# 10 *From the Colony to the Border*
## *The Lawful Lawlessness of Racial Violence*

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Border governance has come to operate as a regime of terror, death, and disappearance with the adoption of ever more restrictive policies and technologies of immigration control. Over 67,000 migrants have died or disappeared as they tried to cross borders since 2014, according to a conservative estimate, as of July 2024 (International Organization for Migration [IOM], 2024). Overwhelming evidence points to a close connection between migrant deaths and disappearances and border control policies that push migrants to ever more dangerous routes (Callamard, 2017; Shatz & Branco, 2019). Among the policies that systematically give rise to death and disappearance is what scholars have described as "extraterritorialization" of migration control, which includes a wide range of practices, including the removal of certain territories from jurisdiction for immigration purposes, interstate agreements to "outsource" border control to countries of origin and transit, and maritime interdiction of migrants to prevent their entry into territory.

As many critics have underscored, such policies aim to manipulate and dissolve the close connection between territory and jurisdiction that is central to modern conceptions of law and politics (Benhabib, 2020; Gammeltoft-Hansen, 2011; Gündoğdu, 2018; Shachar, 2020b). With its claim to exclusive jurisdiction within its territory, the modern state is supposed to extend its legal framework to all of its inhabitants (Arendt, [1951] 1968: 230; Brubaker, 1992: 25). In this regard, modern territorial jurisdiction stands in distinction from medieval common law that organized jurisdiction around status and allocated rights and obligations accordingly (Dorsett & McVeigh, 2012: 83). A corollary of territorial jurisdiction within the migration context is that a migrant's entry into the territory of a state triggers state obligations under domestic and international laws, including protections

against refoulement. However, states have strategically manipulated the principle of territorial jurisdiction to evade such obligations and adopted border control policies that amount to a politics of nonentrée (Hathaway, 1992; Hathaway & Gammeltoft-Hansen, 2015). Extraterritorialization allows the states to disavow responsibility for the consequences of their migration policies by "delinking … the bond, between territory, jurisdiction, and the public in whose name and with whose authorization law and coercion are presumably exercised" (Benhabib, 2020: 88). This delinking places migrants in what Hannah Arendt ([1951] 1968) called "a condition of rightlessness," denying them access to territory, personhood before the law, and the right to have rights (Gündoğdu, 2015, 2018). Extraterritorialization is also problematic because it reintroduces status-based discriminations in conflict with the modern principle of equality before the law. As "the shifting border" is unmoored from the geographical frontiers of each state, it is 'transported' to the bodies of migrants to the effect of "barring certain bodies and populations from territorial arrival at the shores of well-off countries" (Shachar, 2020b: 37, 33).

In this chapter, I propose rethinking policies of extraterritorialization as one key element in a contemporary constellation that can be best understood in relation to other projects of racial domination such as colonial rule. In that, my analysis joins the recent efforts to rethink migration in relation to colonialism and empire (e.g., Achiume, 2019; El-Enany, 2020; Gündoğdu, 2022; Mawani, 2018; Mayblin, 2018; Mayblin & Turner, 2021; Mongia, 2018; Reynolds, 2021), but it makes a distinctive intervention by examining some of the striking, yet unexplored, resemblances between the juridical formulas and techniques employed in colonial and migratory contexts. These include, among other things, strategic manipulation of jurisdiction, a status-based legal system, racialization of status categories, normalization of a state of exception, and racialized determinations of culpability.[1]

[1] This chapter focuses on the migration control policies adopted in the Global North, more specifically by European states. While there is more variation in the Global South, it is possible to observe some of the racist and racializing practices that I discuss even in countries that appear to adopt relatively less restrictive policies. For an excellent account of how racism and racialization operate in the asylum determination process in Brazil, a country that is often considered a safe haven for refugees, for example, see Jensen (2023).

Law plays a crucial role in crystallizing these elements into racial domination – under colonial rule and within contemporary border governance. In fact, the juridical regime characteristic of both of these constellations can be best described as one of "lawful lawlessness," to borrow a term introduced by Austin Sarat and Nasser Hussain (2004) in a different context. On the basis of a comparative analysis of colonial and migratory juridical regimes, I argue that policies that continuously manipulate jurisdiction to create a condition of rightlessness are neither exceptional nor unprecedented; they have long been a key weapon in the arsenal of racial domination. In making this argument, my goal is not to draw a direct, causal link from colonialism to contemporary migration control but rather to identify certain shared elements between these two contexts to understand how and why the lines between lawfulness and lawlessness are blurred in regimes where law is put in the service of race rule.

The chapter develops this argument as follows: First, I outline the peculiar juridical maneuvers colonialism introduces to reconcile racial domination with the principle of equality before the law championed by colonial powers such as France and Britain. In Section 2, I discuss the Spanish enclaves of Ceuta and Melilla, the EU's only land borders with Africa, to point out the ways in which the colonial juridical techniques are reconfigured within the migration context. In Section 3, I examine how law becomes complicit in maintaining borders as regimes of racial domination by turning to the 2020 ruling of the European Court of Human Rights (ECtHR) in *N.D. and N.T. v. Spain*, which in effect condoned the Spanish pushback operations in Melilla. By way of a conclusion, to address the question of whether law can have any emancipatory possibilities within this context, I briefly point to a diverse range of struggles that seize hold of legal discourses in inventive ways – inside and outside courts – to resist the transformation of borders into zones of death and disappearance.

## 1 Lawful Lawlessness under Colonialism

Colonial orders could not have been established and maintained without the use of force, but neither could they have been established and maintained solely on the basis of force. Law was crucial to racial domination under colonialism, not only as a justificatory framework authorizing violent practices, but also as a productive mechanism that

created the jurisdictions and statuses used for the differential allocation of rights, privileges, and penalties. That allocation was racial through and through – interweaving phenotypical and biological conceptions of race with sociocultural assumptions about "civilizational" differences (Saada, 2005). In the colonies, "the rule of law," stripped off its normative connotations and mobilized in the service of racial domination, categorized humanity into different juridical statuses and replaced equality before the law with "the rule of colonial difference" (Chatterjee, 1993).

What arose as a result was a system that continuously blurred the line between *lawfulness* and *lawlessness*: The decrees and codes used to entrench racial domination under colonialism were so arbitrary, indeterminate, and unstable that some would hesitate to place them under the rubric of "the rule of law," given the association of the term with normative expectations such as impartiality, clarity, and predictability (Mann, 2009). "The rule of law," however, has remained an ambiguous term since its origins in nineteenth-century German jurisprudence, signifying not only a normative framework constraining state power, but also an instrument of state domination (Saada, 2002: 104). It was this latter meaning that prevailed in the colonies where a certain form of race rule "exploded … the alternative between lawful and lawless government, between arbitrary and legitimate power," to adopt Arendt's ([1951] 1968: 461) characterization of totalitarian regimes.

Such juridical orders embody a form of "lawful lawlessness," to borrow a term introduced by Austin Sarat and Nasser Hussain (2004) in their analysis of executive clemency. My use of the term differs from theirs to the extent that Sarat and Hussain are primarily interested in the occasional discretionary exercise of sovereign power in a constitutional democracy that otherwise rests on a legal system of predictable rules. I use the term instead to describe a juridical order in its entirety – and not sporadic acts of discretion. "Lawful lawlessness" becomes the norm rather than the exception in systems where law is placed in the service of racial domination, as I discuss below by drawing on the literatures on French and British colonialism.

One key element of colonial juridical orders was the manipulation of jurisdiction, which allowed European powers to cover up the contradictions arising from their commitments to equality before the law and their routinized violation of this principle in their colonies – a strategy

that bears striking resemblances to contemporary efforts to evade jurisdiction in migration control. Assertion of jurisdiction was essential to establishing the authority of colonial laws (Dorsett & McVeigh, 2007: 4–5), but that authority was maintained by deploying multiple, and often conflicting, concepts of jurisdiction to justify racial domination (Esmeir, 2012: 15; Mawani, 2015: 421, 2018: 24–25; Pasternak, 2014; Saada, 2002: 103). In the case of French colonialism, for example, the French state worked with a territorial conception of jurisdiction to assert its sovereignty over the colonial territory, but it also simultaneously marked that territory as an exceptional space where French laws did not apply. This territorial exceptionality went hand in hand with another notion of jurisdiction based on status (Blévis, 2014; Le Cour Grandmaison, 2006, 2010; Saada, 2002, 2005): While the French Constitution did not apply to French Algeria, the French "settlers" continued to maintain their rights under that Constitution. Those same rights could not be extended to the "natives" (*indigènes*), however, who were "*French subjects*, or peoples under French protection or administration, and *not French citizens*" (Henry Solus quoted in Le Cour Grandmaison, 2006: 39; emphasis in original).

Status distinctions within colonial juridical orders were based on race – a problem that reappears within contemporary immigration policies and laws. In the French context, *le code de l'indigénat*, the continuously changing ensemble of laws that subjected colonized populations to an arbitrary rule by decrees, established the status of *indigènes* on a racial basis, working with the assumption "to each race its law and to each law its race" (Saada, 2002: 110). Within the British context, similarly, race was "the most obvious marker of colonial difference," which rendered it impossible to "[administer] an impersonal, nonarbitrary system of law" (Chatterjee, 1993: 20; see also Hussain, 2003; Kolsky, 2010). Even when there were attempts to codify a unified set of laws that would apply equally to all the inhabitants of the colony, the failure of those attempts was due to the tenaciousness of the idea of racial difference. In fact, such attempts, as illustrated by the Code of Criminal Procedure established by Britain in colonial India in 1861, "expanded legal distinctions, exceptions, and inequalities" and exacerbated the problem of racial inequality before the law (Kolsky, 2010: 73).

The construction of racial difference in and through law was central to instituting racial segregation under colonialism (Saada, 2002: 105),

as illustrated by the subjection of the movement of the colonized to an elaborate system of controls, which, in many ways, is the precursor to contemporary migration controls. In the Belgian Congo, for example, local populations were required "to acquire an internal passport and to seek the authorization of the territorial administrator to be able to leave their home district" (Le Cour Grandmaison, 2006: 43). Similarly, with the Criminal Tribes Act of 1871, the British made it illegal for anyone affiliated with a "criminal tribe" to go 'beyond the limits so prescribed for [their] residence' without a pass (Hussain, 2007: 522). We should also recall within this context that the contemporary system of passport controls finds its origins within the British efforts to control the movement of unindentured Indians within the empire (Mongia, 2018).

The abandonment of the modern idea of equality before the law was justified within the colonial context on the basis of assumptions about the special conditions of the colony, which foreshadow the construction of borders as spaces of exception. This exceptionality was asserted by major colonial powers such as Britain, France, and Belgium even during the negotiations to create an International Bill of Human Rights after World War II, and it is enshrined in the Article 56 of the European Convention of Human Rights, infamously known as the "colonial clause," which allows "due regard … to local requirements" in circumscribing the "territorial application" of the Convention (Mayblin, 2018; Spijkerboer et al., 2021).

As a result of this exceptionality, in the colonies law operated in a more or less permanent emergency, under which the generality and relative stability of laws gave way to ever-shifting decrees, arbitrarily laid down by the colonial administrators (Hussain, 2003; Reynolds, 2017). Punitive measures, normally deemed unacceptable under the rule of law, were permissible under colonial rule. Administrative internment, for example, allowed for the detention of colonial subjects with no right to appeal and often with no clearly specified time limit (Le Cour Grandmaison, 2006: 45). Even collective punishment was legally permissible; in French Algeria, for instance, the governor-general could impose a collective fine on an entire tribe or village if they did not cooperate with the authorities (Le Cour Grandmaison, 2006: 47). Political protests and local uprisings, even those involving unarmed, nonviolent protesters, were violently suppressed by invoking martial law and authorizing the use of lethal force (Hussain, 2003: 99–131). The state of emergency that characterized colonial regimes

created a regime of impunity in which it was extremely difficult to uphold colonial officials (and nonofficial Europeans) accountable for the use of violence against the colonized (Kolsky, 2010).

While the colonial regime exempted the colonizers from any culpability, it rendered "the native" suspicious in the eyes of the law on the basis of a set of racist assumptions about the innate characteristics of the colonized, including aggressiveness, mendacity, irrationality, and criminality. Frantz Fanon's scathing critique of the infamous Algiers School of Psychiatry, founded by Antoine Porot, brings to view how the pseudo-science of the time participated in the propagation of these claims. According to Porot and his followers, "the North African" was predisposed to criminality because of congenital defects tied to the underdevelopment of the cortex (Fanon, [1961] 2004: 227). Equally problematic were assumptions about "native mendacity," which rendered the "native" an unreliable witness and made it very difficult to hold Europeans accountable for the crimes they committed against the colonized (Kolsky, 2010: 110). Similar assumptions about native culpability and untrustworthiness shape the ways in which states and courts interpret the words and deeds of migrants of color, as I discuss in Section 3, turning their nonviolent actions (e.g., climbing a fence) into belligerent acts and rendering their testimonies unreliable.

Colonialism, in short, turned the colonized into rightless entities who could be subject to arbitrary rule and violence with impunity. Doing away with the fundamental rights and basic protections associated with the rule of law, it elevated "lawlessness, inequality, and multiple daily murder of humanness" to the status of "legislative principles" (Fanon, 2018: 434). The lawlessness associated with colonial order is a problem arising not from the absence of law altogether but rather from the monstrous peculiarities of colonial law, which can shed critical light onto new forms of lawful lawlessness that arise in the migration context.

## 2 Lawful Lawlessness of Borders

On June 24, 2022, the Spanish border enclave of Melilla became the scene of a bloody massacre as the Spanish and Moroccan border forces violently thwarted the efforts of over 1,500 migrants, mostly from Chad and South Sudan, to cross the border to Spain. Described as

the deadliest incident in the history of the Spanish–Moroccan border, the brutal operation led to the death of at least thirty-seven migrants. Some were killed in a crush, as they were trapped by the Spanish and Moroccan forces in riot gear; others fell from the fences due to the use of tear gas and rubber bullets (Gilmartin, 2022b).

The aftermath of the massacre was business as usual. In an interview with the Spanish daily newspaper *La Vanguardia*, Spain's Socialist prime minister Pedro Sánchez briefly expressed his regret for the loss of lives, but without taking any responsibility; instead, thanking the Spanish and Moroccan forces for their work, he shifted the blame to the "mafias and criminals who organize violent actions against our border" (quoted in Hedgecoe, 2022). On September 13, 2022, his party joined the conservatives and the far right to quash a proposal for a parliamentary investigation into the events of June 24 (Gilmartin, 2022a). Meanwhile on the Moroccan side, a state-backed investigation claimed that the cause of death was "mechanical asphyxiation" due to stampede rather than the use of force (Sanderson, 2022). Moroccan authorities quickly started prosecuting sixty-five migrants who were among those who tried to cross the border on June 24, 2022 on numerous charges, ranging from illegal entry and violence against law enforcement officers to facilitation of illegal immigration (Le Monde, 2022).

The Melilla massacre brings to view the key elements that contemporary border governance shares with colonial regimes: strategic manipulation of jurisdiction to create lawless zones; differential allocation of rights on the basis of racialized status distinctions; justification of excessive force in a normalized state of exception; institution of a regime of impunity; and allocation of culpability to the victims of violence. In what follows, I examine the Spanish–Moroccan border regime in Ceuta and Melilla in order to understand how these elements are reconfigured within a new constellation of racial domination that redeploys lawful lawlessness.

Ceuta and Melilla, two Spanish enclaves bordered by Morocco, are the only land borders between the EU and the African continent. Spain conquered Melilla in 1497, and Ceuta, captured by Portugal in 1415, was transferred to Spain in 1668 (Saddiki, 2017). In an effort to control migration from the African continent, Spain started building fences in Ceuta and Melilla in 1993, and currently, there are three 6-meter-high, 12-kilometer-long fences. As "the only African

territories of an EU member state (excluding the Canary Islands) since Algeria became independent," Ceuta and Melilla remain an unresolved territorial dispute between Spain and Morocco (Aris Escarcena, 2022: 64). Despite its cooperation with Spain on migration control, Morocco has never recognized Spanish sovereignty over Ceuta and Melilla, and continues to characterize these enclaves as occupied territories (Boeyink, Sahraoui, & Tyszler, 2022; Saddiki, 2017). In fact, in a letter addressed to the United Nations Human Rights Council, denying any responsibility for the pushback operation on June 24, 2022, the Moroccan government contended that "Melilla is a prison occupied by Spain" and that "the kingdom of Morocco does not have any land borders with Spain" (quoted in Ramajo, 2022). Outraged by this statement, Spain's prime minister forcefully reasserted Spanish sovereignty in the enclaves: "Ceuta and Melilla are Spain, full stop" (quoted in Ramajo, 2022).

The peculiar maneuvers that the Spanish government makes in dealing with questions of jurisdiction in these enclaves highlight the need to rethink contemporary border control policies in relation to colonialism. If we recall, a signature move of colonial powers was to manipulate different conceptions of jurisdiction to mark their colonies simultaneously as their sovereign possessions *and* as exceptional spaces where their laws did not apply. This colonial technique sheds critical light on Spain's concept of "operational border," a legal fiction that turns the border from a fixed line into a continuously fluctuating one. While Spain asserts sovereignty within Ceuta and Melilla, which should mean that the three fences are within its territorial jurisdiction, it also argues that migrants enter Spanish jurisdiction only after climbing over the third fence and crossing the last line of Spanish security forces. With this maneuver, the border is no longer the legal one defined by international treaties but rather an operational one that can be arbitrarily moved at the Spanish government's whim (González García, 2019: 217). This is why, despite its claims to sovereignty in Ceuta and Melilla, Spain tried to evade any legal accountability for the Melilla massacre of June 24 by declaring that the events did not take place within Spanish territory (Sáiz-Pardo, 2022).

As exemplified by Spain's jurisdictional subterfuge, extraterritorialization, similar to the colonial tactic of manipulating jurisdiction, aims to create zones of exception where rights and legal protections can be evaded. Locating Ceuta and Melilla within the *longue durée*

of colonialism helps us understand how and why such policies target racialized subjects. Before becoming an "open-air prison" for migrants from Africa, Ceuta used to be a "penal colony" for "undesirable" subjects, including dissidents from "seditious America" – that is, free Blacks and Creoles engaged in abolitionist and separatist struggles in Cuba (Sánchez, 2018: 338, 333–334). That history urges us to reconsider extraterritorialization alongside the colonial orders that denied equality before the law on the basis of racialized status distinctions.

On its surface, the legal regime at the Spanish–Moroccan border seems to have nothing to do with colonial juridical orders, as it purportedly targets conduct – that is, illegal entry – and not a racially determined status (e.g., *indigène* or "native" under French colonialism). The move away from explicitly racial status categories, however, points to a radical reconfiguration, rather than complete abolition, of race rule within the migration context. To clarify, the distinction between status and conduct has never been clear-cut, despite the conventional assumption that modern law leaves behind status distinctions and concerns itself only with voluntary conduct. "Status" can appear in new forms in modern law when it gets disaggregated into legally "regulable component 'acts,'" as illustrated by the antihomeless legislation that criminalizes activities associated with unhoused persons (Feldman, 2004: 50). Similarly, migration laws that target illegal or unauthorized entry amount to a de facto criminalization of status to the extent that one's mobility, including eligibility for visas or visa-free travel, is significantly shaped by factors such as country of origin. Within the context of the Spanish–Moroccan border, due to cooperation schemes that the EU devised in order to outsource migration control, "illegality" becomes a racialized status. Particularly since the 2015 Valetta Summit, which established the EU Trust Fund for Africa, the EU has been providing financial assistance to African countries in return for their cooperation in migration control. The EU and its member states have also signed bilateral agreements with countries such as Morocco, Libya, Mauritania, Nigeria, Senegal, and Ethiopia. These schemes, euphemistically defined as "mobility partnerships," aim to immobilize migrants from "sub-Saharan Africa" in particular. This term, normalized within the European debates on migration as if it were simply a geographical designation, is racially charged to the extent that it lumps together most of the countries in the African continent, despite their differences, and excludes only the countries in North

Africa whose inhabitants are perceived to be closer to "whiteness" (Ball, Lefait, & Maguire, 2021). The coordinated efforts to illegalize "sub-Saharan" mobility have led to systematic violence against Black African migrants (Council of Europe: Committee for the Prevention of Torture [CPT], 2015; European Center for Constitutional and Human Rights [ECCHR], 2020), as illustrated by the massacre of June 24.

Such violence has become routinized in a normalized state of emergency, which, in ways reminiscent of "the rule of colonial difference" (Chatterjee, 1993), has been justified on the basis of assumptions about the peculiar characteristics of borders as spaces of exception (Reynolds, 2021; Spijkerboer et al., 2021). This emergency logic is exemplified by the amendment that the Spanish government introduced to its Aliens Act in March 2015, during the adoption of the Law "on the protection of citizen security" (Asylum Information Database [AIDA], 2021: 25). Working in the spirit of the emergency decrees characteristic of colonial rule, this amendment establishes a "special regime" in Ceuta and Melilla, as it authorizes the Spanish authorities to expel migrants suspected of "illegal entry" back to Morocco, without any inspection of their individual circumstances. Efforts to render the amendment unconstitutional has come to an end with the Spanish Constitutional Court's 2020 ruling that the "special regime" in Ceuta and Melilla is in accordance with the Spanish Constitution and the ECtHR's jurisprudence (AIDA, 2021: 27–28).

This special regime is presented by Spain as a justified response to an "invasion" by migrants who are depicted as "enemies" acting belligerently (Garzon, 2015). Migrants' efforts to cross the border collectively are described as "quasi-military" attacks aided by the mafia, justifying the use of anti-riot gear and tactics (Groupe Antiraciste de Défense et d'accompagnement des Étrangers et Migrants [GADEM], Asociación Pro Derechos Humanos de Andalucía [PDHA], La Cimade & Migreurop, 2015: 46). This militarized discourse of "invasion" and "enemy" is tied to a racialized imagery of "Africa" and "Africans" within the European immigration context, as can be seen in the following statement of a colonel of the *Guardia Civil*: "It is Europe that must go to Africa, not Africa to Europe … They must be taught democracy, education, and almost by force if necessary" (quoted in Boeyink et al., 2022: 63). Within this Eurocentric imagery, "Africa" is represented as a place of absolute deprivation, devastation, and precariousness (Mbembe, 2017: 48–53) and "Africans" as destitute "savages" to

be saved and/or disciplined by the "civilized" Europeans. Racialized migrants, especially those from "sub-Saharan Africa," are held captive to representations that associate them with aggressiveness, criminality, mendacity, and irrationality, which were central to the construction of "the native" as a suspicious subject within colonial juridical orders. As a result, under the normalized state of exception at the borders, they stand before the law as always already culpable even for the violence they face regularly at the hands of border agents, as illustrated by the 2020 ruling of the ECtHR in *N.D. and N.T. v Spain*.

## 3 Always Already Culpable Subjects

*N.D. and N.T. v Spain* (2020) concerns the "pushback" of two migrants, *N.D.* from Mali and *N.T.* from Ivory Coast, by Spain to Morocco. N.D. and N.T. were part of a group of around 600 migrants who tried to cross the Spanish–Moroccan border through the border fence in Melilla in August 2014. They succeeded in doing so, but the Spanish authorities immediately returned them to Morocco, without assessing their individual circumstances. The question before the Court was whether Spain violated the prohibition against collective expulsion and the right to effective remedy by depriving these migrants of the means to challenge their immediate return. In 2017, a Chamber of the ECtHR found violations on both counts, but the case was then referred by Spain to the Grand Chamber, which ruled in February 2020 that the Spanish pushback did not amount to a violation because it was the applicants themselves who "placed themselves in an unlawful situation" as they "chose not to use the legal procedures … to enter Spanish territory lawfully" (*N.D. and N.T. v. Spain*, 2020: § 242).

*N.D. and N.T. v Spain* highlights the need to examine the shifting constellation of techniques mobilized for the racial governance of borders rather than focusing solely on extraterritorialization. While the Court rejected the arguments the Spanish government invoked to evade jurisdiction, it ended up upholding various other techniques associated with race rule – including an emergency logic that justifies exceptional forms of punishment, a status-based distribution of rights, and a racial allocation of culpability.

The Spanish government's efforts to evade jurisdiction by invoking the concept of "operational border" were ultimately rejected by the Court, though not without some serious problems in reasoning.

Seeing through the government's intention to create a lawless zone, the Court underscored that "the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system" (*N.D. and N.T. v. Spain*, 2020: § 110). In its consideration of the Spanish government's invocation of an "exception to jurisdiction," however, the Court also entertained a possible scenario in which a state might be significantly constrained in its "effective exercise" of authority over its territory (§105). In making this concession, the Court was responding to Spanish government's claim that it was the applicants' "illegal storming of the border fences" (§128) that justified its action in accordance with Article 51 of the UN Charter, which justifies the states' right to self-defense against 'an armed attack'" (§126). While the Court did not take the argument of self-defense seriously in its literal sense as laid out in the UN Charter, it took on board the Spanish government's image of an invasion by immigrants ("an attempt by a large number of migrants to cross that border in an unauthorised manner and *en masse*") as it underlined the challenges confronting European states as a result of the political and economic crises in "certain regions of Africa and the Middle East" (§§166, 169).

This logic of emergency was invoked by the Spanish government to shift culpability for collective expulsion to the applicants themselves. During the Grand Chamber hearing of the case in 2018, the lawyer for Spain justified the pushback operation by inviting the judges to imagine themselves sitting at their homes with their families and suddenly seeing "600 strong men coming, menacing to break your windows": "And then, your reaction is to close the windows and secure shutters and blinds. … Who is being violent and unlawful?" (*N.D. and N.T. v. Spain*, 2018). The Court effectively agreed with that reasoning, which presented the state itself as the "victim" rightfully engaging in self-defense. The Spanish government asserted, citing *Hirsi Jamaa and Others v Italy* – a 2012 ruling of the ECtHR that is often read as a historic victory for migrants' rights against extraterritorial migration policies – that a state cannot be held accountable for "collective expulsion" if "the lack of an individual removal decision could be attributed to the culpable conduct of the person concerned" (*N.D. and N.T. v. Spain*, 2020: § 133). It was precisely this reasoning that the Court adopted, as it declared that such culpability exists when migrants "deliberately take advantage of their large numbers and use force …

to create a clearly disruptive situation" (§201). The Court reinvoked this reasoning in its later ruling in *Shahzad v. Hungary* (2021), when it drew a sharp contrast between the irregular but undisruptive entry of Shahzad and the eleven other migrants he traveled with and the "clearly disruptive" acts of N.D., N.T., and their companions, whose "storming" of the border fences created a "situation which was difficult to control and endangered public safety" (*Shahzad v. Hungary*, 2021: §§ 59).

Such reasoning renders human rights conditional on arbitrary interpretations about the "culpable conduct" of migrants, but it is even more sinister in that it turns unauthorized border crossing into a de facto status crime when undertaken collectively by subjects who are perceived to be threatening. Determinations of culpability assume racialized overtones within the context of the Spanish–Moroccan border control, as discussed in Section 2, since this kind of "culpable conduct" is most likely to be undertaken by migrants from "sub-Saharan Africa" who are systematically denied access to legal entry procedures.

It was precisely this racial dimension of the problem that was *disavowed* in the Court's ruling. I use the term "disavowal" in its Freudian sense to refer to a double gesture that consists of "a 'refusal to recognize the reality of a traumatic perception' combined with an oblique acknowledgment of that disturbing state of affairs" (Steinmetz, 2006: 448–449). We see such a gesture in the Court's response to numerous forms of evidence submitted by third parties, including the United Nations High Commissioner for Refugees, which unanimously highlighted that "persons from sub-Saharan Africa" are systematically denied access to regular border crossing points and asylum offices and had no option but to enter Spain by climbing the fences (*N.D. and N.T. v. Spain*, 2020: §§ 58, 143, 155, 163). While the Court noted this situation, it also suggested that the reasons for it were not clearly established (§218). Obliquely acknowledging but also denying racism, it chose to assign culpability not to the Spanish state but rather to the migrant applicants, presenting the latter in effect as irrational subjects who could not produce "cogent reasons … based on objective facts" for not following the legal procedures for entering Spain (§229).

The disavowal of racism in *N.D. and N.T. v Spain* (2020) illustrates the Court's reluctance to recognize what scholars have called "structural" racism, which takes us beyond individual prejudices and centers on the racial disparities arising in the implementation of

seemingly colorblind policies (Armenta, 2017). A similar disavowal can be seen in *Memedov v North Macedonia* (2021), in which the Court acknowledged the overwhelming third-party evidence demonstrating the systematic police abuse that the Roma faced in North Macedonia, while refusing to read that evidence as proof of "institutionalised racism" or as evidence that racism was "a causal factor in the impugned conduct of the police officers" (*Memedov v North Macedonia*, 2021: §§ 55, 54).

In *N.D. and N.T. v Spain*, the Court's reluctance to recognize structural racism is combined with racialized assumptions about disposition to law-breaking – not unlike the assumptions that underlie "the North African criminality" thesis criticized by Fanon, albeit this time attributing culpability to "sub-Saharan Africans" who were similarly declared to be "impervious to ethics" owing to their unlawful and violent conduct (Fanon, [1961] 2004: 6). In shifting culpability to migrants and suggesting that they could not produce compelling reasons for their "illegal" entry, the Court's ruling effectively paints the migrants as irrational, impulsive, and aggressive subjects who would rather climb three fences, risk being injured by razor wire, and expose themselves to violence by border guards instead of following legal routes.

*N.D. and N.T. v Spain* highlights the need to understand extraterritorialization as one key element in a constellation of techniques put in the service of racial governance of borders. While the Court read the case as a clear-cut instance of territorial jurisdiction, its reasoning highlights how this territorial conception coexists with various competing conceptions in the legal domain, including a functional one (often applauded by migrants' advocates) that can devolve into a dangerous logic of emergency during which a state, facing a violent attack by migrants, might be said to be constrained in exercising "effective authority" in its territory. In accordance with this logic, the racialized image of a violent horde ("taking advantage of their large numbers") acting stealthily ("they frequently operate at night in order to produce a surprise effect") and attacking the borders of Europe ("storming the fences") is invoked to justify state violence. Colonial orders frequently invoked emergency in order to allow punitive measures that would not normally be allowed under the rule of law, including collective punishment. Similarly, in *N.D. and N.T. v Spain*, when the Court holds the migrants "culpable" (in ways similar

to the racialized assumptions of "native" guilt under colonialism), it ends up justifying a collective punishment that would have been normally disallowed by the prohibition against collective expulsion.

## Conclusion: Jurisgenerative Politics against Lawful Lawlessness?

*N.D. and N.T. v Spain* highlights the crucial role that law plays in transforming borders into "death-worlds" where racialized subjects become vulnerable to a form of necropolitics that either literally kills them or "confer[s] upon them the status of the *living dead*" (Mbembe, 2017: 92). But this process been contested by a wide range of struggles, including the numerous protests and uprisings of the migrants themselves, as exemplified by the March of Hope that shook Europe from mid-2015 to mid-2016 as thousands of migrants organized collectively and marched hundreds of kilometers chanting their demands for freedom and dignity. As many scholars have noted, such struggles highlight how migrants' agency has transformed borders into "spaces of constant tension, conflict, and contestation" (Hess & Karakayali, 2018: 418); (see also Celikates, 2022; Mezzadra, 2018; Mezzadra & Neilson, 2013).

To what extent can law play a constructive role in such struggles? It has become increasingly difficult for law to assume such a role within official juridical spaces in which a statist understanding of immigration control has come to prevail. Within these spaces, law has increasingly functioned in a "jurispathic" way as a mechanism that endows state violence with an aura of legitimacy (Cover, 1983). For some, this problem reflects the "built-in" limitations of international human rights law, arising from "the asymmetry … between the right to leave any country and the right to enter" (Costello & Mann, 2020: 313). Given the racial inequalities at the heart of access to mobility, this asymmetry renders it especially difficult for migrants of color to seek redress within courts, as my analysis of the ECtHR highlights.

Not all is lost, however, and there are possibilities for pushing law in an egalitarian direction even in these more official sites, as illustrated by numerous strategic litigation efforts that have turned to international criminal law, maritime law, and tort law to tackle the limitations of human rights law (Costello & Mann, 2020). Such efforts to mobilize different kinds of law to contest the regime of

impunity surrounding border violence are not unlike the struggles that turned the pluralistic colonial juridical regimes into sites of contestation – an "unequal contest," to be sure, but one that involved "non-compliance and appropriation by the subjugated" (Merry, Sally, Engle, 1991: 891).

Moreover, when we approach such juridical efforts with a shift of perspective and move from "seeing like a state" to "seeing like a migrant" (Mezzadra & Neilson, 2013: 166), even cases such as *N.D. and N.T. v Spain* appear in a new guise as acts of claims-making that strive to transform borders into sites of contestation. Such a shift suggests that law cannot be reduced to the ultimate ruling issued by the judges, as it also involves an alternative archive consisting of the testimonies of survivors, third party reports, dissenting opinions, and petitions ruled inadmissible, among other things. Even a case that appears to be a simple "failure" from a statist perspective can usher in new lexicons and strategies of contesting violent borders.

Finally, law cannot be just reduced to official juridical sites and decisions. As Robert Cover famously reminded us, "the formal institutions of the law" do not exhaust the meaning of law as "nomos – a normative universe" or "a world of right and wrong, of lawful and unlawful, of valid and void" (Cover, 1983: 4). Law in this sense is "a system of tension or a bridge linking a concept of a reality to an imagined alternative," one that relates "is" not just to "ought" but also to "what might be" (Cover, 1983: 9–10). Law as nomos, practiced beyond the official juridical sites, introduces us to the idea of "jurisgenesis," which involves creative acts of legal meaning-making that contest the hegemonic interpretations of law (Cover, 1983: 11). Such jurisgenerative practices can be seen, for example, in the various political mobilizations around migrant deaths and disappearances, which have appropriated legal idioms such as "human rights" and pushed them into a more egalitarian trajectory for holding states accountable (Gündoğdu, 2021: 580–582; Rygiel, 2016). Such mobilizations highlight that law, understood as a normative universe that cannot be limited to state courts, can play a crucial part in the struggles that contest border violence and call for the universalization of a right to free movement.