim is not to reject international law but to highlight power dynamics to transform from within[5].

[5] This might not sound as a concrete institutional solution. However, they describe TWAIL's value as lying in its dual strategy of resistance and reform: by taking a unique political stance that challenges dominant legal narratives, and highlight that the law is not value-free, it seeks to reorient international law toward more just outcomes.

Although there are diverse perspectives within TWAIL, this approach would focus on the law's potential to advance justice for historically marginalized communities.

Another criticism of TWAIL has been its reliance on the dichotomy of 'First World' versus 'Third World.' Some scholars have argued that this binary is less relevant in the context of emerging global powers like the BRICS countries, which contribute to a multipolar world order (Zoellick 2010). Despite this, TWAIL scholars maintain that the 'Third World' is not a fixed geographic location but rather a political project (Prashad 2007). Doreen Massey (1995) elaborates on this by arguing that the 'geographical imagination of power' means that representations of the world are always embedded in ideologies. Consequently, the concept of the Third World is better understood as a reference to the struggles and experiences of marginalized communities (Okafor 2008). As B.S. Chimni (2006) articulates in his TWAIL manifesto, while recognizing the diverse social, economic, and political realities of different nations, it is still crucial to acknowledge the structural constraints imposed by the global economy, which disproportionately affect certain countries[6].

Colonial Legacies in Migration Regimes

One legal doctrine where divisions between the Global North and Global South become visible is in international migration law. TWAIL scholars fundamentally critique the colonial legacies apparent in contemporary migration regimes as mechanisms that reinforce racial hierarchies and neocolonial power structures. Scholars like Chimni (2006) and Achiume (2019) suggest that migration from the Global South should be understood as a decolonial act, challenging historical and contemporary imbalances in political power and sovereignty. Chimni argues that

[6] In this work I am using First World/Third World interchangeably with Global North/Global South. These are not set geographical locations but point to the power hierarchies stemming from colonial legacies. There are overlapping features between the terms although not always used in the literature synonymously; Third World is often marked by the Bandung Conference of 1955, whereas the Global South also can refer to oppressed communities (or economic disadvantages countries) within The Global North. For further discussion on terminology see Stavrianos 1981 or Grovogu 2011.

the ‘myth of difference,’ the idea that refugees from the Global South are fundamentally different from those in the Global North, has been used to justify exclusionary practices and focus on voluntary repatriation (2006). Most recently, the 'myth of difference' became evident in the selective activation of the Temporary Protection Directive (TPD) in response to the war in Ukraine. While the TPD granted immediate protection to Ukrainian nationals, its application explicitly excluded most third-country nationals who lacked international protection or permanent residence status in Ukraine ((EU) 2022/382, Art. 2). Although this distinction was legally provided for within the TPD framework, it effectively created a two-tier system of protection. As Ineli-Ciger (2023) argues, the unprecedented solidarity shown in this case, compared to the EU’s inaction during crises in Syria or Tunisia, reflects the racialized logic of refugee protection stemming from the perception of Ukrainians as white, Christian Europeans.

Importantly, not all instances of exclusion or mobility control are inherently postcolonial or racially motivated. TWAIL does not argue that every act of state exclusion is unjust; rather, it interrogates the global asymmetries in mobility regimes that were shaped historically through colonial conquest and have been institutionalized through international law (Anghie 2005; Spijkerboer 2018). These hierarchies persist today through visa regimes, passport privileges, and carrier sanctions, forms of control that disproportionately restrict mobility from the Global South (Achiume 2020; Spijkerboer 2018). Importantly, this does not limit the possibility for postcolonial states to adopt and adapt the logics of colonial migration control. Sadiq and Tsourapas (2021) in their paper on migration control in India and Egypt, highlight how these states, post-independence, have relied on the control of cross-border mobility that prioritizes specific groups of citizens at the expense of others[7].

[7] One example given in Sadiq and Tsourapas (2021) is the policy difference in Egypt between ‘temporary’ and ‘permanent’ migrants, prioritizing the needs of the permanent migrants. The distinction is practice mostly based on the country of destination, with permanent migrants is meant the people that emigrate to the ‘West’.

However, the historical global ordering of mobility, who may move, how, and under what legal protections, was institutionalized by European empires (Achiume 2020). These powers pioneered the racialized migration restrictions that have become the norm globally (Lake and Reynolds 2008). Literacy tests, passport requirements, and national origin quotas were explicitly developed to exclude Asian and African migrants while maintaining racial homogeneity (Achiume 2020; Mongia 1999). To understand how these logics operate today, it is important not to conflate all forms of border control with postcolonial exclusion. Rather, TWAIL directs attention to the structural disparities embedded in the global legal order, disparities that former colonial powers played a central role in shaping. These distinctions matter: exclusion becomes postcolonial not simply when states exercise migration control but when such control reproduces historical patterns of racial and geopolitical domination while denying accountability through international legal norms.

These critiques from TWAIL align with broader scholarship on the racialized genealogy of migration governance. Mayblin and Turner (2021), for example, offer a historical, sociological perspective that traces how colonialism, dispossession, and racial hierarchies have influenced how modern border regimes operate. Their concept of the 'coloniality of migration control' echoes TWAIL's emphasis on historical continuity, illustrating how tools such as passports, quotas, and detention regimes are legacies of imperial strategies of population management and labor extraction. Importantly, while their work draws from different disciplinary traditions, it underscores the same central insight: that contemporary migration policies are not neutral mechanisms of state sovereignty but products of a longer history of racialized governance tied to the European empires[8] (Mayblin and Turner 2021, 84).

[8] It could be argued that early European migration controls, such as serfdom or emigration restrictions, were not racialized, and that Asian empires like China and Japan also restricted mobility on civilizational grounds. While this is true, these did not have the same global reach as the European empires had during colonialism. TWAIL and postcolonial scholars focus on how the modern international migration regime emerged through European

Space, Place, and Legal Geography

Important to the discussion of borders, migration, and colonialism is the idea of modernity, which has historically framed time and space in a linear, Eurocentric manner. This framework has led to the categorization of some countries as 'underdeveloped' or 'backward' (Mayblin and Turner 2021), reinforcing a geographical hierarchy where non-Western nations are placed on a Western timeline. Places become defined by the West's idea of progress instead of acknowledging the relational ties between places[9]. As Kinnvall (2015) argues, this narrative is not limited to geography but extends to space and time, with Europe positioned as the pinnacle of modernity, while the rest of the world is often seen as caught in historical phases of underdevelopment. This understanding justifies policies such as inequities regarding visas, settling, and traveling, which are based on the geographical imaginations of 'the Other' as 'backward' and 'uncivilized' (Walia 2013). These categorizations reinforce spatial boundaries that dictate who belongs and who does not, both politically and culturally, with the notion of modernity used to maintain exclusionary borders. Kinnvall's postcolonial lens on Europe further complicates this narrative by emphasizing that colonialism never entirely left Europe; rather, it continues to shape European space and temporalities, influencing how borders are conceptualized and how migration is regulated today (2015).

Beyond TWAIL's critique, which challenges the racialized and colonial nature of migration regimes, legal geography highlights how border regimes actively shape spatial inequalities. Migration laws create hierarchical spaces, privileging the movement of Global North

imperialism and institutionalized racial hierarchies globally (Achiume 2020; Anghie 2005; Mongia 1999). These colonial powers developed legal and bureaucratic tools that transformed racialized exclusion into the current international system.

[9] To be more concrete: these relational ties are colonial conquest and extractive economic exploitation where the Third World was integrated into the global economy as suppliers of enslaved labour and producers of raw material. These were then for the benefit of the metropole while consequently destroying local economies and communities. Therefore, underdevelopment does not have to do e.g. with a lack of scientific transformations but with the consequences of colonial expansion and are thus relational (See e.g. Rodney 1972).

populations while restricting those outside the borders of Europe (Kinnvall 2015). Legal geography highlights how legal systems are deeply embedded with spatial practices and power dynamics instead of just concerned with static space (Braverman et al., 2014). Earlier scholarship on space in law often assumed space was a distinct object on which law was applied, creating universal laws but acknowledging spatial differentiation in their application (Blomley and Clark 1990). In contrast, legal geography now understands space as a relational concept - one that is shaped through interactions, such as the way undocumented migrants experience the border deep within a state, far from the physical boundary (Braverman et al., 2014). Legal geography has engaged with colonial border-making by assessing how Western legal systems have ranked the world territories hierarchical, as the historical origin of legal spaces is central to many legal geographers (Braverman et al. 2014, Nicoloni 2022). By integrating legal geography with TWAIL's critique, we can gain a better understanding of migration law functions within a larger geopolitical system that divides the world into spaces of privilege and exclusion. Legal geography thus offers an essential framework for unpacking how spatial power is exercised through law and sovereignty, moving beyond the idea of a fixed space and reinforcing the same colonial and racial structures that TWAIL critiques in the migration context.

By merging TWAIL and legal geography, I aim to address the gap by approaching the fiction of non-entry from a historical perspective. Whereas the legal fiction of non-entry is mostly analyzed as a recent development in response to the 'refugee crisis,' I argue that it is in line with a long history of global mobility control. Legal geography has drawn attention to the history of bordering but without TWAIL's focus on racialized hierarchies that can be produced by the spatial practices of law. By combining these two frameworks, I aim to show that the fiction of non-entry does not only change legal borders but, in doing so, reproduces global inequities in migration governance.

CHAPTER 4: THEORETICAL FRAMEWORK

Different theories in international relations and international law are shaped by underlying scholarly assumptions, which influence how law is understood and interpreted (Bianchi 2016). These different perspectives are not interchangeable but represent distinct ways of approaching legal questions and addressing different issues within the realm of international law (Bianchi 2016). This section justifies the TWAIL approach and further highlights why this framework, in combination with legal geography and its approach to space, will help to explore how the EU's New Pact on Migration and Asylum creates spatial realities that reinforce postcolonial patterns of exclusion.

The Global Hierarchies of Migration

As highlighted in the previous section, TWAIL emphasizes the historical and contemporary patterns of exclusion that define the international migration regime. Importantly, it is not arguing that exclusion as a standalone measure is postcolonial; rather, the overarching inequalities that exist within the 'Global Mobility Infrastructure' originate from the governance of mobility during the European empires (Spijkerboer 2018). TWAIL scholars (e.g., Anghie 2005, Chimni 2006, Achiume 2020) have shown how modern migration regimes continue to operate within racialized[10] frameworks that protect the interests of former colonial powers while restricting access to migration and asylum for populations from the Global South. These inequalities are visible, for example, through the access to citizenship, passports, and visas that

[10] Race is not a static category but redefines itself in different localities. Racialization is defined by Silverstein as the: "processes through which any diacritic of social personhood, including class, ethnicity, generation, kinship/affinity, and positions within fields of power, comes to be essentialized, naturalized, and/or biologized" (2005, 364). Notably, racialization does not always presuppose non-whiteness, as this is just as much a changing category. Earlier European migrant groups such as Celts or Eastern European Jews were 'othered' in other to create distinctions between 'us' and 'them'. When I refer to racialization or race, I am referring to these socio-political processes that treat people differently based on categories such as nationality, culture or religion.

guide the differentiation in migration and mobility (Achiume 2020). The European Schengen visa regime exists out of a list of countries that need a visa to enter based on their presumptive undesirability. Instead, individuals must prove on an individual, costly basis that they are different from their fellow nationals (Achiume 2020). Achiume highlights that most of the Global North is included in Schengen while most African and Asian countries are on the 'black list' (2020, 470). Visa decision-making is then based on strict documentation requirements and financial circumstances, whereas North Americans or other Global North countries are not restricted to the same requirements. As argued by Thomas Spijkerboer, this shows how migration law in the Global North facilitates the access of some with ease while simultaneously denying access to others based on race, class, and gender, therefore reinforcing inequalities within migration policy (2018). Importantly, this leaves not many other options for those excluded but wanting to access the Global North than informal border crossings and making use of dangerous smuggling routes, showing how the law is complicit in creating and upholding these inequalities (Spijkerboer 2018). Therefore, the fiction of non-entry should not be seen in its own right but analysed in contrast to these differentiations in mobility by asking for whom presence on European territory is legally made into non-presence. TWAIL scholars argue that the origin of these racial borders, as outlined above, can be traced back to European imperialism, where mobility was explicitly regulated in a way that the benefits of colonial exploitation would be allocated to the metropole (Achiume 2020). White-settler nations such as the United States, Canada, Australia, and New Zealand were some of the first to formalize systems for controlling migration and excluding specific groups of people based on race and ethnicity to maintain access to land and resources (Turner 2020). One example was the Chinese Immigration Act of 1855 in Australia, which restricted Chinese immigration and was specifically racially motivated to limit the competition for labor in colonial markets (Achiume, 2020). Lake and Reynolds, in their book 'Drawing the Global Colour Line,' discuss the racial

anxieties triggered by the influx of Indian and Chinese laborers into British colonies in the late 19th century (2008). The British used these racialized policies to limit the mobility of non-Europeans, ensuring that 'only Europeans could exercise freedom of movement' (Lake and Reynolds 2008, 26). Similar anxieties over the influx of Indian laborers into Canada made the Canadian government introduce passport requirements where nationality became a proxy for racialized exclusion without explicitly mentioning so (Mongia 1999). Achiume further explores how policies like the literacy test, which was initially used to disenfranchise Black voters in the U.S., became a tool for racial exclusion in immigration systems in South Africa, Canada, and Australia (2020). Unequal global migration has a historical foundation of racialized migration control evolving out of European empires. The former colonial powers, especially Britain, France, and other Western European states, held significant global influence, and their migration policies shaped the global migration system as these countries established migration laws to target and regulate the mobility of people.

The Law of Spatiality

Whereas TWAIL establishes the continuing inequalities within the global mobility infrastructure and points to its historical origins, further questions remain about the role of sovereignty and territory. To understand what role these play in the EU New Pact, I will rely on several scholars who have made connections between colonialism, the role of territory, and the making of international law. This will be complemented by theory from legal geography on the making of borders to inform my understanding of the fiction of non-entry.

Legal geography relies on the concepts of space, place, and sovereignty to understand how law actively shapes and defines these concepts. According to Nicolini in his book on comparative law and the production of space, 'spaces' become 'places' when they gain social and legal meaning as a site of human activity (2022). Law is central to the process of defining space into

a meaningful place and inscribing value onto landscapes through the assigning of rights, borders, or jurisdiction (Nicolini 2022). Within legal geography, a territory then becomes a governed space claimed by a specific community as a politically bounded jurisdiction with the power to control and define that area (Nicolini 2022, 23). Importantly, these processes are not neutral but reflect a politico-legal discourse that frames and reshapes the environment for political purposes. The *law of spatiality* refers to this production of space by highlighting how the physical environment is processed by political power and coded through law (Nicolini 2022, 6). Nicolini gives the example of rivers, stating that only once these are assigned legal meaning there is a legitimate political power to regulate them. However, even more instructive are the processes in colonial contexts in which colonial powers actively used legal frameworks to produce places in ways that legitimized their territorial expansion. Colonizers imposed foreign laws and a foreign spatial order on those lands, depicting the local population as 'savages' and declaring their territory empty of valid ownership, creating a legal justification for colonial appropriation (Nicolini 2022, 106). This is clearly illustrated by TWAIL scholar Anthonie Anghie, who shows how European international lawyers formalized occupation through the notion of terra nullius (2005). Using the myth of civilization in international law, they created a dichotomy between the 'civilized' and 'uncivilized' world, in which full sovereign rights could only be exercised by the 'civilized' states (Anghie 2005, 54). Consequently, if a region was inhabited by people who were considered not sovereign, it could legally be appropriated, which happened to enormous areas outside of Europe. By making indigenous people legally irrelevant, they created a legal fiction that ordered the world in a way that opened the space for occupation. Drawing these boundaries solved an inherent tension between the violent occupation that took place 'elsewhere'; Europe was the civilized, Christian world, whereas, on the other side of the lines on the map, there was chaos, barbarism, and therefore, freedom for land occupation (Nicolini 2022).

Colonialism was not just a political-military endeavor but a juridical project: it required crafting a legal geography where colonizers' place in the world was one of dominance. European empires turned geography into an architecture of empire by defining territories and their status in legal terms as colony, protectorate, mandate, or terra nullius[11] (Anghie 2005). This political processing of space into law both enabled and legitimized colonial practices: it provided the vocabulary (ownership, boundaries, jurisdiction) and the authority (sovereignty, civilizing mandate) to take control of lands across the globe.

Together, TWAIL and legal geography will inform my critical lens to analyze the fiction of non-entry in the EU New Pact on Migration and Asylum. Whereas TWAIL highlights the racial and colonial histories that are intertwined in today's migration regimes, I aim to find how the New Pact reproduces these hierarchies. Legal geography and the concept *law of spatiality* further shape my analysis by showing how law constructs place and territory not as neutral categories but as legally produced tools for exclusion. By examining how presence is defined as non-presence, I hope to gain more insight into how these techniques continue a Global Mobility Infrastructure that prefers European Sovereignty over Third World mobility and protection. My analysis will thus focus on the legal mechanisms through which the New Pact sustains the fiction of non-entry, asking not only how these are justified but for whom they function to include or exclude, continuing a longer colonial pattern of managing the Third World movement.

[11] These different forms of sovereignty were based on how Europeans saw local rulers. For example, Japan and the Ottoman Empire were seen as having partial civilization and therefore 'quasi-sovereign' (Anghie 2005). However, this still meant they could be subject to European oversight or unequal treaties.

CHAPTER 5: METHODOLOGY

Research Approach and Design

To analyze the New Pact, I have used critical discourse analysis (CDA) within a hermeneutic-interpretive framework, drawing on Third World Approaches to International Law (TWAIL) and legal geography. Legal texts are treated as artifacts that reflect and produce power relations, what Guest et al. (2012) describe as proxies for how institutions represent knowledge, emotion, and authority. As Hodder (2003), building on Derrida, argues, meaning is not fixed but evolves through re-reading; texts are shaped by their historical context and the interpretive lens applied to them. This historical sensitivity is particularly important for a TWAIL-informed analysis, which focuses on how colonial power structures persist in contemporary legal regimes through patterns of inclusion and exclusion.

Given that the New Pact was only recently adopted, this research does not assess implementation or practice but analyzes how the legal texts construct power, space, and exclusion through discourse. Following an abductive and hermeneutic process (Wernet 2014), the analysis combines close readings of specific legal provisions and their broader historical and theoretical contexts. Importantly, this approach is dynamic and iterative, allowing for an ongoing back-and-forth between theory and data, where theory is informed by emerging patterns in the data, and data is interpreted through the lens of theory, allowing continuous refine both the data and the aspects of theory that are informative to my research question.

Data Collection and Critical Discourse Analysis

The data I will rely on are the legislative files that compile the New Pact. These regulations and directives are my primary source data, complemented with secondary data such as the summaries and commentaries of the different laws by the European Commission (Morris et al.

1997). Documents, as physical traces of social settings, serve as ways to show how power and ideologies are embedded within social and organizational structures. They not only reflect the ways in which individuals, groups, and institutions represent themselves but are instrumental in our understanding of our surroundings (Webb et al., 2000). In this sense, documents act as vehicles for the negotiation of power and social norms, offering a lens through which we can examine how social practices are organized and represented (Coffey 2014).

This idea aligns with Wodak's perspective on discourse (2004), which she sees as both socially constitutive and socially conditioned. Discourse, whether in written, spoken, or visual form, plays a crucial role in shaping the identities and relationships of individuals and societies. Therefore, discourse creates and sustains power relations within society as much as it describes existing social structures. Fairclough and Wodak (1997) argue that discourse has ideological effects. It can perpetuate unequal power dynamics between social classes, genders, and cultural groups by representing people and situations in particular ways. Thus, documents are more than mere records; they are tools of power that contribute to reproducing or transforming the status quo by framing how we understand social identities and relations.

For my definition of power, I am relying on the one given by Teun van Dijk in his text on Critical Discourse Analysis (CDA), in which he describes CDA as a practise of analysis that highlights how discourse structures 'enact, confirm, legitimate, reproduce, or challenge relations of power' (2015, 467). Power is defined as the ability to control the thoughts and actions of others through resources such as violence, money, information, and knowledge (Van Dijk 2015). Relying on Gramsci's concept of hegemony, he explains that dominant groups exert their power through, e.g., laws and social norms, which can be embedded in everyday actions and routines, such as sexism and racism, and are important to consider at the group level (Van Dijk 2015). In this context, analyzing documents, whether legal texts or other written records, becomes an essential method for uncovering how discourse operates in producing and

reinforcing power structures. By interpreting the underlying structures, it is possible to see how social reality is constructed in migration and asylum law, where language often plays a central role in shaping who is seen as deserving of protection or rights.

While the analysis began with organizing legal provisions related to the fiction of non-entry, the interpretive process was not structured around formal coding. Instead, it followed a concept-driven and iterative process inspired by Wodak's (2004) approach to critical discourse analysis, where research questions are operationalized into linguistic and conceptual categories, which are then applied to the text based on the theoretical frameworks. In this case, the categories, such as sovereignty, legal subjectivity, spatial dislocation, and jurisdictional fictions, were drawn from TWAIL and legal geography. These themes were not isolated but functioned relationally, allowing the analysis to explore how the legal texts under investigation construct and reinforce exclusionary regimes.

One drawback will always be the abstracting of knowledge and recontextualizing this. Segmenting data means it is taken out of context and realized into a new set of relationships (Maxwell and Chmiel 2014). Therefore, I have tried to present the data in a narrative format, yet importantly, codes are never 'the whole story' (Coffey and Atkinson 1996). Yet this is precisely the goal of TWAIL research: to reassess international law, question its neutrality, and find the discourses of power that are taken for granted within this international legal framework. In doing so, it is relevant to redraw relations and find overarching or contrasting themes.

CHAPTER 6: ANALYSIS

This chapter critically examines how the EU's New Pact on Migration and Asylum constructs and operationalizes the fiction of non-entry to legally exclude certain non-EU nationals from full legal protection. A close reading of the Screening Regulation (SR), Asylum Procedure Regulation (APR), and Return Border Procedure (RBP) shows how legal mechanisms manipulate territorial definitions to deny access to rights despite individuals' physical presence within EU jurisdiction. Drawing on Nicolini's concept of the *law of spatiality* (2022), the analysis explores how law reshapes geographical and legal meaning to align with political objectives, producing legally grey zones that are formally inside, yet legally outside the EU. Simultaneously, the chapter builds on Anghie's account of international law's colonial foundations, where legal subjectivity and sovereignty were historically denied to colonized peoples through spatial-legal distinctions. In the contemporary EU border regime, these colonial logics persist in racialized exclusions, nationality-based hierarchies, and the externalization of responsibility through legal fictions. By analyzing how territorial presence is legally disregarded and mobility regimes hierarchized, this chapter aims to show how the New Pact sustains postcolonial legal geography that governs through containment, differentiation, and the selective utilization of law.

Fiction of Non-Entry in the Screening Regulation

The first step in the newly adopted Pact is the screening of people who are non-EU nationals ('Third Country Nationals')[12] and who are not in line with the requirements set out in the Schengen Border Code (Regulation (EU) 2016/399, hereafter SBC). People who undergo the

[12] According to SBC Art 2(6): "'third-country national' means any person who is not a Union citizen within the meaning of Article 20(1) TFEU". Article 20 establishes everyone holding a nationality of one of the Member States is a citizen of the Union.

screening procedure are assessed for vulnerability, health, identity, and security in accordance with the Screening Regulation (Regulation (EU) 2024/1356, Art 8(5)). Crucially, during this time, the people who are subject to the Screening Regulation 'shall not be authorised to enter the territory of a Member State' (Art 6). This clearly relies on a legal fiction, as it concerns people who have been 'apprehended' after crossing an external border or are disembarked 'in the territory of a Member State' after a search and rescue operation (Art 5(1)).

The Screening Regulation does not apply to all non-EU nationals but specifically to those who do not fulfill the entry conditions according to the SBC. Although this might seem to be a neutral check before entering the EU, the hierarchy of the 'global mobility infrastructure' (Spijkerboer 2018) becomes clear based on who is able to legally enter and for whom it is extremely hard to fulfill these entry conditions. As demonstrated by Anghie, this ordering of global mobility is not new, as international law historically has relied on the creation of legal subjectivity by defining who is sovereign and who is excluded (2005). Colonized subjects were systematically denied legal personhood in the international sphere, and their movement was tightly controlled by the imperial powers under the guise of order and civilization[13]. Like earlier colonial legal regimes that constructed tiers of legal subjectivity, modern mobility controls similarly operate through frameworks of racialized suspicion and geopolitical ordering (Achiume 2022). Contemporary mobility controls, such as visa regimes and entry screenings, echo these earlier colonial technologies of population management: they produce hierarchies of legitimate and illegitimate movement grounded in racialized ideas of who belongs within the legal space of the state and who does not.

[13] Some examples are given in Turner (2020) who shows that the British Empire's regulation of Indian indentured labor, exemplified by the Indian Ports Act of 1875, required strict documentation and approval for migrants, effectively controlling their movement. Once abroad, laborers were further confined by passport systems that restricted their mobility, justifying these controls under the guise of maintaining colonial order and protecting white settler interests.

The entry conditions are based on valid travel documentation, such as a visa, valid residence permit, or a valid long-stay visa, according to the SBC (Art 6). Additionally, people have to prove their financial means are 'sufficient' to stay in the EU (Art 6(4)). Visa conditions for people are based on nationality and closely related to socio-economic means. Comparing countries based on the regulation that establishes who needs visas to enter the EU, it becomes visible how citizens from the Global North, such as the United States and Australia, can freely travel, whereas, e.g., citizens from most African countries require visas[14] (EU 2018/1806, Annex I and II). Even more instructive is the map published on the website by the European Commission in which most of the globe is painted red to indicate the nationals who need a visa to enter the Schengen area[15] (2025). Simultaneously, the visa rejection rate for some of Africa's largest economies, such as Nigeria, was between 40 and 50 percent in 2023[16] (Foresti 2023).

According to Achiume, this sorting of people who are able to enter Schengen is highly racialized[17] (2022). Although the container of nationality is used as a neutral affront to halt 'unauthorized migration,' the result is a system where mobility for the nonwhite world is highly limited. Additionally, these EU visa regulations justify the ordering of mobility based on seemingly neutral criteria such as security and economic benefit (EU 2018/1806, Art 1). Nevertheless, following Nicolini, by inscribing meaning onto space and creating a stratified legal other that privileges certain nationals' movement over others, it clearly exemplifies the

[14] One exception is Latin America where citizens mostly do not have to get a short-term visa. Spain supported visa-free access for its former Latin American colonies, likely because its immigration policy reflects a perception of shared cultural and ethnic ties. Many of these countries had previously pursued whitening policies, encouraging European immigration to align more closely with European identity. (Achiume 2022, supra note 106; Chaizka et al. 2018).

[15] See Appendix 1 for the map

[16] As highlighted by Bigo and Guild (2005) African visa applicants face disproportionately high rejection rates due to systematic biases in the EU visa regime, which profiles applicants based on nationality, race, and presumed economic status. These biases are embedded in both the visa requirement lists and opaque, discretionary consular practices that treat applicants from African countries as high-risk by default.

[17] Although Third World Countries also have visa policies, limited studies available show that it is relatively easier to secure these visas for First World citizens than vice versa (Achiume 2022, supra note 138).

law of spatiality (2022). The law transforms space into a bordered zone of access and exclusion, mapping legal meaning onto geography in a way that mirrors colonial techniques of control.

The *law of spatiality* becomes even more evident when considering that the willingness of third countries on readmission agreements directly can influence visa requirements. When, for example, an asylum application is rejected, those with no right to stay according to the EU are meant to return either to their country of origin or a safe third country. As highlighted in the communication by the commission, only a third of people whose international protection is rejected return home (2020, 1). A solution for the commission is increased 'cooperation,' through which countries that fail to accept the return of their nationals after deportation can face punitive visa measures, such as increased fees or processing delays. Conversely, countries that comply with EU readmission demands may be rewarded with visa facilitation (European Commission 2020, 6.5). In this context, access to the EU is not only organized based on factors such as economic or security risks but strategically reordered based on the EU and its migration governance goals. One such example is the increased visa fee for Gambian nationals, which is justified by the fact that according to the law, identification and return have 'remained difficult' without signs of change (EU 2022/2459, 3). The EU argued that the agreed timelines under the EU-Gambia readmission arrangement were not followed, and The Gambia maintained a unilateral ban on charter flight returns until March 2022. As Nicolini argues, 'the law of spatiality rearranges all the 'facts' of the physical world after the logical space of political power and assigns them with a new meaning that fits into its agenda' (2022, 20). Visa policy is used to influence geopolitics and moves beyond merely regulating movement; therefore, it transforms legal space into this logical space of political power by cooperation, coercion, and

selective openness[18]. This reveals how the law does not neutrally operate onto space but actively produces it as a hierarchically ordered space arranged to fit European political interests.

Following the ordering of space through the creation of nationality hierarchies in terms of visa access, the territory is consequently manipulated for those who arrive at the borders 'unauthorized.' Accessing Schengen through legal means is an unequal process, where those who need to be in possession of a visa and are most likely to be denied end up crossing borders without fulfilling the entry conditions. Consequently, it is these nationals for whom the definition of territory is legally bent by pretending they have not arrived on European soil. Although the ground on which people stand is the same, based on ordering nationalities, legal fictions rooted in nationality distinctions subject people to differential treatment and lower individual rights guarantees. It reflects a continuity in the legal logic of the 19th century 'civilizing mission' with law as the construct to distinguish people between 'civilized' and 'uncivilized' to subordinate the sovereignty of indigenous people and justify colonial conquest (Anghie 2005, 62). These are now mapped not through empire but through nationality and economic capacity. The exclusionary logic in visa systems operates on two levels: first, the stigmatization of entire countries based on their perceived economic or geopolitical status, and second, the sorting of individuals within those countries based on their economic capacity. This sorting, however, is not race-neutral either; class is deeply racialized**,** as economic inequality and access to resources are historically structured by race. As Bhambra argues, "Class is not the operation of a race-neutral economic system, (…) race has been fundamental to the configuration of socio-economic inequalities" (Bhambra 2017). This reflects visa policies as a double-layered process where not only countries are stigmatized but then reflect deeper

[18] Countries strategically engage with the EU in the context of visa policies, negotiating terms and leveraging cooperation for their own political and economic interests. However, this relationship remains asymmetrical, with the EU often setting the terms of cooperation, reinforcing unequal dynamics in the geopolitical space of migration governance (see eg. Hinger and Lutz 2019).

assumptions about who can access wealth and security, with racialized populations unequally denied access based on economic capacity**.** The SR shows how legal access to territory and rights is tied to the constructed hierarchies of nationality, reproducing the logic that only those with the right passport and economic means are deemed 'civilized' enough. Those deemed outside this normative standard are not only subject to health and security assessments but are also legally dislocated. Consequently, people are physically present but conceptually erased through these legal fictions.

Fiction of Non-Entry in the Asylum Procedure Regulation

Following the SR, people applying for international protection are subjected to the APR. This regulation offers two main procedural tracks. In the accelerated examination procedure, where an application may be fast-tracked due to the case's circumstances, the applicant is considered to be on Member State territory (Art 42). However, under the Asylum Border Procedure, the applicant is legally treated as if they are not on EU territory, despite their physical presence, and therefore relies on the fiction of non-entry (Art 43(1)). This fiction, as in the SR, enables a spatial and legal dislocation: people are here but legally imagined as not yet arrived. There are some conditions under which the determining authority may choose to apply the ABP, such as if an application is made at an external border crossing point or after disembarkation following a Search and Rescue mission (Art 43(1)). In addition, when the applicant has 'intentionally misled the authorities' (Art 42(c)), is considered a 'threat to national security' (Art 42(f)), or most poignantly 'is of a nationality of which the proportion of decisions granting international protection is 20% or lower' (Art 42(j)), they must undergo the ABP.

The ABP is accelerated compared to other asylum procedures and must be completed within a maximum of 12 weeks. As Evangelina Tsourdi highlights, the strict time limits for border processing are highly ambitious and risk undermining the quality of asylum procedures (2024).

They may prevent asylum seekers from receiving proper information and preparing their cases adequately, potentially resulting in flawed or unfair decisions. Although the APR highlights in its guarantees that every applicant has the right to lodge an individual application[19] (Art 8(2)), this guarantee is hollowed out in practice[20]. Applicants from low-recognition nationalities are pre-categorized and fast-tracked through a compressed border procedure (42(j)), undermining the possibility of meaningful individual assessment. Article 35 of the APR emphasizes that the determining authority must 'examine applications objectively, impartially and on an individual basis.' Yet this contrasts the preselection based on nationality. Simultaneously, the regulation consists of paradoxical logic, where border procedures will likely lead to higher rejection rates for these nationalities due to the nature of the accelerated process, therefore reinforcing the low acceptance rate of international protections. In effect, legal space is manipulated to reinforce the fiction of non-entry and maintain racialized hierarchies of legitimacy, where the circumstances under which to apply for protection not correlate not with individual claims but with nationality-based assumptions institutionalized in EU procedures (APR Art. 42(j)).

Here, the *law of spatiality*, as described by Nicolini, becomes evident: law rearranges the 'facts' of physical space (a person's bodily presence on EU soil) to fit the political logic of exclusion, remapping legal status according to national and racial hierarchies (2022). Rather than treating territory as a stable ground for rights, legal territory becomes fluid and contingent, manipulated to manage undesired mobility. This structure reproduces what Anghie identifies as a colonial legal technique where law is used to differentiate who counts as a legal subject and who remains outside the law's full protection (2005). The ABP thus revives the civilizing mission's logic,

[19] This right to an individual assessment for international protection reflects obligations under the 1951 Geneva Convention, which requires assessment of a "well-founded fear" of persecution on a case-by-case basis (Art. 1(A)(2)).

[20] As highlighted by reports from ECRE, when migrants are subject to limited zones, they often lack access to full judicial reviews and get excluded from accessing legal procedures in the host country (Soderstrom 2022).

where certain groups (determined by nationality, race, or perceived credibility) are structurally disqualified from full procedural rights.

Furthermore, Member States are permitted to reject an asylum claim as inadmissible based on the Safe Third Country (STC) concept if it is determined that the applicant can be 'guaranteed' effective protection (Preamble 46 APR). The APR requires that a meaningful connection exists between the applicant and the designated third country to justify this redirection (Preamble 48 APR). However, regardless of the STC concept, Member States must still ensure that the applicant has access to a procedure in the EU if a third country refuses to admit or readmit the applicant. While STC designations are legally decided, they do not always adhere to the actual protection realities. The CJEU's interpretation of Article 38 of Directive 2013/32 states that the decision to authorize an STC designation is not based on the actual admission or readmission of applicants. The case law maintains that these designations remain valid regardless of refusal to accept returns as long as basic procedural guarantees are respected (Article 38(4)). For example, Turkey was classified as a 'safe' third country despite its suspension of readmission agreements (Pirrello 2024). Although Member States, according to the law, must ensure a procedure for the applicant when refused by the STC, the practical reality often leaves applicants in a legal limbo[21]. Therefore, legal designations do not always reflect political realities.

This legal flexibility reveals that STC designations are not primarily about adherence to human rights compliance but can be used for territorial containment aligned with EU migration control objectives. The STC mechanism allows the EU to construct legal territories of protection that do not fully have to correspond to political reality. Drawing on Nicolini's legal geography, this

[21] Pirello (2024) explains that between 2021 and 2023 Greece found over 10.000 applications not admissible, based on Turkey's STC designation. As Greek authorities did not automatically reopen cases based on this, people had to demonstrate a new finding under Article 40 of Directive 2013/32, which Greek authorities often refused. This left individuals in legal limbo based on the reliance on a designation disconnected from practical enforcement.

is a case of the *law of spatiality*: law rearranges the geography of responsibility, asserting that protection exists in spaces where the EU desires it to exist, not where it is meaningfully provided. These territorial fictions allow for the externalization of asylum obligations by projecting the legal meaning of 'safety' onto third countries, regardless of their actual capacity or willingness to offer protection. In effect, the law produces grey zones of juridical safeguards: territories marked as safe by EU law but functionally used as buffers to deflect asylum seekers.

This spatial dislocation echoes broader legal fictions seen in the border procedure: the applicant is physically present in the EU but territorially erased through legal designation. What is particularly contradictory is how the APR insists on broad generalizations when denying applicants access based on national origin in the border procedure (Art. 42(j)) but suddenly demands individualized nuance when using the STC clause, permitting exceptions for specific regions or categories within the 'safe' country (Art. 46 APR). This asymmetry exposes how territorial and legal meaning is strategically fluid and manipulated to exclude at the border while minimizing EU accountability. As Achiume (2022) argues, in both visa and asylum regimes, individuals from the Global South are often required to prove that they are exceptional, thus different from their fellow nationals, to access mobility or protection. In the context of asylum, this logic recurs: applicants from countries with low recognition rates must disprove the generalized assumption of safety attached to their nationality, while in the STC framework, the burden flips and requires the EU to acknowledge exceptions convenient for its own purpose. This reinforces a dynamic that replicates a postcolonial logic of exclusion, where the burden of proof shifts disproportionately to applicants from the Global South, requiring them to transcend the legal meaning attached to their nationality. Protection is then not solely determined by individual need but embedded into how one can escape the negative legal meaning assigned to their national belonging.

Fiction of Non-Entry in the Return Border Procedure Regulation

The Return Border Procedure Regulation (RBP) is a mandatory regulation for people who have been rejected from the APR (Art 1(2)) and is supposed to ensure a 'streamlined approach' between these two regulations (preamble 2). The regulation sets out that the procedure can only take a maximum of 12 weeks, including the finalisation of an appeal (Art 6(1)(a)). Similarly to the Asylum Border Procedure, the people who must return are not considered to have entered Member State territory legally regardless of their physical presence and therefore, the RBP relies on the fiction of non-entry (Art 4(1)). Importantly, the RBP lays down a logic of containment, as it requires people to reside in locations at the borders or at transit zones (Art 4(2)). The grounds for detention under the RBP are multifold. People continue to be detained if they are already contained during the APR for the purpose of preparing their return, carrying out removal, and strikingly preventing their entry into the territory of the Member State (Art 5(2)). Furthermore, people can be detained if there is a 'risk of absconding' or if they are a threat to public policy, public security, or national security. How the threat to public policy or security should be interpreted[22] is not laid out in the regulation and could lead to broad interpretation to justify detention.

While the Return Directive[23] (2008/115/EC) authorizes the detention of individuals deemed to be staying 'illegally' within a Member State, the key distinctions from the RBP, which operates on the assumption that people have not entered Member State territory, concern the nature and strength of legal oversight and procedural safeguards. Where individuals are considered to have entered the territory, their detention, under either asylum or return frameworks, is subject to

[22] There is no explicit definition in the CEAS and interpretation is quite varied in different EU courts and tribunals (EUAA 2022)

[23] The Commission has proposed a new return directive that is currently under review (COM/2025/101). This started already with a Commission Recommendation in 2017 that called for the strictest possible interpretation of the Return Directive.

clearly defined procedural guarantees, including prompt judicial review, the right to appeal, and periodic reassessment of necessity and proportionality. These protections are highlighted in Article 15 of the Return Directive (2008/115/EC), which requires that detention is a measure of last resort, justified through an individual assessment, and accompanied by effective remedies. However, detention under the fiction of non-entry within the RBP runs the risk of lowering the quality of processing and for the applicant to adequately prepare their file and case[24]. As ECRE notes, migrants held in border procedures are frequently denied access to effective remedies, with detention formalized without adequate safeguards or individualized justification (Soderstrom 2022). The fiction of non-entry enables states to hold individuals in de facto detention, often in isolated or securitized facilities, without triggering the full procedural architecture that applies on territory. As Cornelisse has argued, this approach not only weakens access to justice but creates a parallel legal space where fundamental rights protections are diluted under the guise of spatial exceptionalism (2022).

The RBP, like the SR and the APR, relies on the fiction of non-entry to exclude individuals deemed undesirable from the legal space of the EU. In doing so, it constructs spatial-legal fictions that treat spaces physically located within the EU as legally external, allowing Member States to bypass the procedural guarantees that would ordinarily apply upon territorial entry. Detention in these spaces is not simply administrative. It is juridically constitutive, turning physical presence into a zone of exception and withholding protections normally triggered by territorial presence. This strategy reflects what Gammeltoft-Hansen and Hathaway describe as the 'politics of non-entrée,' whereby states convert airports, harbors, coastlines, and islands into

[24] The RBP regulation refers to articles from the Return Directive that shall apply (4(3)). Notably missing from this is Article 13 which refers to the right to appeal. Tsouri (2024) highlights that the time limits in the law are very limited and to show that assessment in practice often takes a long time (reference note 12).

non-territory, permitting them to commit to refugee protection while evading the obligation to uphold it in practice (2015).

As Nicolini argues in his work on legal geography and colonialism, the drawing of territorial lines has historically functioned not only to define empire but to delineate between justice and injustice. On one side of the line, there is 'the civilised, logical space of the Christian world,' whereas on the other side of the line, there is the violence and brutality of imperial conquest (Nicoloni 2022, 96). The line becomes a 'sanitising function' that allows for both to co-exist together, allowing imperial powers to maintain a narrative of civilization and legality on one side while legitimizing violence on the other. Anghie similarly shows how international law developed through the colonial encounter, enabling European states to differentiate between the legally recognized 'civilised' world and the ungoverned, racialized spaces of conquest (2005). This reasoning is not just theoretical but reflected in how Member States understand 'entry' as a movable legal threshold to limit rights without technically breaching obligations under EU law. The EU's border regime echoes this colonial cartography. The legal construction of certain arrivals as having 'not entered' EU territory replicates the logic of spatial partition, granting rights selectively based on who is allowed to be legally present.

The RBP thereby allows Member States to maintain a formal commitment to the Charter of Fundamental Rights, including the right to asylum and fair trial, while circumventing these obligations through spatial and legal exceptionalism. Those subject to the fiction of non-entry are placed in legal limbo, where their access to rights is suspended not based on the law's absence but on the law's redefinition of space itself. The legal border is thus 'shifted' or re-mapped depending on who is considered desirable and who is not, reproducing a postcolonial logic of racialized exclusion through the language of legality.

From Legal Tools to an Architecture of Exclusion

Taken together, the Screening Regulation, the Asylum Procedure Regulation, and the Return Border Procedure do not operate as isolated or merely procedural instruments. Rather, they collectively construct a legal architecture that reorganizes space to regulate, exclude, and displace. While each measure may appear administrative or technical on its own, they are deeply interlinked by the fiction of non-entry, which functions as the legal backbone, allowing the EU to disregard full legal responsibility for those it seeks to exclude. The spatial dimension of this architecture becomes visible in how physical presence is systematically disconnected from legal presence. Individuals intercepted at sea, disembarked on European shores, or detained in border facilities are legally framed as not having entered EU territory at all. As Nicolini's concept of the *law of spatiality* demonstrates, this is not a passive reflection of geography but an active legal construction: the border becomes a shifting zone of exception to deny entry rights without formally violating EU obligations.

Visa regimes and readmission conditionalities further entrench this architecture. By linking visa access to geopolitical cooperation and using punitive methods for countries with low return rates, the EU reshapes not only who may enter but also under what conditions and at what cost. These tools exemplify Nicolini's *law of spatiality,* where legal meaning of space is mapped not onto geographic facts but onto political objectives. Nationality thus becomes the filter through which bodies are legally sorted. Those with passports from the Global North move freely, while those from the Global South are assumed to be an economic or security risk. As Achiume notes, these regimes demand a different standard from Global South migrants: to prove that they are unlike their fellow nationals and merit legal recognition. Framed through Anghie's postcolonial lens, this entire apparatus reveals the continuity between colonial and contemporary techniques of legal exclusion. Just as colonial international law denied full sovereignty and legal personhood to colonized subjects by spatially displacing them from the international legal

order, today's EU migration law denies territoriality and rights through legal fictions of non-entry that uphold a racialized hierarchy of mobility. The visa apparatus is directly linked to who will end up at the European external border and whose presence will be made 'irregular.' The border, in this framework, is not a fixed line but a juridical instrument that works as a mechanism for organizing inclusion and exclusion in ways that preserve the normative and material dominance of Europe.

What emerges, then, is a legal cartography of managed exclusion, where the law does not fail to protect but is designed to protect selectively. By manipulating space, the New Pact on Migration and Asylum constructs a border regime that governs through dislocation and denial, therefore reinscribing colonial patterns of mobility control hidden under a veil of legal order.

CHAPTER 7: CONCLUSION

The fiction of non-entry is embedded across the Screening Regulation, the Asylum Procedure Regulation, and the Return Border Procedure, where it is used to reorganize legal space in ways that deny territorial presence and, with it, access to full rights for those arriving at the EU's borders. This construct allows the EU to treat individuals who have physically arrived at its borders as if they are not legally present. Through visa regimes, readmission arrangements, and the designation of safe third countries, the EU constructs a shifting legal geography that stratifies access to protection. Crucially, the fiction of non-entry is neither novel nor neutral. It builds on a longer history of racialized legal control, where law was used to partition the world and justify imperial domination. By legally remapping space and selectively withholding rights, the EU continues to reproduce the colonial logic of exclusion under the guise of neutrality and legal objectivity.

This thesis has shown how the New Pact on Migration and Asylum represents the latest version of this exclusionary logic. Yet, this does not mean international law is without potential. As Hathaway and Gammeltoft-Hansen (2015) argue, jurisdiction includes legal responsibility over people beyond the state's territorial borders. This expansion opens possibilities for accountability under refugee and human rights law. In this sense, TWAIL scholars such as Eslava and Pahuja emphasize the importance of remaining between resistance and reform, revealing how the law upholds global hierarchies while still engaging it as a possibility for contestation. While this thesis has focused on how the New Pact perpetuates colonial patterns of exclusion through legal fictions, future research might explore how legal strategies can also be repurposed to challenge and subvert those very regimes.

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APPENDIX I

Visa policy within Schengen

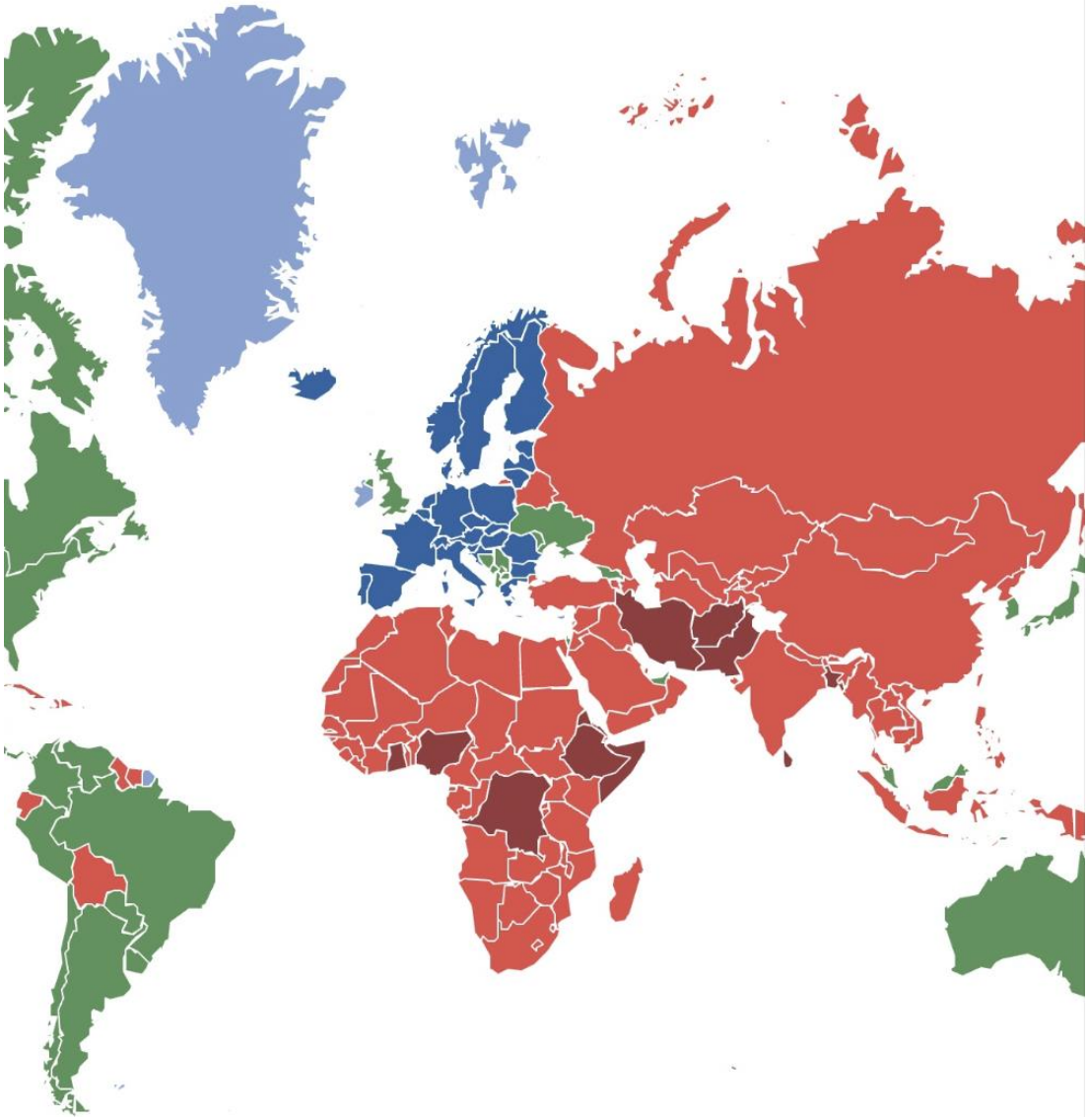

Figure 1: Which countries' nationals need a visa to enter the Schengen area? Red represents the countries in need of a visa, whereas green does not need a visa, and blue represents the countries within Schengen. (European Commission 2025)