5. BETWEEN PHYSICAL AND LEGAL BORDERS: THE FICTION OF NON-ENTRY AND ITS IMPACT ON FUNDAMENTAL RIGHTS OF MIGRANTS AT THE BORDERS BETWEEN EU LAW AND THE ECHR.

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A. Introduction

The fiction of non-entry is a legal fiction allowing a disarticulation between the physical presence and the legal entitlement of a person to enter and stay on the national territory.[21] Generally, it is employed when a person crosses a border being devoid of an authorisation to do so. This has specific consequences on the legal framework applicable to unauthorised migrants at the borders, as it allows for the application of a completely different legal regime to migrants at the borders from those, legally or even irregularly staying, within the national territory.

States justify the application of such a different legal regime arguing that unauthorized migrants at the borders did not "enter" the national territory for legal purposes since they are devoid of a formal authorization to do so. This legal technique is one of the main strategies that States employ to manage migration flows and human mobility, and is generally employed at a country's national borders (See J. C. Hathaway).

In the European context, both the Court of Justice of the European Union and the European Court of Human Rights have dealt with the issue of migrants' rights at the States' borders. Both have addressed the consequent legal regime applicable, especially from the perspective of detention regimes, non-admission and expulsion at the borders and access to asylum.

In this light, the aim of this paper, structured as follows, is to analyse the issue of migrants' exclusion at the borders from the perspective of the so-called fiction of non-entry. Firstly, the topic of the fiction of non-entry is presented. Secondly, the paper examines the issue from the perspective of the ECtHR jurisprudence on migrants at the borders, with special attention to the topic of detention and protection from expulsion. Thirdly, the paper focuses on EU law. In addition, it compares the relevant EU law provisions with the would-be amendments proposed within the EU New Pact on Migration and Asylum.

B. Discussion: From extraterritoriality to the fiction of non-entry in migration law

As critically assessed by a considerable body of literature, in liberal democracies a border is not only a physical border but also a legal border (*ex plurimis*, G. Agamben, T. Basaran, J. Apap, S. Carrera). As such, it serves the function of defining the legal framework applicable to persons holding a certain status in a specific territory, governed by a specific authority. It distinguishes, first and foremost, between citizens and non-citizens (See T. Basaran, J. C. Hataway, T. Gammeltof Hansen).

[21] According to the Merriam-Webster dictionary, a legal fiction is "something assumed in law to be fact irrespective of the truth or accuracy of that assumption"; The Collins dictionary defines it as "an acceptance of something as true, for the sake of convenience".

Interestingly, the meaning we nowadays attach to the idea of the border has totally embraced the divisive declination of the French word *frontière* rather than the dimensions of proximity and interdependence attached to the idea of the border by the quasi-synonym Latin word *confinis*, (composed by the prefix *cum,* and the word *finis*) standing as *common limit* (see C. Blumann). Under this reading of the notion of "border", exclusion does not stand as an exception in liberal States and in the rule of law. Rather, it becomes a mechanism which is structural to States' politics, and in the construction of the inside-the-border *vs.* outside-the-border dichotomy. Because the border also serves the function of filtering and managing mobility, by means of selecting those who are entitled to enter and stay on the territory, border areas are assigned a peculiar status and function, being at the same time manufactured as "inside" or "outside" the national territory depending on the subjects crossing them (T. Basaran, *id*.).

Historically, there have been at least two ways of constructing such an idea of inside and outside throughout the concept of the border: the idea of "extraterritoriality" (1.1) and the fiction of non-entry (1.2).

1.1 ***The idea of extraterritoriality***

The idea of extraterritoriality originates from the peculiar status that the States attach to certain portions of their territories, usually their borders. It is based on the exclusion of a part of their territory from the exercise of their jurisdiction. Through such a fictional excision, States have argued, for example, that airport transit areas were not part of the national territory and that, therefore, a different set of laws and rights would apply to them as opposed to the one applying to the State's territory. In the case of airport transit areas, this assumption is roughly based on the fact that they enjoy a particular legal status on the ground of agreements related to the facilitation of the transit of goods and, sometimes, of persons. The most common example consists in the ease of international transit at airports, allowing passengers in transit to board a second flight avoiding customs and immigration border controls (see T. W. Bell).

This was precisely the French government's position in the case of *Amuur v. France*. In *Amuur* the European Court of Human Rights (hereinafter: ECtHR) dealt with the *de facto* detention in the transit zone of the Charles De Gaulle airport of ten asylum seekers fleeing Somalia who reached France from Syria. *In casu*, the French authorities maintained that the airport transit zone enjoyed extraterritorial status and that France, therefore, lacked jurisdiction over that area. As a result, according to the French Government, French law would not apply. The legal regime applicable to the transit zone consisted of a number of administrative decrees and circulars, as Maillet explained, devoid of a legal basis in national law and was in force until 1992, the year when the Law on Waiting Zones was adopted. Such a legal regime established that asylum applications made at the airport transit area were subjected to an admissibility evaluation from the Ministry of the Interior. In case the request was deemed admissible, the applicant was authorised to enter the territory and subjected to the ordinary asylum procedure. Applicants awaiting the admissibility decision were not allowed to move freely on the territory nor in the transit area. They were placed under the constant supervision of the authorities without legal assistance. Such a *de facto* detention was not subjected to judicial scrutiny nor the applicants had the possibility to have a Court review their detention (*Amuur*, §§ 45-47). However, the French Government argued that this legal void was justified by the extraterritorial

status of the airport transit area: since applicants waiting for the admissibility decision were not deemed to be on the French territory, French law would not apply (§ 26).

The ECtHR, however, rejected the French Government's argument affirming that transit zones are part of the State's territory and that they fall within its jurisdiction. This meant that the State was bound to apply the human rights set by, *inter alia*, the European Convention on Human Rights (ECHR). As a consequence, the applicants' detention was devoid of a proper legal basis. Moreover, no judicial review of the detention was afforded to the applicants, which made them devoid of means of judicial protection. In sum, national law did not safeguard the human rights of the applicants. (§§ 50-.54). Following the *Amuur* judgment, France adopted the Law on the Waiting zones, applicable to land, sea and air borders. On the one hand, this law provided the administrative practice with a proper legal basis. However, it also institutionalised a differential treatment for those at the borders as compared to irregular non-citizens on national territory, through the establishment of the fiction of non-entry in national law.

1.2. ***The fiction of non-entry***

The new French legislation introduced the so-called fiction of non-entry and normalised its application to "border cases". The thereby newly established legal framework is structured around three main elements: the presumption of non-presence on the territory until a decision on admission is taken (*i.e.* the fiction of non-entry); the possibility of automatically detaining those awaiting admission; and the immediate return of non-citizens who are refused admission at the borders.

Unlike extraterritoriality, the fiction of non-entry does not rely on a fictive excision of the territory and on the manipulation of the State's jurisdiction. It justifies the exclusion of non-citizens exploiting the disarticulation between their physical and legal presence at the border. In this regard, the fiction of non-entry revolves around the idea that a person, despite being physically present on the national territory, is legally considered to be outside of the State as long as she is devoid of a formal authorisation to enter and reside. As BASARAN frames it, «mere physical presence on the territory is insufficient, and only lawful admission amounts to entry and hence the right to benefit from constitutional protection» (p. 64). As an example, under the new French legal framework, detention of border applicants is significantly longer than the detention of ordinary applicants (*i.e.* applicants admitted to the territory undergoing the ordinary asylum procedure) (Article L.342-4 Code de l'entrée et du séjour des étrangers et du droit d'asile CESEDA). This differential treatment is indeed justified by the "unauthorised" status of border applicants.

Another country employing such a legal fiction on a regular basis is Germany, at its air and land borders. Indeed, the "*Fiktion der Nichteinreise*" (fiction of non-entry), was introduced in the 1997 German Residency Law (Aufenthaltsgesetz), in paragraph 13, section 2, which provides that a migrant is considered to be on German territory only once he or she has been legally admitted to the country. Such fiction remains applicable until a decision on the third-country national's stay is taken, even if the individual is transferred "inside" the national territory. Interestingly, when the border is a Schengen external border, the non-admitted individual will be considered as never having entered the State's territory or the Schengen area (see K. SODERSTORM).

However, States experience a number of constraints in the application of such legal fictions due to, *inter alia*, their international obligations. The following section analyses how the ECtHR has limited the State's power on the matter, despite having endorsed this legal fiction in some of its case law.

2. The fiction of non-entry in the ECtHR jurisprudence

The ECtHR dealt with the issue of transit areas multiple times over its jurisprudence. As mentioned in the previous section, in *Amuur* the Court firmly rejected the extraterritorial argument and found that France had full territorial jurisdiction over the transit area. *In casu*, this meant that the human rights guaranteed under the ECHR were fully applicable and that France did not act in conformity with the ECHR. The Court held its position consistently in several judgments dealing with migrants' access to the territory. Beyond *Amuur*, the Court stated in its recent Grand Chamber judgment in *N.D. and N. T. v. Spain* (dealing with a land border) 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 […]. [T]he Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction» (§ 110), as well as that the State's territorial jurisdiction is triggered « at the line forming the border» (§ 109) (see also ECtHR, 12 February 2009, *Nolan and K. v. Russia*, req. no. 2512/04, § 95; 24 January 2008, *Riad and Idiab v. Hungary*, req. no. 29787/03 and 29810/03, § 79). This entails that States cannot create areas «outside the law where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention» (*N.D. and N. T*. § 110)

However, when confronted with the concept of "admission on national territory", the Court retains a degree of ambiguity. In such cases, the issue is no longer related to jurisdiction, but lies with the applicability of "ordinary" human rights guarantees. An example may be detected in the jurisprudence related to Article 5 ECHR and the issue of detention. More specifically, Article 5(1)(f), first period, allows "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country". The uncertainty surrounding the definition of "unauthorised entry" was at the centre of another Grand Chamber judgment in *Saadi v. UK*, related to detention upon arrival of an Iraqi asylum seeker. *In casu,* the applicant maintained that, because he immediately applied for asylum once arrived in the country, he was not seeking to make an unauthorised entry, and he was acting in *bona fide* (§ 28).

Both the Chamber and the Grand Chamber established that under Article 5 States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. In this regard, the Grand Chamber agrees « with the Court of Appeal, the House of Lords and the Chamber that, until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry"» (§ 65). In the case of *Saadi*, the entry of the applicant remained unauthorised well beyond the space of the border (see ECRE). As Costello observes, «the applicant in *Saadi* was not only physically present in the UK, but participating in the asylum process» (p. 143). Still, his legal presence remained "unauthorised" and his mere physical presence was not sufficient to grant the applicant an evaluation of the necessity and proportionality of his detention.

The Court did not deem that the applicant's detention violated Article 5. The fact that the applicant was an "unauthorised entrant" made him automatically detainable, with no burden on the State to prove the necessity of this measure nor the proportionality of the aim pursued. On the contrary, the Court considered that the detention measure was in line with the objective of guaranteeing him a swift asylum procedure. The assessment of legality and non-arbitrariness of detention in cases falling under Article 5(1)(f) is based on a number of factors, such as the conditions of detention and its duration, which have to be appropriate to its aim. Of course, detention must have a legal basis in national law. However, no assessment of necessity and proportionality is required, as the status of an unauthorised entrant triggers the applicability of detention (see COSTELLO, id.; ECRE, id.; *Saadi*, § 65; see ECtHR, 15 November 2011, *Longa Yonkeu v. Latvia*, req. no. 57229/09, § 119; 13 December 2011, *Kanagatnam and others v. Belgium*, req. no. 15297/09, § 80; 23 July 2013, *Suso v. Malta*, req. no. 42337/12, § 89-90; 21 November 2019, *Z. A. and others v. Russia*, req. nos. 61411/15, 61420/15, 61427/15 and 3028/16 § 159).

The judgment in *Saadi* was a widely contested one and included a joint partly dissenting opinion endorsed by six judges (*ex plurimis*, see V. MORENO-LAX). However, the Court subsequently reiterated that detention of unauthorised entrants is a necessary prerogative of a State's power to control entry and stay of aliens in several cases where detention itself was incompatible with the Convention. In *Z.A. v Russia*, the ECtHR's Grand Chamber held that, in the absence of other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State. In such cases, the State authorities have undertaken « vis-à-vis the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications » (§144). What counts, in the Court's words, is whether procedural guarantees concerning the processing of the applicants' asylum claims, protection against *refoulement* and domestic provisions fixing the maximum duration of their stay in the transit zone existed and whether they are applied (see ECtHR, *Z.A.* § 145; but also ECtHR, 21 November 2019, *Ilias and Ahmed v. Hungary*, req. no. 47287/15, §§ 58 ss). *In casu*, detention was found devoid of a legal basis in national law and was patently not in line with the aim of speedy processing of the applicants' asylum claims. The three applicants were held in a transit zone for seven, five and seven months respectively, denied access to international protection and expelled from Russia with no chance of having their claims examined.

Importantly, however, the Court has stressed that a State cannot deny access to the national territory to irregular asylum applicants, especially when they are able to make an arguable claim under Article 3 ECHR (ECHR, 23 July 2020, *M.K. and Others v. Poland*, req. no. 40503/17, 42902/17 and 43643/17, §§ 166 ss; 30 June 2022, *A. B. and others v. Poland*, req. no. 42907/17, §§ 34 ss). As a result, in such a context a State cannot deny access to the territory to a person who alleges that he or she would be subjected to ill-treatment in the receiving country. In these cases, therefore, a State has to grant the person access to his territory in order to duly assess his or her asylum claim (*id*.).

Thus, as long as the law provides for a legal basis and for the existence of procedural guarantees, and the applicant is able to have his asylum claim assessed, deprivation of liberty is permissible when the person is an "unauthorised entrant". On the one hand, by rejecting the extraterritorial argument the Court has refused the existence of a State's power to artificially restrict its jurisdiction and denied the applicability of human rights, namely of the ECHR. On the other hand, endorsing the fiction of non-

entry, it has simultaneously accepted that States may apply a detrimental legal system to non-admitted foreigners.

In the light of the foregoing, we argue that this legal construction is functional to protect States' sovereign right to control entry on their territory, outweighing the individual's right to personal liberty. This conceptualisation of "entry" allows instituting a different legal framework applicable to those non-admitted (See M. Starita), although present, making them detainable *per se*.

Furthermore, it grants the authorities significant discretion in the application of the measure, as it explicitly admits that the "administrative convenience" (see H. O'Nyons) of granting a fast-track procedure is sufficient *per se* to detain irregular asylum applicants. In these terms, it creates an openly imbalanced relationship between the State and the foreigner.

3. The fiction of non-entry in EU law

As seen above, in the context of the ECtHR, the fiction of non-entry has an impact mainly on the right to personal liberty. EU law, by contrast, might be interpreted as providing an entirely different – "exceptional" – legislative discipline to procedures taking place at the EU external borders.

The Schengen Border Code

The first relevant provisions are found in the Schengen Borders Code (SBC hereafter). The SBC provides that third-country nationals with a short-term visa issued under the EU Visa Code shall fulfil a number of requirements listed under Article 6(1) in order to cross an external border and be admitted into the Schengen area. The fulfilment of such requirements is verified by border guards upon entry into the Schengen area. If the border check is successful, then the third-country national is granted entry. Still, the SBC does not explicitly mention the fiction of non-entry. However, it is arguable, *a contrario*, that for the duration of the border checks and until the third-country national is allowed entry, the person will not be considered as having entered the Schengen area. This is supported by the joint reading of Article 6 on entry conditions with Article 14 SBC concerning the refusal of entry. The latter provision, in paragraph 4, states that «[t]he border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned». The consequence of a refusal of entry is the immediate removal of the unadmitted third-country national. Annex V part A(2)(a) of the SBC provides that the responsible authority shall order the carrier to take charge of the third-country national and transport him to the relevant third country (more specifically «to the third country from which he or she was brought, to the third country which issued the document authorising him or her to cross the border, or to any other third country where he or she is guaranteed admittance, or to find means of onward transportation». Annex V part A(2)(a)).

Ensuring non-entrance on the territory entails two implicit elements. On the one hand, it reinforces the idea that entry amounts to formal admission. On the other, it inherently imposes on third-country nationals who have been refused entry a certain degree of limitation of freedom of movement, which might also amount to a deprivation of liberty. The SBC is not clear on this point, giving Member States room to decide on the measure they deem fit for the purpose.

The Return Directive

The discretion left by the SBC is in line with other provisions of EU migration law. In fact, although the consequences of a refusal of entry amount, *de facto*, to a case of "return", the Return Directive allows the Member States to exclude "border cases" from its application. Under Article 2(2)(a) of the Return Directive:

> «Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 (now Article 14) of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State»..

As the European Court of Justice (hereinafter: ECJ) noted in *Affum* (C-47/15) the purpose of such a system is to permit « the Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted when crossing those borders » (§ 74). More specifically, third-country nationals falling under Article 2(2)(a) of the Return Directive do not have a right to stay on the territory pending their appeal under the SBC and the details of the return procedure are determined by the Member State concerned.

The Asylum Procedures Directive

The legal framework applicable to asylum seekers at the border has its basis in the border procedure provided in Article 43 of the Asylum Procedures Directive (APD hereafter). The border procedure allows the Member States to decide on the admissibility or the substance of asylum applications "at the border", in certain well-defined cases listed in the Directive. The above-mentioned provision stipulates that if a decision on the application is not taken within four weeks the applicant shall be granted entry to the territory of the Member State. Again, we can argue *a contrario* that as long as the four weeks period has not expired, the asylum applicant has not legally entered the national territory.

At this stage, two issues need to be examined: first of all, the status of asylum seekers, especially "at the border"; and secondly, whether Article 43 APD imposes a form of limitation on the applicant's personal liberty in border cases.

With regard to the first question, namely the entry of asylum seekers, a number of provisions of the SBC safeguard the respect of the principle of *non-refoulment*, fundamental rights and Member States' humanitarian obligations. As such, Article 3(b) SBC clearly states that the SBC shall be applied «without prejudice to the rights of refugees and persons requesting international protection, with special attention to the principle of *non-refoulement*». Article 4 similarly re-states that the Member States shall act in full respect of fundamental rights and of the principle of *non-refoulment* as enshrined in the Charter and in the 1952 Geneva Convention.

The above constitutes the foundation of the derogation established in Article 6(4) SBC on entry conditions, which allows the entry of third-country nationals not fulfilling the entry conditions on humanitarian grounds or for international obligations, which is precisely the case for asylum seekers.

Do asylum seekers have a full right to enter the Schengen area, then? The answer is not clear-cut. Under Article 9 APD, an asylum applicant has the right to remain on the territory until the determining authority has made a decision on the asylum application and Article 3(1) APD makes clear that the directive shall apply to asylum requests made in Member States territory, *including the borders*. Nevertheless, in *ANAFE* (C-606/10) the ECJ denied that a temporary residence permit issued for the purpose of the asylum procedure grants a right to re-entry to the Schengen area, as « the issue of a temporary residence permit or temporary residence authorisation is an indication that it has not yet been determined whether the conditions for entry into the territory of the Schengen area or for the grant of refugee status have been met» (*ANFE*, § 68). However, in *Gnandi* (C-181/16) the Court ruled that even though the right to remain does not constitute an entitlement to a residence permit, «it is nevertheless apparent […] that […] prevents an applicant for international protection from being regarded as 'staying illegally'» (§ 40).

Drawing upon the foregoing, asylum seekers do not enjoy a full right to enter the territory within the meaning of the SBC, as they cannot be considered as fulfilling the entry requirements under the SBC. Rather, they have a right *not to be expelled* and *not to be considered* "illegally staying on the territory" pending their asylum application.

With regard to detention, the wording of Article 43 APD implicitly imposes on border applicants a form of limitation of their freedom of movement (see G. Cornelisse, M. Reneman). Detaining an applicant in order to decide on his right to enter the territory is indeed permissible under Article 8(2)(c) of the Reception Conditions Directive (RCD henceforth).

However, it remains that under EU law any form of limitation of personal liberty shall fulfill the necessity and proportionality requirements, and shall be resorted to only when less restrictive measures are deemed ineffective (see ECJ, 30 May 2013*, Arslan,* C-534/11, EU:C:2013:343). The obligation to evaluate the necessity and proportionality of the measure was stressed by the ECJ in a number of recent judgments involving Hungary. In particular, in *Commission v Hungary* (C-808/18) the Court clarified that the detention of asylum applicants under Article 43 shall be strictly connected to the aim of verifying the grounds mentioned in the same provision (*i.e.* it underlined the optional nature of the border procedure). Border detention shall not be established as an automatic measure for all asylum seekers illegally entering the Member States (§ 176-185; see also 14 May 2020, *FMS*, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367). These conclusions were recently reiterated in *M.A.* (C-72/22), where the Court ruled that EU law does not allow the detention of asylum applicants for the sole reason that they entered the territory of the Member States irregularly (§§ 56 ss). In addition, this reading is supported by the obligation incumbent on the Member States not to detain a person on the exclusive ground that he or she is an applicant for international protection, provided in Article 26(1) APD.

In the light of the foregoing, the fiction of non-entry constitutes the basis of the functioning of the Schengen system and of the admission procedures at the borders of third country nationals. This is particularly relevant in the case of third-country nationals who *entered* the Union territory irregularly and were refused entry at the border under Article 14 SBC. For this category of persons, EU law provides for a specific legal framework concerning detention and return which is partly different from the one applicable to third-country nationals irregularly *staying* on the territory. Moreover, under

Article 5(1)(f) ECHR a sufficient ground for detention is that the person is an "unauthorized entrant", regardless of whether he or she is an asylum seeker or an irregular migrant. However, EU law frames detention as a measure of last resort, restricting the power of States to render it a generalized measure. Furthermore, the "humanitarian" derogation under Article 6(4) SBC secures respect for the principle of *non-refoulement* and of the fundamental rights guaranteed by the ECHR, especially with regard to Article 3 ECHR.

4. The New Pact on Migration and Asylum 2020

Admittedly, the logic of exclusion underlying the fiction of non-entry applied to asylum seekers is rather exceptional in EU law. In spite of this, the would-be provisions advanced by the European Commission in the New Pact on Migration and Asylum of 2020 seem to institutionalize it[22]. The New Pact aims at creating "an integrated border procedure", which is composed of three phases: (a) entry checks upon a third country national's arrival; (b) the asylum border procedure; and (c) expulsion at the border consequent to a refusal of entry.

In this framework, the fiction of non-entry becomes the juridical condition upon which the new Regulation for pre-entry screening relies. The pre-entry screening would encompass preliminary screening concerning a) vulnerability assessment; b) identity checks; c) registration of biometric data; d) health screening (the only actual novelty introduced, as not provided so far under the SBC). This would apply to all third-country nationals not fulfilling the entry conditions crossing external borders.

The latter Regulation implicitly mentions the fiction of non-entry in multiple instances. On p. 5 the Explanatory Memorandum states that «during the screening, meaning during the checks to determine the appropriate following procedure(s), *the third-country nationals concerned should not be authorised to enter the territory of the Member States*» (emphasis added) (p. 5). The pre-entry Regulation shall be read in conjunction with the relevant provisions of the Amended Proposal for a Procedures Regulation (APR), which amends part of the border procedure and introduces a procedure of "rejection and return at the border" for those whose asylum border procedure was unsuccessful.

The new border procedure provided in Article 41 of the APR shall take place following the screening procedure and «provided that the applicant *has not yet been authorised to enter Member States' territory* » (Article 41(1)), in cases of, *inter alia*, an application made at an external border crossing point or in a transit zone (Article 41(1)(a)). In this context, the applicant shall be kept in proximity of the external border (Article 41(13)). The third phase of the integrated border procedure consists of the "border returns" of third-country nationals whose application is rejected, under the new Article 41a APR. The provision also explicitly mentions the fiction of non-entry, underlying that third-country nationals undergoing the procedure shall not enter the territory of the Member State (Article 41a(1)).

One of the implicit consequences of such an integrated procedure lies in the wide margin of appreciation given to the Member States to implement detention measures aimed at preventing the entry of applicants. Although in this context the non-entry fiction relies on the alleged short duration

[22] The New Pact on Migration and Asylum was issued in 2020. It aims at reforming the Common European Asylum System and the legal framework concerning the management of migration and external borders by introducing a ''comprehensive approach'' to migration management.

of the procedure, it introduces a generalized use of deprivation of personal liberty of third-country nationals at the border. Moreover, a number of concerns are raised in relation to the pre-entry screening. In fact, the requirements of necessity and proportionality of the detention of asylum seekers still apply to those subjected to the new asylum border procedure. However, third-country nationals undergoing the pre-entry screening appear to be left in a juridical limbo with no clear legal framework applicable, as the screening would precisely serve the function of defining third-country nationals' legal status (see L. Jakulevičienė).

In conclusion, despite the fact that the New Pact was presented as introducing brand new measures and procedures, we argue that it expresses a general trend toward the institutionalization of already existing exceptional measures (see G. Cornelisse, J. Ferejohn, P. Pasquino,). In this light, it does not solve the loopholes already existing in EU migration law. Instead, it deepens the discretion left to the Member States, shrinking the human rights protection of third-country nationals at the EU external borders (on the multiplication of the physical and legal spaces for migrants' informal detention, see G. Campesi).

C. Conclusion

This contribution had the objective to analyse how the legal fiction of non-entry is implemented within the arenas of EU law and ECtHR jurisprudence and how it affects the way that fundamental rights are framed at the borders.

The fiction of non-entry relies on the disarticulation between the physical and legal presence of unauthorized migrants at the borders. Such a disarticulation allows States to implement a different set of rights for those at the borders, normalizing the idea that those not legally admitted to the territory might receive detrimental treatment compared to those already (legally or even illegally) present on the territory.

While in the context of the ECtHR, the implementation of the fiction of non-entry is limited to Article 5 ECHR, in EU law it constitutes the basis of the functioning of the Schengen system. In this regard, a number of concerns emerge in relation to third-country nationals not fulfilling the entry conditions under the SBC who are refused entry under Article 14 SBC. Indeed, they are subjected to a "simplified return procedure" which may reduce their procedural rights, while asylum seekers, even when they are unauthorized entrants and are subject to the border procedure, enjoy a right to stay on the territory (*i.e.* a right not to be expelled) pending their application for international protection. In this regard, the New Pact on Migration and Asylum sheds a worrying light on the respect for migrants' fundamental rights. In addition, this tendency to transform the exception into the rule is not new in EU law, as it has been argued that informal procedures at the EU external borders have served as laboratories for new EU policies (*ex plurimis*, R. Andrijasevic). For example, the hotspot approach well illustrates this trend (see, A. Sciurba).

This relationship between the rule and the exception emerges from the legislative setting of the New Pact on Migration and Asylum of 2020. In this context, the fiction of non-entry would be implemented in all procedures related to irregular third-country nationals and asylum seekers at the external borders. This change in the framework, which would result in a shift from the exception to the rule, has the ultimate effect of lowering the human rights standards of migrants reaching the EU in an unauthorised manner.

D. Suggested Reading and Selected Bibliography:

Caselaw

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