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Ex Parte Principis
Re-(b)ordering Europe
Through Migration Law and Legal Fictions

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TABLE OF CONTENTS: 1. An introduction to legal fictions: structure, functions and purposes. – 1.1. The (dis)appearance of *fictio iuris*: common beliefs. – 1.2. Strategic dissimulation. – 2. Non-entry fiction, (international) transit zones and extraterritoriality. – 2.1. The gradual proliferation of non-entry fictions across the Member States: France and Germany. – 2.2. The incorporation and evolution of fictional devices within EU law. – 2.3. The deprivation of liberty, stemming from the 'non-entry' fiction, is not a distinguished fiction but can lead to additional legal fictions. – 3. New frontiers for re-(b)ordering and extraterritoriality: the Protocol between Italy and Albania. – 4. A diachronic analysis of the use and features of border fictions. – 4.1. First diachronic analysis: differences in structure and purpose between ancient and current fictions. – 4.2. Second diachronic analysis: differences between EU border fictions and U.S. entry fiction doctrine. – 5. Concluding remarks for forthcoming analysis.

ABSTRACT: Contemporary migration and asylum law – both at the level of the Member States and within the broader framework of the European Union – increasingly relies on legal fictions to manage migration flows, process international protection applications, and shifting responsibilities. Among these, the 'fiction of non-entry' stands out as particularly significant. What does this fiction truly encompass, and how does it impact constitutional principles and fundamental rights? In which legal and political circumstances has this *fictio iuris* arisen, and how is it taking shape in practice? What are its key characteristics, and in what ways does it differ from the legal fictions used by older legal traditions or by contemporary systems like that of the United States? This paper aims to tackle these questions and bridge a gap in current academic debate.

KEYWORDS: *fictio iuris* – non-entry fiction – EU migration and asylum law – border – extraterritoriality – transit zones.

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1. An introduction to legal fictions: structure, functions and purposes

The paper explores the emergence, construction and assimilation of legal fictions in Member States and EU migration law, having regard to the negative impact on constitutional principles and fundamental rights. The adverse effects can be preliminarily summarised under the concept of re-(b)ordering, which entails the redefinition and restructuring of border-related jurisdiction through the application of legal fictions. This gradual and complex process not only reshapes the legal framework in the field of migration law but also risks progressively to lead to a reversed EU legal order. Such a shift holds significant consequences, particularly in terms of undermining the adherence to constitutional principles and weakening the mechanisms designed to protect fundamental rights.

In recent years, legal fictions have been frequently employed in the migration law system of some Member States and the European Union. However, the literature on national and EU migration laws addresses legal fictions at times in inaccurate ways, at times in purely rhetorical and emphatical terms and at times after due consideration. In this vein, there are those who reason about the fiction of (international) protection, the fiction of non-detention, the fiction of safe countries and the fiction of non-entry.

To bring clarity to this topic, it is first essential to narrow and define the concept of legal fiction. Then, on the basis of this framework, it is feasible to identify the legal devices of migration law, which can be genuinely qualified as falling with the realm of legal fictions. In other words, legal fictions in a strict rather than in a broad sense.[1]

As regards the first point, i.e. what is meant by legal fiction in a strict sense, the notion of fiction has been associated with a wide array of legal phenomena and methodologies.[2] Nevertheless, it is possible to at least outline the boundaries of this concept to understand its fundamental mechanics. As a means of legal technique, a legal fiction belongs to that art that goes by the name of legal economy, the art of 'finding suitable means to reconcile the often rigorous principles of reason with the demands of practice'.[3] And when that result cannot be achieved by simple means, law resorts to artificial and oblique devices like fictions. Indeed, a fiction is used when, faced with situations that are difficult to reconcile with the established rules or theoretical postulates of the legal system, the law relies on legal expedients designed to make the new situations fit in.

Unlike extensive interpretation, legal presumption and analogy, which remain within the established legal system, a fiction is a legal tool whose artificiality and

[1] To grasp how scholars broadly use the term 'fiction' in the context of migration legislation and administrative measures see A Lindberg and L Marie Borrelli, 'State-Crafted Dominant Fictions: How Bad Documents, Gut Feelings, and Selective Intelligence Shape Border Control in Europe' (2025) 59 *Social Policy & Administration* 627.

[2] For an in-depth examination of legal fictions, with reference to constitutional law see E Olivito, *Le finzioni giuridiche nel diritto costituzionale* (Jovene 2013).

[3] G Macchiarelli, 'Fictio iuris (concetto razionale e positivo della)' in *Enciclopedia Giuridica Italiana*, VI/2 (Società editrice libraria 1903) 539 (my translation).

strained nature is more evident.[4] Because of the way in which a legal fiction succeeds in achieving its underlying purposes, it can be traced back to the realm of pseudo-truths or false assertions.[5]

A false assertion can take the positive form of simulation, whereby an object or event is consciously presented as similar to something from which it differs (thus, *as if* it were something other than which it actually is). But it can also take the negative form of dissimulation, whereby what it actually is (or is in a certain way) is consciously portrayed *as if* it were not (or *as if* it were not in that particular way). In the case of a legal fiction, however, a false assertion does not imply a desire to mislead the addressee, as is the case with deception.[6] The person propounding the fiction (the legislature, the court or legal scholar as the case may be) has no intention of creating a mistaken understanding of certain objects or events: the divergence between what is *asserted* (or concealed) and what *really* is the case is evident to both sides.[7] Recourse to a fiction can therefore be distinguished by the fact that a form of tacit agreement exists between the author and the addressee/audience of the false assertion: it is clear to both that the assertion is not actually true.[8]

In the field of legal studies, a fiction is not designed to mislead but rather to cater to specific needs within the legal system. Indeed, its significance lies in the objectives for its use and the purposes it seeks to accomplish. Moreover, legal fiction not only satisfies various requirements within a legal system but also derives its rationale from the unique characteristics of that system, as well as from the socio-historical developments that require legal adaptation. Within the framework of a historical analysis of law, it is thus crucial to move beyond an examination limited solely to the linguistic structure of legal fictions. Instead, primary emphasis should be placed on understanding the multifaceted functions these fictions fulfil and their broader implications for the legal and societal contexts in which they are embedded.

In this regard, the starting point can only be Rudolf Jhering's famous distinction between 'historical fictions' and 'dogmatic fictions'.[9] This bipartition has been adopted by many other classifications, each of which has in some way echoed the original thereby operating to add to or embellish it. Jhering, who defines legal fictions as 'a technical lie consecrated by necessity',[10] considers that these fictions serve two fundamental functions.

[4] For a thorough analysis of the differences see Ch Perelman and P Foriers (eds), *Les présomptions et les fictions en droit* (Bruylant 1974).

[5] E Dieni, *Finzioni canoniche. Dinamiche del 'come se' tra diritto sacro e diritto profane* (Giuffré 2002) 33 ff.

[6] '[Fictio] non est mendacium, sed aliqua figura veritatis' Tommaso D'Aquino, *Summa Theologiae*, p. III, quaest 76, Art VIII (Ex Typographiae Forzani et S. 1894) 679.

[7] Dieni (n 5) 33 ff.

[8] LL Fuller, 'Legal Fictions' (1930-1931) 25 *Illinois Law Review* 367.

[9] It is undoubtedly noteworthy that Jhering deals with fictions in the third volume of *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, III/1 (Breitkopf und Härtel 1877[3]) 281 ff.

[10] Ibid 296.

So-called historical fictions further legal progress since they allow new situations to be brought within the scope of application of established legal rules, without the need to change the latter while at the same time ensuring that new needs emerging from society are met. The result is achieved by means of a false assertion (or denial) of circumstances, the existence (or non-existence) of which is a condition for the application of the rules in question. In this way, instead of modifying the law so that it can embrace the new cases, the latter are forcibly made to fit within the existing law through a false representation of them (*as if* they were something else).

In the past (Roman law and English law), the result attained by this stratagem was to leave the letter of the law unchanged, while in fact its scope was completely altered. The fiction consisted precisely in this: although altered, the rule appeared to be what it had always been![11] This confirms the close link between fiction and the historical development of law, which even in this case is camouflaged under the guise of an apparent legal immobility.

So-called dogmatic fiction is placed, on the other hand, by Rudolf Jhering on a rather different plane since it does not serve to fictitiously channel new situations into the sphere of application of established rules but is designed to further legal dogmatics. The use of the expedient, in this second case, is dictated by the need to position novel theoretical solutions within a given legal system so that they can be considered as being consistent with founding principles and dogmatic categories of the legal system.

Starting from medieval and early modern law, dogmatic fiction has also made it possible to construct and refine important legal concepts (for example, *persona ficta*, legal personhood).[12] In this different configuration, a fiction no longer operates in the sense of simulating (or dissimulating) certain situations in order to bring them within or outside the sphere of application of existing rules. It proceeds rather in accordance with patterns of progressive abstraction and generalisation necessary to underpin new theoretical-dogmatic doctrines.

A purely practical function, 'in order that the wine of new law might be put into the bottles of old procedure', is thus accompanied by a theoretical function, which serves to 'arrange recognized and established doctrines under the most convenient forms'.[13] However, Jhering's bipartite division, while certainly offering a starting point for grasping some salient differences in the way fictions operate, should not lead us to think that it is possible to separate the two functions so clearly. The proposed distinction can be accepted for its heuristic value, beyond which in practice the contours are much more blurred than can be observed at first glance. In essence, the opinion of those who consider that the distinction between the two types of functions of legal fiction to be inexact is certainly a valid one since 'legal fictions all serve, to a

[11] HS Maine, *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas* (Murray 1861) 26.

[12] Jhering (n 9) 299.

[13] JC Gray, *The Nature and Sources of the Law* (Macmillan 1921) 34, 36.

lesser or greater extent, a historical function and, at the same time, a dogmatic function'.[14]

1.1. The (dis)appearance of *fictio iuris*: common beliefs

In contemporary legal scholarship a deeply held belief persists, that has gained ground since the late 19th century: the era in which the law made use of legal fictions is long gone, and the attention sometimes paid to them by legal scholars is driven by a purely historical interest. Contemporary legal systems are said to have reached such a level of development that the need for *fictio iuris* has ceased to exist. Today, therefore, the conditions for resorting to this expedient no longer exist, even though it played a fundamental role in the evolution, for example, of Roman law and English law.[15]

This belief remains particularly strong in the field of constitutional law, because it is held that legal fictions have faded away before modern constitutionalism became established and the science of constitutional law rose to the rank of an autonomous science. It is also assumed that the supposed resistance of constitutional law to such an ambiguous tool is dictated by reasons of 'survival': to rely on *fictio* where the constitutive principles of the legal system come into play would mean undermining the solidity of certain foundations and calling into question the stability of the system.

This paper, however, takes a different approach.[16] The legal fictions on which legal systems still rely reflect a central element of the *fictio iuris*. This device, in fact, always straddles the line between conservation, continuity and change, finding its place between these imperatives. Legal scholarship has often preferred to emphasise one aspect or the other, whereas the reflections proposed here stem from the belief that the three aspects just mentioned must be considered together to understand the multifaceted nature of this device.

The idea that the study of legal fictions is fundamentally 'historical' in nature is reinforced here, though in a manner that differs significantly from the usual approach to this subject. The historical interest underlying any investigation into the *fictio iuris* does not in any way imply that this device can be relegated to the archaeology of law, such that it would only make sense to deal with it in these terms. The historicity of legal fictions must, instead, be understood in its entirety, as the historicity of law, which is history and becomes history in the ceaseless and intricate flow of conservation and change. It therefore constitutes the necessary key to understanding devices that have not only spanned different historical eras and diverse legal experiences, but above

[14] F Gény, *Science et technique en droit privé positif. Elaboration technique du droit positif*, III (Sirey 1921) 377 (my translation). See also F Todescan, *Diritto e realtà. Storia e teoria della* fictio iuris (Cedam 1979) 458.

[15] In this regard, although from very different perspectives, see HU Kantorowicz (Gnaeus Flavius), *Der Kampf um die Rechtswissenschaft* (Winter 1906) 24 ff; R Pound, *Jurisprudence, The Scope and Subject Matter of Law: Sources, Forms, Modes of Growth*, III (West Publishing Co. 1959) 449.

[16] For a more in-depth discussion of this point Olivito (n 2) 153 ff.

all have acquired, over time, very different forms and functions in response to the needs of legal systems that are just as changeable in structure and purposes.

It is therefore misleading to strive a definition of *fictio iuris* universally valid across all times and for every fiction devised by the law. Such an effort risks oversimplifying a multifaceted phenomenon into generic and overly reductive formulas, stripping them of practical value. A historical perspective offers an alternative approach: one that, on the one hand, aims to differentiate *fictio iuris* from other constructs of legal technique and language – such as presumptions, metaphors, analogies, and myths – and, on the other, remains consistently mindful of the interplay of interests, conflicts, and needs that law seeks to address through it.

In following this direction, one cannot help but note first that there are as many typologies of legal fictions as there are legal systems that have made use of them. The *fictio* of Roman law was, in fact, quite different from that of the medieval epoch, due to the context in which it operated and, consequently, the functions it was called upon to perform. The fictions of ancient Rome, operating at the level of substantive and procedural law, became indispensable above all for adapting a legal system – otherwise rigidly bound by the principle of tradition – to changing historical and social needs. Medieval fictions, by contrast, whilst acknowledging the historical changes taking place, focused also on the renewal of the doctrinal categories employed by *scientia iuris*.[17]

Legal fiction has undoubtedly been a topic of intense doctrinal debate and remains an area where opinions often polarise between complete rejection and full acceptance. However, even a brief review of doctrinal perspectives from the nineteenth and twentieth centuries reveals that views on *fictio iuris* transcend traditional categorisations within legal studies. There is little to substantiate the notion of a distinct divide between formalists, often presumed to be enthusiasts of legal fictions, and anti-formalists, who are supposedly detractors of such devices.

The picture is far more complex, and it is surprising to note how, precisely on the subject of legal fictions, the positions of some legal scholars associated with formalism are close to those of anti-formalism.[18] Opinions regarding *fictio iuris*, in fact, are dictated more by the conception of law developed by legal scholars individually and the historical context in which they formulated it, than by a generic attribution to one or the other 'legal family' (a dichotomy which, moreover, appears problematic in itself).

The issue at hand is considerably more complex than it might seem at first glance. Interestingly, when evaluating the acceptance of legal fictions, the views held by some legal scholars traditionally identified with formalist approaches often closely align with those typically associated with anti-formalist thought. Perspectives on *fictio iuris*

[17] M Lobban, 'Legal Fictions before the Age of Reform' in M Del Mar and W Twining (eds), *Legal Fictions in Theory and Practice* (Springer 2015) 199 ff.

[18] Regarding the challenges that arise when trying to structure the discussion on legal fiction within the binary frameworks of positivism versus realism and formalism versus anti-formalism, see O Cayla, 'Ouverture: Le jeu de la fiction entre «comme si» et «comme ça»' (1995) 21 *Droits, revue française de théorie juridique* 5.

are shaped less by a general affiliation with a particular 'legal family' and more by the specific legal theories developed by each scholar, as well as the historical context within which they were articulated. The dichotomy within legal scholarship regarding the legitimacy of legal fictions further hinges upon the specific function that a given fiction seeks to fulfil. Legal fictions performing a 'dogmatic' function – those designed to reconcile emerging legal concepts with pre-existing doctrinal axioms – are assessed differently from those fulfilling an 'adaptive' function, which seek to introduce new rules while apparently preserving the structure of old ones. Consequently, some scholars may reject the former type of fiction while endorsing the latter, or vice versa. In the context of adaptive fictions, the distinction is sometimes protracted further between legislative and judicial applications, with legislative fictions perceived as legitimate, whereas judicial ones are viewed with scepticism.

Nevertheless, the fundamental issue surrounding legal fictions lies in their connection to reality. These constructs serve as a mechanism through which the law attempts to reconcile legal reality with historical reality. Therefore, how one perceives such tools is ultimately influenced by their understanding of legal reality and, more importantly, by the degree to which they believe it aligns with historical reality.[19] From this perspective, *fictio iuris* is not a complete denial of reality, but rather a tool through which the law, in borderline cases, offers its own image of reality. The reality to which fiction pertains is inherently dual in nature. On one side lies legal reality, the domain that *fictio* aims to influence, effecting a transformation under the guise of maintaining the current order. On the other side, however, the impetus to renew legal reality arises from forces rooted in historical reality, even in cases where fiction is purely theoretical. Within the interplay between these two dimensions, fiction functions as a mechanism through which it may appear that the law seeks to manipulate material reality, while its true focus remains on shaping legal reality.

1.2. Strategic dissimulation

Understanding the relationship between legal fiction and reality requires a thoughtful examination of its underlying causes and the objectives it aims to achieve. Failure to pay attention to both elements risks leading to an assessment of the *fictio iuris* that is unfounded and, therefore, misleading. To this must be added that an investigation into the *fictio* must not only be historically informed but must also combine the diachronic with the synchronic perspective.

The intersection of these two levels allows us, in fact, to add another important piece to the analysis: are legal fictions a temporary or permanent instrument of legal technique? The answer is that 'in itself' the *fictio iuris* cannot be regarded as a tem-

[19] In this regard see Ch Perelman, 'Présomptions et fictions en droit, essai de synthèse' in Perelman and Foriers (n 4) 343.

porary instrument of law, that is, one limited in time to the early stages of its evolution. It cannot be assumed that the law will dispense with it once it has reached a certain degree of maturity.[20] Such a linearly 'progressive' view of law (and of legal fiction) is unconvincing, as it is directly contradicted by the persistent use of legal fictions, albeit adapted to serve varying purposes and contexts.[21]

Temporariness, if anything, characterises single instances of legal fiction: they are introduced with the specific intent of being replaced by more suitable mechanisms once their immediate purpose has been fulfilled. Thus, while *fictio iuris* functions as a lasting tool within the legal system, its particular applications are inherently time-bound. Additionally, legal fictions meet with different fates, depending on their strength, degree of influence, and the outcomes they achieve. As a result, they may gradually fade away, fail to produce any substantial effects, or drift into the ambiguous realm of figurative language.

The belief that modern law eliminated an instrument once regarded as problematic arises from two main factors. Firstly, the perception of a removal was largely driven by a normative perspective, reflecting an urgent desire to portray the law as having broken away from outdated devices. The deeper objective of this assumption was to redirect both legal methodology and, more significantly, the underlying perception of what law represents. Secondly, that idea was rooted in the challenge of acknowledging that legal fiction had not vanished but instead evolved. It undergone a gradual transformation in its structure, functions, and objectives, rather than ceasing to exist altogether.

When *fictio iuris* then entered the domain of public law – which had laboriously achieved autonomy from private law – and took root within the emergent framework of constitutional law, its presence went largely unnoticed. This was partly because it carried little trace of its earlier applications and partly due to resistance against acknowledging the use of a mechanism seemingly at odds with the principles of legal certainty, coherence, and transparency. At a time when modernity demanded that other paths be followed, and public law were no exception, it, too, was expected to align with the paradigms of legal progress, leaving behind legal instruments considered outdated or 'pre-modern'.

The new 'public law' phase of *fictio iuris* marked a notable transition, characterised by the emergence of mechanisms that extended beyond merely adapting the legal system to social changes or organising its related dogmatic underpinnings. In addition to fictions intended to modernise the regulatory and dogmatic framework, a new category of fictions began to surface, eventually becoming central to shaping the foundational principles of modern constitutionalism. A striking example of this transformation can be seen in the constructs favoured by seventeenth-century contractualist thought, such as the state of nature and the social contract.[22] These were

[20] R Demogue, *Les Notions Fondamentales du Droit privé* (Rousseau 1911) 247.

[21] P Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 27 ff.

[22] YC Zarka, 'État de nature et fiction' in YC Zarka, *Philosophie et politique à l'âge Classique* (Presses Universitaires de France 1998) 227.

conceived as practical heuristic fictions, designed not only to help interpret existing realities but also to act as 'performative' tools that, to some degree, brought those very realities into being.

Gradually, the private law debate regarding the fictional or real nature of legal persons shifted into the context of public law, which was still 'in its infancy' and searching for its categories. Thus, the idea spread that the State possessed its own legal personality. Nonetheless, as is often the case with the adoption of new concepts – particularly those tested previously in other fields – the idea of the State as a legal person emerged as a *fictio iuris*.[23] The difference being that the legal fiction came to encompass the very foundations of the entire legal system and became so deeply integrated and normalised within the legal framework that its artificial nature was effectively obscured. Over time, this conceptual evolution created a paradox: theories clinging to *fictio* to define the State's legal personality came to be labelled as fictions themselves. This shift occurred because, in the discourse of public law scholars, the State's legal personality had gradually solidified into an accepted and undeniable legal reality.

After key principles of modern constitutionalism were embedded in positive law, constitutional doctrine, legislatures, and courts soon created legal fictions to reconcile the theoretical underpinnings of constitutional orders with their practical implementation. An important issue thus arises regarding how these fictions evolve when moving across legal levels. What changes occur when a fiction initially crafted by scholars or courts is adopted by the legislature? Does its meaning or scope shift? Furthermore, how does the adoption of such fictions by constitutional versus ordinary judges impact the legal system's ability to integrate them?

These questions are of particular interest, both because they allow us to assess the effectiveness of such tools and because they shed light on the eclectic nature of their use. Indeed, there may be cases where a fiction functions perfectly well as long as it remains confined to the realm of legal theory, only to prove unsuccessful once it is translated into positive law. Nor is it certain that the transition of the fiction from one level to the other does not entail its definitive transformation. Over time, in fact, it might even take on the characteristics of a myth or a dead metaphor or simply become a commonly used verbal expression.

2. Non-entry fiction, (international) transit zones and extraterritoriality

Fictio iuris is not merely a tool of legal technique but a means behind which concrete interests and conflicts lie hidden. The analysis of *fictio iuris* in the context of Member States and EU migration law thus provides an insight into the diverse rationales underpinning legal systems governing migration.

[23] H Vaihinger, *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschen auf Grund eines idealistischen Positivismus* (Meiner 1922) 257 ff.

If nowadays migration law is one of the fields in which the 'incursions' of *fictio iuris* seem to be increasing, it is necessary to understand the features and purposes of legal fictions employed there as well as the reasons underlying their use. In migration law, legal fictions are employed not solely for technical purposes or to maintain internal consistency within the system. Their very existence highlights that, when faced with challenges in addressing certain needs directly, the legal system resorts to an ambiguous mechanism to navigate these complexities. It is equally crucial to distinguish legal fictions from reality, as this allows for a critical examination of their legitimacy and the potential consequences they produce.

In this regard, *fictio iuris* is an instrument, whose ambiguity stems from the fact that not only it can be employed to serve very different purposes, but it can function in two opposing ways. It can serve as a means of bending the law to the influence of State interests, thereby masking the legal system's capitulation to the sheer force of State sovereignty. Alternatively, fiction can serve as proof of how the law, in some instances, follows indirect routes to accommodate demands that would otherwise remain unmet, precisely because they do not align with dominant interests. To distinguish between the two scenarios, it is necessary to examine how migration law' fictions are shaped and the framework – both historical and legal – in which they are situated. This approach will enable the distinction between fictions that simply mirror State interests and those that the law employs to shape or influence such interests.

As regards the issue mentioned in Section 1 – namely, identifying the migration law devices that can be classified as legal fictions in a strict sense – an essential prerequisite for this analysis involves the precise delineation of the concept of legal fiction within the context of migration law. To this end, it is crucial to recognise that the term legal fiction neither refers to a literary construct nor denotes a generalised critique or negative assessment of a statutory norm, judicial decision, or legal theory.[24] By establishing this clarity, a more nuanced understanding of legal fictions' characteristics, functions, and constitutional implications can be advanced.

In the realm of European migration law, the concept of legal fiction is particularly relevant when addressing the so-called 'fiction of non-entry'. This term has gained notable traction in recent years within legal discourse, often serving to underscore various setbacks and regressions in migration and asylum policies.[25] The 'non-entry legal fiction' has begun to be discussed particularly in connection to EU migration and asylum law, also because of an extending externalisation of both EU border control and the management of migration flows and asylum applications.

[24] This point is also emphasised by R Lewis, *Legal Fictions in International Law* (Elgar 2021) 3.

[25] Among the earliest to have identified it, albeit without delving into its characteristics as a legal fiction, see J Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40; T Gammeltoft-Hansen and JC Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235; V Moreno-Lax, *Accessing Asylum in Europe, Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017).

The impact of this fiction on the respect for constitutional principles and the safeguarding of fundamental rights is frequently highlighted in existing scholarship. However, there is a noticeable lack of discussion regarding how this fiction should be situated within the notion of legal fiction, whether from a theoretical perspective or through synchronic and diachronic analysis. This paper seeks to address this gap by exploring not only the historical foundations and defining features of the non-entry fiction as applied in the context of EU and Member State migration laws but also its objectives, efficacy, difference from past legal fictions, and its parallels with the US entry fiction doctrine.

First and foremost, it should be noted that the fiction of non-entry hinges on a formalistic distinction between the physical presence of foreigners within a State's territory and their legal recognition as having entered. This notion encompasses several key characteristics: *i)* it operates on the separation between a third-country national's physical entry into the territory of an EU Member State and the legal or regular status of that entry as determined by the Member State; *ii)* it is invoked when a third-country national crosses an EU border without authorisation – or is presumed to lack authorisation – to do so; *iii)* its application is most observed in international airport settings. The 'non-entry legal fiction' can be thus understood as a construct that relies on the manipulation of spatial or geographical elements, leading to significant and complex constitutional implications.

In the European Union context, this legal fiction is examined through three interconnected levels where border control intersects with asylum procedures: *i)* the extensive use of so-called 'border procedures', which have been reaffirmed and redefined under the 2020 EU Pact on migration and asylum;[26] *ii)* the treatment of 'transit zones' as though they were extraterritorial spaces beyond the jurisdiction of the EU Member State in which they are physically located;[27] *iii)* the designation of areas within Third Countries as 'border zones' of EU Member States to facilitate expedited procedures for border control or migrant returns, as exemplified by agreements like the Italy-Albania Protocol.[28]

As will be emphasised, the non-entry fiction has many consequences on the legal framework applicable to third country nationals present at borders or in transit zones. It effectively enables the application of a less robust legal regime and reduced procedural safeguards for third country nationals present at borders. These procedural

[26] M Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status' (2022) 26 *European Law Journal* 171; V Apatzidou, 'Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348' (2025) 37 *International Journal of Refugee Law* 201.

[27] A del Valle Gálvez, 'Las zonas internacionales o zonas de tránsito de los aeropuertos, ficción liminar fronteriza' (2005) 9 *Revista electrónica de estudios internacionales* 1; B Nieswand, 'Die Transitzone und die Fiktion der Nichteinreise. Das Flughafenasylverfahren im Zwielicht von Normalität und Ausnahme' in J Oltmer (ed), *Migrationsregime vor Ort und lokales Aushandeln von Migration* (Springer 2018) 345 ff.

[28] S Montaldo, 'Not in My Backyard! Outsourcing EU Asylum Procedures to Third Countries: A Challenge for the Common European Asylum System' (2025) 62 *Common Market Law Review* 327.

standards fall short of those afforded to foreigners residing within the territory of an EU Member State, whether their stay is regular or irregular.

But before delving into the consequences of this fiction, it is worth examining its structure and the purposes it serves. It is common ground that international airport transit zones are established to allow the transit of individuals and goods through national territory without requiring them to undergo formal entry procedures. Accordingly, it is widely accepted that travellers can pass through these zones to board connecting flights, even if they lack a visa for entry into the transit country.[29] The creation of such zones is, however, often paired with a legal fiction, as States treat these transit zones 'as if' they were not yet State territory and were instead, in terms of jurisdiction, 'extraterritorial zones'. This conceptual framework reveals its fictional nature when analysed through the lens of specific national legal systems as well as within the legal system of the European Union.[30]

2.1. The gradual proliferation of non-entry fictions across the Member States: France and Germany

To understand the relationship between the extraterritorial – or more aptly, a-territorial – status of areas located firmly within a State's geographical borders and the management of migration flows and asylum applications, examining the case of France can provide valuable insights.

Since the mid-1970s, individuals seeking asylum upon arriving in France or those refused entry – whether due to administrative reasons, such as invalid visas or missing passports, or discretionary concerns, such as suspected irregular immigration – have been held under the authority of the air and border police for varying periods. According to official statements from the French government, specific areas within international airports, particularly those between runways and customs checkpoints, are not legally considered part of French territory. These spaces are neither governed by French domestic law nor explicitly regulated under international law. For instance, at Roissy-Charles de Gaulle Airport, which lies deep within French soil geographically, the air border is conceptually redefined as an a-territorial zone.

The disruption of territorial continuity operates through the invocation of a legal fiction: the legal device posits that the so-called 'international zone' of the airport lies beyond France's jurisdictional boundaries, even though it is physically situated within the country. This fictitious manoeuvre effectively enables for specific legal exceptions to be implemented within these areas.[31]

[29] T Gammeltoft, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011).

[30] F Rondine, *La condizione giuridica dello straniero nelle zone di transito aeroportuali* (Editoriale scientifica 2025).

[31] P Maillet, *Nowhere Countries: Exclusion of Non-Citizens from Rights through Extra-Territoriality at Home* (Brill 2019) 26 ff.

In 1992, responding to mounting pressure from human rights organisations and the threat of several legal proceedings, the Socialist Minister of the Interior, Paul Quilès, introduced legislation designed to formalise an administrative practice which had already become established within a legal framework. Known as the Quilès Law and enacted as Law No. 92-625 on July 6, 1992, it specifically provided for the creation of 'waiting areas for persons awaiting a decision' (*zones d'attente pour personnes en instance – ZAPI*). It also amended Ordinance No. 45-2658 of November 2, 1945, which had previously regulated the conditions for the entry and residence of foreign nationals in France.[32]

The detailed history of waiting zones in France cannot be fully explored here. Nonetheless, it is worth highlighting how this concept has significantly evolved since the early 2010s, becoming more flexible and adaptable over time. The transformation is due both to changes in its legal definition and to administrative practices, which now incorporate digitalisation and dematerialisation of border control processes. As a result, what was once viewed as an exceptional measure within French law has gradually normalised into routine practice.[33] Furthermore, in 2021, the legislation has been amended to include a provision stating that if a group of at least ten foreign nationals enters France outside an official border crossing point, the waiting zone can be extended for up to twenty-six days, covering the area between the actual point of entry and the nearest border crossing.[34]

The aim of these legislative reforms is clearly to prevent migrants – who, despite being physically present on French soil at the time of their identification, may not necessarily be in border regions – from accessing the standard procedures for exercising their rights and seeking asylum. Instead, the reforms aim to subject them to a distinct legal framework governing refusal of entry and detention within designated waiting zones.

Based on the research conducted to date, European legal literature has nevertheless started to scrutinise the fiction of non-entry more critically between 2017 and 2018, in the context of German legislation and its application within transit and border zones: *die Fiktion der Nichteinreise*.[35] Section 13(2) of the Residence Act of 2008 (*Aufenthaltsgesetz*), as amended in 2018, provides as follows:

> 'A foreigner is deemed to have entered the federal territory only after having crossed the border *and passed through the border check point*. Should the authorities charged with

[32] C Makaremi, 'Pénalisation de la circulation et reconfigurations de la frontière: le maintien des étrangers en "zone d'attente"' (2008) 71 *Cultures & Conflits* 55; C Makaremi, 'Border Policies. From Denizens to Legal Ghosts' in U Lehmkuhl and L Schowalter (eds), *Spaces of Difference. Mediating Difference in Transcultural Spaces* (Waxman 2015) 201 ff.

[33] S Slama, 'La définition légale des zones d'attente: mobilité et déterritorialisation de la frontière française' in N Kada (ed), *Les discontinuités territoriales et le droit public* (Dalloz 2020) 149 ff.

[34] See Art L221-2, *Code de l'entrée et du séjour des étrangers et du droit d'asile*: CESEDA, in force until 2021 and now Art L341-6.

[35] D Schmalz, 'Die Fiktion der Nichteinreise ist ein Instrument der Entrechtung' (Verfassungsblog, 4 July 2018), at verfassungsblog.de; M Hong, 'Die „Fiktion der Nichteinreise" als Grundrechtseingriff durch normativen Tatsachenausschluss' (Verfassungsblog, 4 July 2018), at verfassungsblog.de.

> policing cross-border traffic allow a foreigner to pass through the border check point for a specific temporary purpose prior to a decision on the refusal of entry (Section 15 of this Act, Sections 18, 18a of the Asylum Act) or during preparation, safeguarding or implementation of this measure, *this does not constitute entry* as defined in sentence 1 as long as the said authorities remain able to monitor the foreigner's stay. *In all other cases*, a foreigner is deemed to have entered the federal territory when crossing the border'.[36]

It implies that, from a legal perspective, the act of merely crossing a national border does not constitute formal entry into the country. Entry is officially validated only when the individual has successfully passed through the designated border control checkpoint.[37] Consequently, if a foreigner, under the supervision of border authorities, temporarily goes through the checkpoint as part of a refusal decision, this transit does not count as entry into the territory. In both scenarios referenced in the second and third sentences of Section 13(2) *AufenthG*, there exists a legal fiction that the foreigner has not officially entered the territory, even if they have physically crossed the border. [38] Furthermore, Section 18a of the Asylum Act (*AsylG*) [39] governs what is known as the airport procedure, a specialised process for handling asylum claims. Under this procedure, even though the individual is physically present on German territory, being within the transit zone of an airport, they are not regarded as having legally entered Germany.[40]

[36] Aufenthaltsgesetz in der Fassung der Bekanntmachung vom 25. Februar 2008, zuletzt geändert durch Artikel 1 des Gesetzes vom 8. März 2018 (emphasis added).

[37] W Kluth, U Hornung and A Koch, *Handbuch Zuwanderungsrecht. Allgemeines Zuwanderungs- und Aufenthaltsrecht nach deutschem und europäischem Recht* (Beck 2025) 33 f.

[38] With respect to the internal borders of EU Member States, these are primarily regulated by the prevailing EU legislation, as set out in the Schengen Borders Code. Nevertheless, the Code permits Member States, under specific circumstances, to temporarily reintroduce border controls at internal borders. Where such controls are reinstated, the procedures to be applied are governed by the rules applicable to external borders, in particular those provided for in Art 32 of the Schengen Borders Code. For instance, Germany reintroduced border controls along its border with Austria in September 2015, and these measures have been consistently renewed ever since: Deutscher Bundestag: *Zur Fiktion der Nichteinreise nach § 13 Abs. 2 Aufenthaltsgesetz und zum Flughafenverfahren nach § 18a Asylgesetz*, WD 3 - 3000 - 255/18, 12 July 2018.

[39] Asylgesetz in der Fassung der Bekanntmachung vom 2. September 2008 (BGBl. I S. 1798), das zuletzt durch Artikel 1 des Gesetzes vom 23. April 2026 (BGBl. 2026 I Nr. 111) geändert worden ist.

[40] The German Federal Constitutional Court has ruled that the airport procedure is constitutional: 'The limitation of the stay of asylum seekers during the procedure pursuant to Section 18a of the Asylum Procedure Act to the premises provided for their accommodation in the transit area of the airport does not constitute a deprivation of liberty or restriction of liberty (Art 104 of the *Grundgesetz* in conjunction with Art 2, para 2, sentence 2, of the *Grundgesetz*).

[…] The State border is a predetermined obstacle to free movement under the general legal order. Every State is entitled to restrict free access to its territory and to establish the criteria for foreigners to enter its territory. Legal and factual obstacles to the free crossing of the State border therefore do not affect the guarantee of the physical freedom of movement protected by Art 2, para 2, sentence 2, of the *Grundgesetz*.

The filing of an asylum application does not change this. This application establishes no right to entry under either international law or German domestic law. The territory of the Federal Republic of Germany is legally inaccessible to asylum seekers who arrive without the appropriate travel documents until their asylum claim has been determined. *The fact that they are already on German territory upon arrival at an airport does not alter the fact that a decision regarding entry must still be made*. Moreover, the actual

2.2. The incorporation and evolution of fictional devices within EU law

Grasping the scope of non-entry fiction within French and German migration and asylum law is crucial, as it initially emerged as an experimental and provisional legal tool, which has been later normalised. It aimed to create an exception to, and deviation from, both EU law and the principles of the Schengen system. Over time, the fiction has been progressively incorporated by EU institutions, first in terms of legitimacy and then through its codification. This shift – from one legislative domain to another and from a perspective of legitimacy to one of legality – holds significance for two interconnected reasons.

First, the shift reveals how strategies adopted by Member States to tackle alleged migratory crises originate as exceptions to either national or EU legislation. But once introduced as temporary measures aimed at filling gaps in EU law, they turn out to be mechanisms designed to widen the scope of assumed residual procedures, such as border procedures. Thereafter, EU institutions provide political legitimacy to national measures originally devised as exceptional devices, either by endorsing the policy objectives they embody[41] or by incorporating them into the EU law framework.[42]

limitation of freedom of movement for asylum seekers at the airport arises from their intention to seek protection in the Federal Republic of Germany and to undergo the prescribed procedure. While they cannot be expected to return to the state that may be persecuting them, *the resulting restriction of their freedom of movement is not the consequence of any measure attributable to German State authority*' (BVerfGE 94, 166 (116-119) – 1996, my translation, emphasis added).

[41] See for example European Commission, Recommendation (EU) 2023/682 of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council, Recital 15: '*Closer links between the asylum and return procedures and swift procedures at the external borders* of the Member States can considerably increase the efficiency of return. When the derogation from the application of Directive 2008/115/EC on the basis of Article 2(2)(a) is not applicable, *there is a need to accelerate, within the current legislative framework*, *notably the effective return of those third-country nationals whose application for international protection has been rejected and for cases in the vicinity of the external border of Member States, through a faster return process* providing that the respect of their fundamental rights is ensured during the whole return process' (emphasis added).

See also European Commission, Proposal for a Regulation of the European Parliament and of the Council of 11 March 2025 establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC: 'Return to a country with which there is an agreement or arrangement for return: the proposal introduces the *possibility to return third-country nationals who have been issued a return decision to a third country with which there is an agreement or arrangement for return ("return hubs")*. […] Such agreement or arrangement must set out the modalities of transfer, *as well as the conditions for the period during which the third-country national stays in the country*, which may be in the short or longer term' (emphasis added).

On June 17, the EU Parliament approved at first reading the Common System for the Return of Third-Country Nationals Staying Illegally in the Union (Return Regulation): see Recital 23 and Art 17, which, pursuant to Art 52, shall apply as of the date of entry into force of the Regulation.

[42] As to the non-entry fiction, it has also been pointed out that 'the Explanatory Memorandums of both Communication COM(2021) 752 final [from the Commission of 1 December 2021 on a proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland] and

Through corresponding EU legislative provisions, EU institutions thus strive to normalise national measures, provided they align with the overarching goals of EU policy agendas.[43] Suffice it to say that, under the current EU legislation, which will be addressed later, individuals undergoing a border procedure are prohibited from entering the territory. It means that border procedures function under the legal fiction of non-entry. Furthermore, as evidence of the point just made regarding the conversion of the exception into the rule, the border procedures now envisaged by EU law not only have a broader scope of application but, in some cases, are mandatory.[44]

In light of the points just mentioned, the paper aims to explore whether, by normalising and codifying a legal fiction, EU law ultimately exhausts the purpose of that fiction, which thus becomes 'dead' in Lon Fuller's meaning: 'A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and reality'.[45]

Secondly, the transition from the national to the EU level has enhanced scholarly awareness of the constitutional implications of the non-entry fiction, with legal scholars more consistently characterising it as such. Nonetheless, the current debate frequently remains underdeveloped in relation to the specific characteristics that justify classifying the device as a legal fiction. Accordingly, it is essential to examine not only the routes and institutional mechanisms through which the fiction has been formed and disseminated, but also to situate these developments within a broader, more nuanced account of the function of legal fictions in both national and EU migration law.

Within a broader European framework, scholars increasingly question the premise of 'non-entry', but their inquiry proceeds along two distinct analytical paths, each yielding divergent conclusions: the European Convention on Human Rights (ECHR) and EU law.

On the one hand, the configurability of a fiction of non-entry (or rather of non-presence) began to be associated with the caselaw of the European Court of Human

Communication COM(2021) 890 final [from the Commission of 14 December 2021 on a proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum] *explicitly refer to the application of a fiction of non-entry as the objective of the extended border procedure*. In Communication COM(2020) 612 final [from the Commission of 23 September 2020 on a proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817] instead, *such fiction is only theorised but never explicitly mentioned*': M Gerbaudo, 'The European Commission's Instrumentalization Strategy: Normalising Border Procedures and *De Facto* Detention' (2022) 7 *European Papers* 615, 622 n 48 (emphasis added).

[43] V Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU' (2024) 9 *European Papers* 179, 206.

[44] E Tsourdi, *The New Screening and Border Procedures: Towards a Seamless Migration Process?* Policy Study, (Foundation for European Progressive Studies, Friedrich-Ebert-Stiftung and European Policy Centre, Brussels 2024) at www.epc.eu 7 ff.

[45] Fuller (n 8) 373.

Rights (ECtHR), in particular since the judgment *Saadi v United Kingdom*.[46] In *Saadi v United Kingdom*, the judges in Strasbourg established 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"'.[47]

Based on this judgement, it has been concluded that '[t]he premise informing the Strasbourg ruling is that all entry is "unauthorised" until the State decides otherwise. In addition, it implicitly trades on a fiction of non-presence, inviting us to imagine the detainee as being kept "outside" the state, awaiting approval for her entry'.[48] The fiction lies in the fact that, according to the ECtHR, United Kingdom was entitled to treat the applicant *as if* the applicant had not entered British territory, even though he had been physically present in British territory for several days.

Nevertheless, the grounds found in the caselaw of the ECtHR are vague and contradictory.[49] In the earlier case of *Amuur v France* the ECtHR ruled that holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty.[50] The French authorities had maintained that the airport's transit zone had extraterritorial status and, consequently, having France no jurisdiction over it, French law would not apply. However, the ECtHR dismissed this argument, ruling 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 ECtHR. The case law of the ECtHR therefore offers conflicting guidance, particularly if the aim is to counter the European trend towards the legal fiction of non-entry. Nevertheless, the judgments referred to are useful in shedding light on the early development of such mechanisms.

On the other hand, the characteristics, boundaries, and implications of the fiction of non-entry have been extensively analysed within the scope of EU law. This topic has gained heightened scrutiny, above all in light of the recent EU Pact on Migration and Asylum and the new legislative framework adopted in 2024 pursuant to it.

Within the context of EU law, scholars predominantly identify the fiction of non-entry as a functional device within Regulation (EU) 2016/399, more commonly referred to as the Schengen Borders Code.[51] By conducting an *a contrario* analysis

[46] *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008).

[47] Ibid para 65.

[48] C Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 *Current Legal Problems* 143, 151.

[49] C Costello and M Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 *Refugee Survey Quarterly* 59.

[50] *Amuur v France* App no 19776/92 (EctHR, 25 June 1996).

[51] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.

based on specific provisions,[52] the Schengen Borders Code has been interpreted to imply the existence of a legal fiction, even though the notion of 'failure to enter' is not explicitly mentioned. The Code suggests that for the duration in which border controls are operative – up until the point a third-country national is officially granted entry – the individual is legally considered as not having entered the Schengen area.[53] It therefore implies that 'entry' is understood as formal authorisation rather than mere physical presence within the territory.

Similarly, the *a contrario* inference of the above fiction concerns Directive 2008/115/EC (also known as Return Directive),[54] where it allows Member States to exclude 'border cases' from its application:

> '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 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air 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'.[55]

Indeed, the non-application of the Return Directive in cases of 'irregular border crossings' in border areas underpins the legal fiction of 'unauthorised entry' for asylum seekers at the border and ensures that Member States continue to apply national legislation when carrying out returns of asylum seekers whose applications have been rejected.

Ultimately, the transition of the fiction of non-entry from the framework of national legislation to the domain of EU law is exemplified by the comprehensive set of measures outlined in the New Pact on Migration and Asylum. In this context, the proliferation of legal fictions is interpreted as a sign of 'an exception becoming the norm'[56] and this trend appears to reflect a broader objective: the systematic normalisation of restricted access to international protection mechanisms within the European Union. Emblematic of the shift of the fiction of non-entry from national to EU law is, in fact, the package of measures of the New Pact on migration and asylum, particularly the components of the so-called integrated border procedure: Regulation

[52] Arts 6(1), 14, Annex V part A(2)(a) of Regulation (EU) 2016/399.

[53] F Rondine, 'Between Physical and Legal Borders. The Fiction of Non-Entry and its Impact on Fundamental Rights of Migrants between EU Law and the ECtHR' (2022) 8 *Cahiers de l'EDEM* 55 ff.

[54] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[55] Art 2(2)(a) of the Return Directive. In fact, in the European Commission Recommendation (EU) 2017/2338 of 16 November 2017, establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, there is an express reference to the non-entry legal fiction and to Art 2(2)(a) of the Return Directive.

[56] V Mitsilegas, 'The EU External Border as a Site of Preventive (In)Justice' (2022) 28 *European Law Journal* 272.

(EU) 2024/1356 (Screening Regulation),[57] Regulation (EU) 2024/1348 (Asylum Procedure Regulation),[58] and (Return Border Procedure Regulation)[59].[60]

Article 6 of the Screening Regulation provides that '[d]uring the screening, the persons referred to in Article 5(1) and (2) *shall not be authorised to enter the territory of a Member State*'. Therefore, pursuant to this provision, asylum seekers have to undergo 'pre-screening' when applying at an external EU border. It takes place in a transit zone before an entry permit is issued and should last at most seven days (Recital 22).[61] In combination with Article 44 of the Asylum Procedure Regulation, the Screening Regulation also serves as a preliminary examination procedure in asylum matters. After that preliminary examination, it is decided whether the person's asylum application should be examined in a so-called border procedure.

Similar points can be made in relation to the Asylum Procedure Regulation and its connected reference to the border procedure. This Regulation provides that the applicant acquires the right to 'remain' in the territory of the Member State until the outcome of the border procedure,[62] but not the right to enter it.

> 'Applicants subject to the border procedure *shall not be authorised to enter the territory* of a Member State, without prejudice to Article 51(2) and Article 53(2). Any measure taken by Member States to prevent unauthorised entry to their territory shall be in accordance with Directive (EU) 2024/1346.
> By way of derogation from Article 51(2), first subparagraph, last sentence, the applicant *shall not be authorised to enter the Member State's territory where*: […]'.[63]

[57] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

[58] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

[59] Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148.

[60] One of the main objectives of the New Pact is, in fact, to establish '*a seamless procedure at the border* applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure – thereby integrating processes which are currently separate' (European Commission, 'Communication: A New Pact on Migration and Asylum', COM(2020) 609 final, 4 (emphasis added)).

[61] J Junghans, 'Die GEAS-Reform - Fortschreitende Harmonisierung oder zunehmende Fragmentierung?' in W Kluth, W Breidenbach, J Junghans, H Kolb, *Das neue Migrationsrecht* (Nomos 2024) 199 f.

[62] See Recital 91 ff and Art 10 of Asylum Procedure Regulation.

[63] Ibid Art 43 paras 2-3 (emphasis added).

In addition to the provisions of the Screening Regulation, there are also provisions of the Asylum Procedure Regulation concerning who exactly the border procedure covers: 'Member States should assess applications in a border procedure […] where it is likely that the application is unfounded because the applicant is of a nationality for whom the proportion of decisions granting international protection is 20% or lower of the total number of decisions for that third country. […] In other cases, such as when the applicant is from a safe country of origin or a safe third country, the use of the border procedure should be optional for the Member States' (Recital 60 of Asylum Procedure Regulation).

Legal scholars have emphasised the practical implications of the border procedure, noting that, despite the derogations from its application or its time limits, there remain numerous exceptions where asylum seekers are still barred from entering the territory. In these instances, the Return Border Procedure Regulation must take precedence. Moreover, '*the ban on entering the territory is a legal fiction*, as the locations of the border procedure could be either at or near the borders or transit zones or on the territory; yet this still does not count as authorisation to enter the territory. Even travel for health care or legal proceedings does not count; the [Asylum Procedure] Regulation maintains its legal fiction even inside courtrooms'.[64]

In addition to this, the Return Border Procedure Regulation pushes the fiction of non-entry even further, since the individuals mentioned in article 4, paragraph 1,[65] are required by Member States to reside in areas near the external border or transit zones for a maximum of twelve weeks. Member States may also use other locations on its territory, if it is unable to accommodate such individuals there, but '*[t]he requirement to reside at a particular location in accordance with this paragraph shall not be regarded as authorisation to enter* into or stay on the territory of a Member State'.[66]

2.3. The deprivation of liberty, stemming from the 'non-entry', fiction is not a distinguished fiction but can lead to additional legal fictions

After examining the structure and legal foundations, both national and EU, of the non-entry fiction, attention shifts to the impact of entry refusal based on this fiction. Primarily, it affects the personal liberty of third-country nationals considered not legally present. This effect of the fiction is often referred to as the 'fiction of non-interference with personal liberty' and relates to the *de iure* or *de facto* detention of asylum seekers in transit zones and/or border areas. The impact of the non-entry fiction on personal liberty becomes evident in how Member States manage asylum seekers who arrive at their borders or find themselves within their territories.

Scholars have highlighted that Member States employ divergent terminologies to describe the legal regime governing individuals upon their arrival. For instance, an asylum seeker may be 'held in a waiting zone' in France, 'accommodated in a contained environment' in Malta, 'required to stay in a designated place' in the Netherlands, 'placed or retained in Temporary Installation Centres' in Portugal, or 'supervised' at the airport or subjected to 'a regime of restricted movement within the

Moreover, following the fiction of non-entry to applicants with little chance of recognition, because coming from countries with a success rate of lower than 20%, accelerated asylum procedures should be applied at the external borders of the EU (Art 42(1) *letter j*; Art 45(1) Asylum Procedure Regulation).

[64] S Peers, 'The New EU Asylum Laws: Taking Rights Half-Seriously' (2024) 43 *Yearbook of European Law* 113, 157 (emphasis added). See Art 54, paras 1-4-5 of Asylum Procedure Regulation.

[65] *Id est*, third-country nationals and stateless persons whose application has been rejected in the context of the asylum border procedure.

[66] Art 4(2) of Return Border Procedure Regulation (emphasis added).

Reception and Identification Centre' in Greece.[67] But despite different labels, the terminology used to describe such measures is ultimately irrelevant, as the tangible result consistently amounts to a deprivation of liberty.

The counterproductive consequences of the non-entry fiction are inextricably linked to the way it operates.[68] Member States resort to it even to justify forms of 'border detention'. This is often accomplished by deeming international airport zones as areas outside their jurisdiction, thereby enabling the establishment of extra-legal detention spaces within their territories.[69] In certain Member States the so-called fiction of non-interference with personal liberty – referred to by some as a fiction of extraterritoriality –[70] has been extended so much as to detention facilities located on their soil, such as the transit zones in Hungary, located along its borders with Serbia and Croatia.

Despite its adverse impact on personal liberty, the so-called fiction of 'non-interference with personal liberty' cannot, strictly speaking, be classified as a legal fiction. Instead, it denotes a linguistic or rhetorical tool frequently employed by Member States in court to justify the deprivation of this fundamental right in the context of border procedures and zones. The rhetorical stratagem is further underpinned by persistent ambiguities within the EU asylum framework, specifically regarding the legal status and regulation of transit zones. However, the fact that it does not qualify as a standalone legal fiction does not preclude that the deprivation of personal liberty – arising from the legal fiction of non-entry – uncork the creation of further legal fictions.

This is most recently illustrated by the reasoning of the Court of Justice of the European Union (CJEU) in *Danané and Others v Commissaire général aux réfugiés et aux apatrides*.[71] According to the Court, in a procedure for examining an application for international protection, Directive 2013/32/EU (known as Asylum Procedure Directive)[72] '*does not preclude the same place of detention from being treated initially as a "place at the border" and subsequently*, after the applicant has been authorised to enter the territory on account of the expiry of the four-week period laid down in Article 43(2) of that directive, *from being regarded as a* '*place in the territory*'.[73] Moreover,

[67] M Mouzourakis and K Pollet, 'Boundaries of Liberty: Asylum and de Facto Detention in Europe' (Asylum Information Database, 31 December 2017), at asylumineurope.org 19.

[68] G Cornelisse and M Reneman, 'Border Procedures in the European Union: How the Pact Ignored the Compacts' (2022) 11 *Laws* 1, 9.

[69] Costello and Mouzourakis (n 49) 59.

[70] Ibid 61.

[71] Joined Cases C-50/24 to C-56/24 *Danané and Others v Commissaire général aux réfugiés et aux apatrides*, EU:C:2026:301.

[72] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[73] Ibid para 64 (emphasis added).

> '*the continued detention* of an applicant for international protection and *the change in the legal classification of the place of that detention*, in accordance with national legislation, after the expiry of the four-week period laid down in Article 43(2) of that directive, in themselves, *have no bearing on the competence of the determining authority,* it being understood that the expiry of that period has the effect of lifting the material and temporal limitations resulting from Article 43'.[74]

In this regard, the key issue here revolves around the legal reclassification of a location formerly identified as 'on the border' to one now designated as 'within the territory'. However, this shift might have minimal practical implications for the applicant's circumstances. If she remains confined in the same closed facility and continues to face identical conditions of deprivation of liberty, the reclassification is unlikely to significantly alter their situation. This is where the judgment warrants closer scrutiny: formal entry into the territory carries little significance if it is not paired with adequate safeguards.[75]

The question remains whether the shifting classification constitutes a fiction in the strict sense or, more precisely, a transformation – or the dissolution – of the fiction of non-entry. Building upon the perspectives offered by Lon Fuller, which will be further explored, it becomes evident that a legal fiction does not simply cease to exist following its formal repeal. Rather, it ceases to operate when the meaning of its constitutive terms transforms to such an extent that the alteration initially introduced by the *fictio iuris* is fully integrated into the legal system.

3. New frontiers for re-(b)ordering and extraterritoriality: the Protocol between Italy and Albania

The fiction of non-entry intertwines with extraterritoriality in several ways, particularly as this legal device continues to evolve beyond its traditional boundaries. Worthy of note is the Protocol between the Government of the Republic of Italy and the Council of Ministers of the Republic of Albania on Strengthening Cooperation in Migration Matters, which was signed on 6 November 2023.[76]

Article 4, paragraphs 3 and 4, of the Protocol provides that

> '[t]he competent Albanian authorities allow *entry and stay on the Albanian territory of the migrants hosted in the facilities* as per paragraph 1 for the sole purpose of carrying out border and return procedures and for the time strictly necessary for it. In the event that the right to stay in the facilities ceases for any reason, the Italian side pledges to

[74] Ibid para 68 (emphasis added).

[75] V Apatzidou, 'One Legal Fiction After Another: The Court of Justice Judgment on the Asylum Border Procedure in Joined Cases C-50/24 to C-56/24 (Danané)' (EU Law Analysis, 20 April 2026), at eulawanalysis.blogspot.com.

[76] Its ratification and execution were authorised in Italy by Law No 14/2024, later amended by Law Decree No 37/2025 converted by Parliament into Law No 75/2025.

> immediately transfer the migrants out of the Albanian territory. The transfers to and from the facilities are carried out by the competent Italian authorities. *The entry of migrants in the territorial waters of the Republic of Albania* is carried out exclusively with resources belonging to the competent Italian authorities. Upon the arrival on the Albanian territory, the competent authorities of both parties proceed separately to fulfil the obligation prescribed by their national legislation and in respect with the present Protocol'.[77]

On one side, the bilateral cooperation highlighted here reflects the long-standing practice of collaborating with third countries to manage migration flows and restrict entry to the EU. However, Yet, the Italy-Albania Protocol introduces more intricate dimensions compared to earlier externalisation strategies employed across the European Union.[78] Within the overarching but varied framework for the extraterritorial processing of asylum claims,[79] the Protocol provides that applications for international protection are to be examined on Albanian territory through an accelerated border procedure. This includes transferring, above all, migrants intercepted by Italian authorities at sea outside EU territorial waters to Albania for processing.

Under the provisions of the Protocol, Italy financed the establishment of two centres in Albania, located in Shengjin and Gjadër. These facilities are designed to accommodate migrants and process asylum applications under the jurisdiction of Italian authorities, operating in compliance with both Italian and EU legal frameworks.[80] The centre in Shengjin primarily focuses on conducting initial health screenings and performing assessment to identify vulnerable individuals eligible for transfer to Italy. Meanwhile, Gjadër hosts two distinct facilities: one dedicated to carrying out an accelerated asylum procedure at the border within a twenty-eight-day timeframe, and another for implementing return procedures for up to eighteen months. The accelerated procedure specifically targets adult men who are neither physically nor mentally vulnerable and come from countries classified by Italy as safe. Additionally, it includes migrants who are subject to detention orders issued, confirmed, or extended within Italian migration detention centres, as stipulated in the amendments introduced through Law Decree No 37/2025.

The fictional element inherent of the Protocol stems from its incompatibility with Article 3 of the Return Directive. This article explicitly requires that migrants sub-

[77] Emphasis added.

[78] A Saccucci, 'Il Protocollo Italia-Albania sulla «dislocazione» extraterritoriale dei migranti' (2024) 107 *Rivista di diritto internazionale* 640 ff.

[79] M Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601; S Marinai, 'Extraterritorial Processing of Asylum Claims: Is It a Viable Option?' (2018) 12 *Diritti umani e diritto internazionale* 481.

[80] Arts 4(2) and Art 7(4) of Protocol between the Government of the Republic of Italy and the Council of Ministers of the Republic of Albania.

jected to return decisions by Italian authorities be repatriated directly from Italy, rather than through the involvement of a third country.[81] Nonetheless, the bilateral agreements allegedly signed with Albania for implementing the Protocol also govern return procedures carried out directly from Albanian territory.[82] The result is a paradoxical situation: since Tirana International Airport lies outside Italian jurisdiction, the implementing acts give rise a legal fiction by treating non-EU territory *as if* it were part of an EU Member State, whereas not only are people detained outside the Schengen area, but they are repatriated from a third country without ever passing through any territory fully subject to the Union's jurisdiction.

Furthermore, a legal fiction of a geographical-spatial nature is evident in the amendment introduced by Article 1 of Law Decree No 37/2025. This modification revised Article 3(3) and (4) of Law No 14/2024, stipulating that: *i)* the areas owned by the Albanian State, as delineated in Annex 1 of the Protocol, are to be regarded as equivalent to (Italian) border areas or transit zones;[83] *ii)* the centres referred to in the Protocol with Albania are to be equated with the so-called crisis points in Italy;[84] *iii)* the return centres in Albania are equated with migration detention centres in Italy.

This fictitious categorisation fundamentally alters both the meaning and structural foundation of the legal fiction premised on the scheme of non-entry. In this regard, it has been observed that if the facilities in Shengjin and Gjader are designated as border zones equivalent to those within Italy, then migrants rescued at sea and subsequently transferred to Albania should be deemed physically present in Italy but not legally present within Italian territory. However, this legal fiction seems to be reversed for migrants who are slated for repatriation, detained in Italy, and later relocated to Albania. These individuals, while no longer physically in Italy, are considered as legally present on Italian territory. As a result, their continued detention at the Gjader facility,

[81] A De Leo, 'Managing Migration the Italian Way II. The "Innovative" Italy-Albania Deal at the ECJ' (Verfassungsblog, 27 June 2025), at verfassungsblog.de.

[82] The term 'allegedly' is used here because the details of the agreements regulating direct repatriations from Albania remain undisclosed. Nonetheless, it is documented that on 9 May 2025 Italy carried out an 'outsourced' repatriation directly from Albanian territory. On that occasion, five Egyptian nationals were taken from the repatriation center in Gjadër, transported along the road to Tirana, and subsequently placed on a flight departing from Rome with a scheduled stopover in Albania before proceeding to Cairo. See ASGI, 'Il trattenimento extraterritoriale e il rimpatrio di persone migranti irregolari dall'Albania: i dubbi di compatibilità con il diritto UE. Analisi giuridica' (ASGI, 8 July 2025), at www.asgi.it.

A related but separate issue, outside this paper's scope, concerns the impacts of the Return Regulation's enactment on the Italy-Albania Protocol and related return agreements (n 41).

[83] These border areas and transit zones are identified by the Decree of the Minister of the Interior adopted pursuant to Art 28-bis(4) of Legislative Decree No 25 of 28 January 2008.

[84] They are governmental centres which serve as facilities where foreigners apprehended during irregular crossings of internal or external borders, or those arriving on national territory through sea rescue operations, are brought, both for rescue and first assistance needs and for photographing and fingerprinting purposes.

as stipulated under Law Decree No 37/2025, does not require an additional court order to validate their detention – except when an extension becomes necessary.[85]

With Order No 23105/2025 the Italian Supreme Court of Cassation, Criminal Section I, submitted a referral for a preliminary ruling to the CJEU, raising questions about the compatibility of the Italy-Albania agreement with the Return Directive as well as with the Asylum Procedure Directive. The Supreme Court of Cassation first observed that, although the aforementioned equivalence serves as a technical mechanism for determining the legal provisions applicable to areas subject to Italian jurisdiction, these areas are not formally transformed into Italian territory by virtue of Law No 14/2024. The application of Italian legislation in these cases does not arise from the Member State's direct exercise of sovereignty but rather from the existence of an international agreement with a third country. By emphasising this point, the Court clarifies that treating the Albanian areas as equivalent to Italian territory is merely a legal fiction, given that Italy does not exercise full sovereignty over these areas. As a result, such transfer cannot be regarded as a 'return' within the meaning of EU law.

Currently, the Advocate General (AG) Nicholas Emiliou has delivered an Opinion suggesting that the Court respond to the two questions raised by the Supreme Court of Cassation in the following manner:

> '– the provisions of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals *do not, in principle, preclude national legislation permitting the transfer of third-country nationals subject to return procedures to detention facilities located in the territory of a third State*, provided that those facilities remain subject to the jurisdiction of the Member State concerned and that the applicable national and EU legislation continues to govern the procedures in question […];
> – Article 9(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection *does not, in principle, preclude national legislation allowing the detention of a third-country national subject to return procedures in facilities located in a third State, where that person has lodged an application for international protection while being held in those facilities* […]'.[86]

It is particularly noteworthy that, according to AG Nicholas Emiliou, Article 9(1) of the Asylum Procedure Directive should be interpreted alongside point (p) of Article 2 within the same Directive. This provision defines the term 'remain in the Member State' as staying within the territory, including areas such as borders or transit zones, of the Member State where the application for international protection has been submitted or is under review. Nevertheless, the Advocate General further

[85] F Vassallo Paleologo, 'Albania, andata e ritorno. Un decreto legge che sancisce un fallimento' (ADIF, 31 March 2025), at www.a-dif.org.

[86] Opinion of AG Emiliou in Case C-414/25 [Sedrata] *Ministero dell'Interno, Questura di Roma v S.H., A.H., joined parties: Procuratore generale della Repubblica presso la Corte Suprema di Cassazione*, EU:C:2026:334 (emphasis added).

elaborates that this definition supports a broader interpretation of Article 9(1) in the Asylum Procedure Directive:

> '[i]t is true that point (p) of Article 2 thereof, notwithstanding a degree of ambiguity – partly reflected in certain language versions– appears to refer to 'transit zones' situated within the territory of the Member State concerned. […] *it appears both logical and necessary to interpret Article 9(1) of Directive 2013/32 as covering any border or transit zone falling under the jurisdiction of the Member State concerned, irrespective of its physical location*'.[87]

As has been pointed out, the Advocate General Nicholas Emiliou ultimately prompts a very broad interpretation of notions such as territory, border, and transit zones, arguing that their scope should be determined by their function rather than their geographical position. This perspective allows for facilities located outside the European Union to be treated as functionally analogous to border or transit zones within a Member State's territory.[88] The Court of Justice of the European Union, in the aforementioned *Danané* judgment, has already acknowledged that entry control procedures may, through a legal fiction of non-entry, be implemented at inland facilities if national law designates them as 'border' or 'transit' zones. However, the AG's opinion in *Sedrata* extends the fiction even further, 'beyond the geographical borders of the Union itself. This marks a qualitative shift, as the "border" is no longer

[87] Ibid paras 96-99 (emphasis added).

[88] In the Opinion of AG Medina in Joined Cases C-706/25 and C-707/25 [Comeri and Sidilli] *Questura di Roma v SG (C-706/25) and JA (C-707/25)*, EU:C:2026:474, a different conclusion is reached regarding the designation of the aforementioned areas located in Albanian territory as either border zones or transit zones: 'it seems to me that *the Italy-Albania Protocol may be classified as a territorial lease within the meaning of public international law*. […] That characterisation of the Italy-Albania Protocol as a territorial lease under public international law is decisive for the purposes of the application of EU law. In the present case, the territorial lease transfers to the Italian Republic *the effective and exclusive exercise of its State prerogatives over the areas concerned*, notably its jurisdiction, applicable law and competent authorities, without however transferring to it sovereignty over those areas. Still, *the concept of 'territory of a Member State' within the meaning of Article 3(1) of Directives 2013/32 and 2013/*33 cannot be interpreted as referring exclusively to the territory over which the Member State exercises its sovereignty in the formal sense of international law, but must be understood as encompassing any geographical area over which a Member State effectively exercises its jurisdiction by virtue of an instrument recognised in public international law as entitling it to do so. […]. Consequently, *without it being necessary to classify those areas as the 'territory' of the Italian Republic*, Directives 2013/32 and 2013/33 apply to them since that Member State effectively and exclusively exercises its State prerogatives there under the Italy-Albania Protocol. […] Moreover, it is my view that *the areas concerned cannot be classified as 'border' zones or 'transit' zones within the meaning of Directives 2013/32 and 2013/33, since those concepts refer to geographical areas situated at the boundaries of the national territory of a Member State, and not to areas located within the territory of a third country.* That finding applies a fortiori in the circumstances of the present cases, in which the persons concerned were transferred from Italian territory to the areas concerned, and not intercepted at sea and then taken directly to Albania' (paras 69-75, emphasis added).

merely redefined within the territory of the Member State, but effectively displaced outside it'.[89]

Building upon this analysis, the argument presented here is confirmed: the incorporation of a legal fiction into legislative frameworks entails significant risks. Chiefly, one fiction can easily lead to others, and more critically, the very legal foundations supporting the fiction may start to erode. This decline signals a departure from *fictio iuris*'s legitimacy stemming *ex auctoritate principis* towards one *ex parte principis*. In this dynamic, the fiction serves only the interests of the prince, reducing the law to a subordinate tool and diminishing the prominence of the rule of law.[90]

4. A diachronic analysis of the use and features of border fictions

The kind of legal fiction that is proliferating in Member States and EU migration law, starting with the fiction of non-entry, revolves around territorial/geographical elements or, more accurately, their manipulation. They are, for instance, fictions by virtue of which people who are (or are not) physically present in the national territory are considered not to be present or present there.

In migration law the fiction act on the territorial/geographical element in two ways: upstream and downstream. Upstream, the fiction is based on the disjunction between the physical crossing of a State's territorial border (or rather the presence in border areas / transit zones) and the legal assessment of border areas / transit zones as extraterritorial. Downstream, the fiction is based on a distinction between physical and legal entry into the country: even though the migrant is physically present within the State's territory, they are considered not legally authorised to enter until the authorities make a formal decision on the matter.

Adjusting the territorial or geographical elements to accomplish a legal fiction, along with the resulting extra-territorialisation or legal neutralisation of specific parts of the national territory, can lead to highly strained outcomes. A notable example of this is the expansion of the transit zone 'geographically beyond the border check point to include the place where an unauthorised crossing took place'. It gives rise to fluid transit zones, which follow the movements of foreign nationals, and 'entire regions are placed outside the safeguards applicable to the rest of the territory'.[91] Furthermore, when the management of transit zones is marked by a significant degree of informality due to the absence of legislative frameworks governing the nature and operations of these areas – such as in the case of Italy – State authorities often

[89] A De Leo, 'The Fiction of Non-Entry Meets the Fiction of Remaining: AG Emiliou in Sedrata' (EU Law Analysis, 27 April 2026), at eulawanalysis.blogspot.com.

[90] E Guild, V Mitsilegas and N Vavoula, *Lawless Borders. The Rule of Law Deficit in European Immigration Control* (Bristol University Press 2025) 37 ff.

[91] The two excerpts are derived from A Ammirati, V Capezio, G Crescini and A Massimi, 'Le zone di transito aeroportuali: definizione, funzionamento e criticità alla luce della prassi' (2012) 14 *Diritto, Immigrazione e Cittadinanza* 55 (my translation).

leverage the legal fiction of non-entry for a twofold objective. First, the fiction serves to simplifies the procedures for the removal of foreign nationals, and second, it facilitates the implementation of informal mechanisms for screening incoming migrants. Thus, unlike the legal fictions drawing on Jhering's renowned distinction, the aim of migration law fictions is not to extend the law to address new or unforeseen situations. This means the law, while maintaining its original wording, is modified to remedy potential inadequacies or conflicts with equity needs. Similarly, their intent is not to create new legal constructs or concepts that would harmonise with established fundamental principles or systemic axioms.

As emphasised in the introductory section of this study, the territorial disjunctions and disarticulations recently noted have long been identified and discussed within European scholarly literature. However, what remains lacking is a comprehensive historical, theoretical, and dogmatic reconstruction of fundamental legal concepts, such as territory, space, and borders.[92] Such an analysis should also consider their evolution towards the notion of 'smart borders'.[93] Equally deficient is an investigation of the distinct methodological approaches to these concepts as determined by whether they are scrutinised through the lens of constitutional law or international law. Lastly, there is a notable lack of an in-depth analysis of the legal mechanisms by which the territorial fictions are put in place to control migration flows.

This contribution offers limited scope to bridge the identified analytical gap, although this critical issue will be examined in greater depth in a separate study. Within the context of this paper, it is nevertheless essential to underscore the ways in which the fictions under consideration reshape the territorial dimensions of law and challenge the conventional frameworks through which modern legal systems have historically interpreted such boundaries.

4.1. First diachronic analysis: differences in structure and purpose between ancient and current fictions

Lon Fuller assumed that '[t]here are live or dead fictions',[94] suggesting that legal fictions are mortal by nature, not eternal. This does not mean, however, that *fictio iuris* is merely a temporary tool limited to the early stages of law's development, as insinuated by Henry Sumner Maine.[95] The so-called 'death' of a legal fiction does not indicate the demise of *fictio iuris* as a legal tool but rather marks the end of specific instances of its use. In many cases, this 'death' reflects the assimilation of that

[92] Among others see L Volpp, 'Imaginings of Space in Immigration Law' (2012) 9 *Law, Culture and the Humanities* 456; E Guild, 'Moving the Borders of Europe' (Publicaties Faculteit der Rechtsgeleerdheid, KU Nijmegen nr. 14 2001), at cmr.jur.ru.nl 1 ff.

[93] PJ Pesch and F Boehm, 'Smart Border is Watching You! Fundamental Rights Implications of Automated Data Processing and Decision- Making at the EU Border' in HCH Hofmann and F Pflücke (eds), *Governance of Automated Decision-Making and EU Law* (Oxford University Press 2024) 149 ff.

[94] Fuller (n 8) 373.

[95] Maine (n 11) 26 ff.

particular fiction into the legal system or its evolution into an entirely new legal construct. Thus, the mortality of legal fictions underscores their adaptable and dynamic nature: they continue to function within modern legal frameworks, albeit in transformed forms and for different purposes.

Despite, or more likely because of, their transient nature, legal fictions hold an inherent ambiguity that makes them exceptionally adaptable instruments within the law. They can help meet urgent demands for justice that might otherwise remain unaddressed, give reason for the acquiescence to established *faits accomplis*, or mediate external forces that impose themselves on the legal order. It is this very ambiguity that enables legal fictions to endure – a phenomenon frequently referred to as a heterogony of ends. Over time, they have evolved by aligning themselves with the unique features and dynamics of the legal systems they inhabit, thereby maintaining their relevance and utility in addressing complex legal challenges.

In Roman and medieval law *fictio* and *aequitas* closely interlinked and complemented one another, in line with the idea of law as *ars boni et aequi*. *Fictio* played a crucial role in mitigating the rigidity of formal legal frameworks to uphold equity, while *aequitas* set limits on the permissible use of *fictio*. However, this symbiotic interplay suffered a decisive rupture with the advent of codification and the ensuing predominance of positivist legal systems.[96] As law increasingly aligned itself with the dictates of a rigid positivism, and as it came to assume that it could address every conceivable case, the prospect of achieving 'justice in the specific case' was correspondingly obscured. This development also undermined the relevance of devices such as legal fictions, which had previously been instrumental in realising facilitate the attainment of *aequitas*.

In the context of modern and contemporary legal systems, legal fictions have largely lost their historically recognised function as instruments of equitable relief. They have increasingly been reassigned to a role concerned with internal systemic alignment. Although *fictio iuris* was originally deployed by jurists as a flexible mechanism for responding to and negotiating the complexities presented by continually evolving circumstances, its scope has narrowed. It has been confined to a device used solely by the legislator to recompose into an orderly system a set of rules deemed inherently self-contained and systematically coherent.[97]

For these reasons, Jeremy Bentham – famously, in several of his writings – characterised legal fictions as inimical to the law itself. In his view, jurists present such

[96] A Giuliani, *La definizione aristotelica della giustizia. Metodo dialettico e analisi del linguaggio normativo* (Edizioni universitarie 1985) 19 ff.

[97] Ibid 22. Alessandro Giuliani suggests that modern fiction inasmuch as legislative fiction, is closely tied to the concepts of order and system, enabling the arrangement of conceptual relationships within a systematic framework. In contrast, classical fiction served primarily as a jurisprudential and judicial mechanism, reflecting a more social and democratic nature because it emerged through collective effort. Unlike its modern counterpart, classical fiction was focused on addressing specific problems and cases, with no ambition toward systemic organization.

tools under the guise of necessity for the administration of justice; however, he regarded them instead as cancers to be eradicated, pestilential falsehoods used primarily by judges to usurp legislative power.[98]

By contrast, Sir William Blackstone regarded legal fictions as practical and indispensable instruments for legal scholars and practitioners. In his assessment, they serve a genuine and effective purpose by enabling the law to address concrete legal needs and to manage specific legal challenges. In the *Commentaries on the Laws of England*, he articulated this perspective in the following terms: 'In fictione juris semper subsistit æquitas'.[99]

Nevertheless, it is no longer accurate to claim that all legal fictions are grounded in equity and that, consequently, they invariably embody its principles. Contemporary legal fictions demonstrate, if anything, the continued relevance of legal techniques based on fiction, but they also reveal their adaptability to evolving legal and political contexts, as well as their capacity for transformation. While, according to Blackstone, equity denotes a type of justice rooted in factual circumstances and concrete needs – such that fictions may serve them – contemporary legal fictions operate neither according to equity nor *ex auctoritate principis* – as some accounts contend for Ancient Roman fictions –[100] but rather *ex parte principis*. This distinction is fundamental, as it draws attention to a core divergence in the purposes pursued by ancient legal fictions compared to contemporary ones, especially those employed within the framework of European migration law. In particular, when contemporary legal fictions function as instruments *ex parte principis*, they can significantly reshape legal frameworks by circumventing – and, in some cases, undermining – fundamental constitutional principles.

In this context, it is important to highlight a debatable departure from the early function of *fictio iuris*. Ancient fictions arose from collective jurisprudential work and often aimed to expand subjective legal statuses, thereby broadening access to procedural remedies. Contemporary legal fictions – particularly in migration law – seem to serve an entirely different function: they are less aimed at strengthening protections or securing rights and more at restricting and undermining the effective guarantees of such rights.[101] This shift is particularly evident in the way legal fictions operate within border areas or transit zones, where their application marks a clear departure from their historically equitable origins. 'Border authorities, treating these

[98] J Bentham, 'Nomography' in J Bowring (ed), *The Works of Jeremy Bentham*, III (Russell & Russell 1962) 241; J Bentham, 'On the Art of Packing Special Juries' in J Bowring (ed), *The Works of Jeremy Bentham*, III (Russell & Russell 1962) V, 92.

[99] W Blackstone, *Commentaries on the Laws of England*, III (Clarendon Press 1768) 43.

[100] R Dekkers, *La fiction juridique. Étude de droit romain et de droit compare* (Sirey 1935) 194 ff.

[101] D Thym, 'Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the "New" Pact on Migration and Asylum' in D Thym, Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022) 28.

areas as extraterritorial, act there as if they were enclaves exempt from the application of constitutional, national, and international norms regarding the protection of fundamental rights'.[102]

Ultimately, focusing on their role in these contexts makes it clear that today legal fictions are used to create restrictive regulatory frameworks rather than to promote expectations of justice.

4.2. Second diachronic analysis: differences between EU border fictions and U.S. entry fiction doctrine

A second diachronic comparison pertains to the so-called U.S. entry fiction doctrine. Among the extensive literature on the subject,[103] two studies stand out as particularly revealing about the constitutional ramifications of invoking this fiction: the ones by Charles Weisselberg and Eunice Lee. Weisselberg offers insights on the U.S. history of entry fiction that are above all interesting for juxtaposing the European context – particularly the interplay between EU law and domestic law – while Lee highlights that the original purpose of the entry fiction has since changed, being now used for purposes other than those for which it was initially created.

Charles Weisselberg summarises the entry fiction and the constitutional effects arising from its extraterritorial elements in the following terms:

> '[I]t is important to consider the relevance of aliens' physical presence on our land.
> By the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels. Congress therefore passed several immigration laws to permit inspectors to order the "temporary removal" of an alien from a vessel for inspection; the statutes also specified that this removal would not be considered "a landing". The "removal" and "landing" provisions were the beginning of what has come to be called the "entry fiction".
> Under this fiction, an alien on United States soil pending admission would be treated as if she was still at the border and was not within the United States. Because courts did not consider the Constitution to reach extraterritorially, the Due Process Clause would only

[102] A Ammirati, V Capezio, G Crescini and A Massimi, 'Le zone di transito aeroportuali come luoghi di privazione arbitraria della libertà e sospensione del diritto' (asgi.it, January 2021), at www.asgi.it 3 (my translation and emphasis).

[103] Although she refers to it as 'fiction of non arrival', see also A Shachar, 'The Shifting Border: Legal Cartographies of Migration and Mobility' in A Shachar et al (eds), *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) 23 ff.; A Shachar, 'The Multiple Sites of Justice: A Reply' in A Shachar et al (eds), *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) 222; A Shachar, S Benhabib, 'Introduction Bordering and Ordering: The Reconfiguration of Territory, Rights, and Jurisdiction' in A Shachar and S Benhabib (eds) *Lawless Zones, Rightless Subjects Migration, Asylum, and Shifting Borders* (Cambridge University Press 2025) 4 ff. For a comparison with South America see SM Lambertini Martinez, 'The Fiction of Non-Entry in South American Airports: Evidence from Brazil, Chile, and Ecuador' (2026) *Federalismi* 116 ff.

> protect an alien who had managed to effect "a landing". The entry fiction becomes increasingly strained when "removals" are extended in time. In *Kaplan v. Tod*, the Court first addressed the problem of a long-term "removal"'.[104]

Weisselberg's analysis contextualises the constitutional implications of the legal device under consideration by examining its emergence within the framework of Supreme Court case-law. This encompasses its connection to the rulings that established and subsequently interpreted the plenary power doctrine, the principle of territorial standing, and the concept of immigration parole.

In a similar vein, Eunice Lee concisely describes entry fiction as follows:

> 'Under entry fiction, "arriving" immigrants stopped at the border are deemed "unentered" and "not here" for constitutional due process purposes, even in detention centres deep within the United States.
> As a result, the Department of Homeland Security ("DHS") uses its sole discretion to detain tens of thousands of arriving asylum seekers in its facilities without a bond hearing. Despite significant modern changes in immigration statutes and due process jurisprudence, the Supreme Court recently suggested, but did not decide, that individuals subject to entry fiction may continue to lack constitutional due process protections against detention. Both courts and the government have invoked sovereign power as the doctrine's justification, asserting that detention is necessary to effect exclusion (removal) of individuals and that entry fiction appropriately protects the government's power to detain'.[105]

Lee's research centres on Chinese Exclusion and McCarthy-era, aiming to uncover the functionalist and humanitarian underpinnings underlying entry fiction, with the goal of reducing hardships faced by migrants.

Examining the US history of (non-)entry legal fiction brings three key points into focus.

Firstly, it is imperative to distinguish between the positive and negative articulations of legal fiction, particularly as observed in the United States and European Union – labelled here as the U.S. entry fiction and the EU non-entry fiction, respectively. The linguistic divergence in these formulations is rooted in their historical development and initial conceptualisation. In the United States, the positive framing of the fiction emerged from its original function, which allowed for the temporary transfer of foreign nationals arriving by sea onto U.S. territory. This transfer was permitted solely for the purposes of detailed inspection without being legally recognised as constituting an actual 'landing'.

Over time, this legal fiction evolved into a tool for federal authorities to regulate border management and administer admission processes based on territorial considerations. As a result, specific locations have been formally designated as unauthorised

[104] CD Weisselberg, 'The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei' (1995) 143 *University of Pennsylvania Law Review* 951-952.

[105] E Lee, 'The End of Entry Fiction' (2021) 99 *North Carolina Law Review* 565.

points of entry to discourage illegal crossings. Federal immigration law has later codified this shift, redirecting attention away from the mere act of physical entry toward the more nuanced concept of admission. Admission is understood as 'lawful entry of the alien into the United States after inspection and authorization by an immigration officer'.[106] Individuals who circumvent these procedural requirements and enter without undergoing the requisite inspections are deemed inadmissible, much like those intercepted at the border lacking proper documentation. However, the implications of the conceptual shift from 'entry' to 'admission' on the enduring use of legal fictions remain a matter of scholarly interpretation and debate within immigration law.[107]

Within Europe, the legal fiction governing border crossings is articulated in terms of negation. From the outset, it is predicated under the premise that when a foreign national crosses into a Member State without proper authorisation – whether by transgressing national boundaries or by entering through a designated port of entry without permission – their physical presence is not accorded legal recognition as an official entry into the State's jurisdiction. This fiction applies even in cases where a physical entry occurs temporarily, solely to facilitate their eventual removal or repatriation.

In both scenarios, the fiction hinges upon the premise that, despite the individual's physical presence within the State's borders, they are considered, from a legal standpoint, to be outside its territory. In other words, these individuals are placed in a legal limbo of 'non-entry,' akin to the status frequently assigned to passengers in international airport transit zones. Consequently, the European non-entry fiction exhibits remarkable parallels to its later development in the United States.[108] It stipulates that a third-country national is only deemed to have officially entered a Member State's territory once the competent border authorities have explicitly granted authorisation for entry. Hence, such recognition does not depend on the physical presence of the individual but rather on the procedural act of authorising their admission into the State's jurisdiction.

In contemporary practice, the non-entry fiction is extensively employed by Member States within the framework of the Common European Asylum System (CEAS), often serving a hidden purpose: to evade the obligation of allowing asylum seekers to formally submit their applications and to sidestep compliance with the principle of non-

[106] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 301, 110 Stat. at 3009-575 (codified as amended at 8 U.S.C. § 1101(a)(13)(A)).

[107] Lee (n 105) 593.

[108] The development and broader implications of the fiction under discussion become evident when considering the recent ruling by the U.S. Supreme Court Mullin, Secretary of Homeland Security v Al Otro Lado, No. 25-5 (U.S. June 25, 2026). The Government's appeal centred on clarifying the point at which an asylum seeker attempting to enter the United States from Mexico is considered to have 'arrived in the United States', as defined by the Immigration and Nationality Act of 1952, which regulates the asylum application process. The issue under consideration is whether the specified legal threshold is applicable at the moment an individual arrives at the border or only after they have successfully crossed it. Notably, Justice Sotomayor's dissenting opinion provides essential commentary on the 'entry-fiction' doctrine for further consideration.

refoulement. Within the specific context of European asylum law, the non-entry fiction primarily performs as a mechanism for the externalisation and diversion of Member States' responsibilities in the processing and management of asylum claims.[109]

Secondly, both entry fiction and non-entry fiction share certain features. They notably affect the personal freedom of migrants deemed as not having formally 'entered', leading to their detention either *de iure* or *de facto*. Additionally, these expedients have implications for procedural safeguards related to both detention and the admission application process. But despite attempts to differentiate between basic rights directly tied to admission procedures and those extending beyond them,[110] there remain constitutionally significant differences in the extent to which these rights are affected.

In the United States, the difference lies between excludable foreigners and expellable foreigners. The entry fiction doctrine, as embedded in constitutional reasoning, means that foreigners deemed 'excludable' are treated as if they were outside the nation's borders for constitutional due process purposes. Consequently, they lack constitutional rights concerning admission procedures. Even in instances of arbitrary detention, such individuals are not granted protection under national laws, including the Fifth Amendment's due process clause. In contrast, 'deportable' foreigners, being considered physically present within U.S. territory, are afforded some constitutional protections, albeit limited to procedural issues or arbitrary actions by immigration officials who have acted arbitrarily.[111]

In the European Union, the repercussions of the non-entry fiction for the rights of migrants – individuals who have physically arrived but are legally regarded as having 'not entered' – can be understood through an examination of its connection to the so-called border procedure. By virtue of the fiction of non-entry, Member States may follow a procedure different from the ordinary one applicable to regular or irregular migrants already within the national territory. It is predominantly applied when examining applications for international protection submitted at external points of entry, transit zones, or in circumstances involving detention related to the unauthorised crossing of external borders. The procedure applied in connection with the fiction of non-entry result in shorter processing times for asylum applications, fewer guarantees, and an increased possibility of detaining the applicant or of rapid and immediate return.

In contrast to the legal framework of the United States, the EU legislation does not extend to asserting that a foreign national who is physically present within its territory but legally classified as 'not entered' falls outside the territorial jurisdiction of the State where they are located. The fiction serves to differentiate procedural

[109] K Soderstrom, 'An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation' (ECRE, September 2022), at ecre.org 3.

[110] TA Aleinikoff, 'Federal Regulation of Aliens and the Constitution' (1989) 83 *American Journal of International Law* 865.

[111] Weisselberg (n 104) 949.

pathways and limit the scope of protections available to applicants. However, it stops short of entirely depriving individuals of constitutional safeguards in matters related to admission processes or detention measures.

Thirdly, although the U.S. entry fiction doctrine has evolved alongside the gradual and uneven transition of immigration powers from State control to federal authority,[112] it is necessary to verify whether in the European Union framework the rise of both non-entry fictions and fictions tied to the extraterritorial status of certain border areas or transit zones reflects the steady and ongoing transfer of sovereign powers over migration from Member States to the European Union.

There is no time here to review that process, by which the European Union has acquired extensive and significant competences in matters of migration and asylum. Nevertheless, the gradual entrenchment of this legal fiction – initially within the administrative practices of certain Member States and subsequently through its codification into national migration legislation – reflects an enduring tension between Member States and EU institutions. This phenomenon highlights a calculated effort by Member States to preserve and assert their authority in these domains via the use of fictions. The persistent friction between national and EU governance over migration highlights the intricate challenges inherent in such a sensitive domain, one deeply tied to State sovereignty. Although the legal framework at the EU level has gradually developed, Member States have consistently shown, and continue to show, considerable reluctance to relinquish their competences.

The way migration law's legal fictions have established themselves as fictions *ex parte principis – id est* fictions crafted to reflect the sovereign interests of Member States – reveals a deliberate political strategy. This approach focuses less on directly altering the distribution of competences on migration and asylum to benefit Member States and more on leveraging legal mechanisms to circumvent that arrangement. In the process, it weakens the constitutional protections that are fundamental to upholding the rule of law.

However, when examining recent legislative measures adopted under the EU New Pact on Migration and Asylum, it appears the European Union itself is moving toward institutionalising legal fictions devised by Member States. By codifying what initially operated as an exception, the European Union risks normalising these expedients and turning them into general rules. This raises an important question: are these fictions now dead because they have successfully fulfilled their intended purpose or, from the point of view of a dogmatic function, because they have played a role in reshaping the concept of border?

[112] Lee (n 105) 581.

5. Concluding remarks for forthcoming analysis

The preceding sections have emphasised that merely documenting the legal fictions employed in migration and asylum law, or outlining their mechanics and functions, fall short. A more comprehensive investigation is necessary to thoroughly examine the motivations underpinning the creation of legal fictions and the objectives they aim to achieve. Such an inquiry entails uncovering the mechanisms through which these fictions were institutionalised, as well as conducting an in-depth analysis of the legal, historical, and political contexts that enabled their adoption. Furthermore, it requires tracing their development from national legal frameworks to the domain of European Union regulations and assessing their transition from administrative practices into codified law. Equally important is the evaluation of how these legal fictions have been received by both legal scholars and judges, whether through assent or critical scrutiny.

To properly address these intricate questions, both a diachronic and synchronic approach are essential. Together, these analytical perspectives provide a comprehensive framework for understanding the multifaceted nature of legal fictions in migration and asylum law. A diachronic analysis allows for a comparison of contemporary legal fictions with those from earlier periods, shedding light on continuities and changes over time. A synchronic analysis enables the examination of similar legal devices across different legal systems, delving into their application, the objectives they fulfil, and the degree to which they correspond to or deviate from the fiction of non-entry.

According to the findings of this investigation, should the European Union continue to align its approach with the use of legal fictions akin to those practiced by certain Member States – thereby transforming what was once an exceptional mechanism into a standard practice – three interconnected issues arise that warrant closer scrutiny.

i) The fictions embedded within migration law may be considered 'dead', as they have already served the purposes for which they were initially conceived. In other words, have they been fully integrated that they no longer constitute a fiction, but a structural element of the legal system?

ii) Examining *fictio iuris* from its dogmatic function raises the question of whether its endurance serves as a tool for reshaping the concepts of borders and the territorial scope of legal systems. In this regard, can fictional devices be seen, either historically or in their evolved context, as legal tools for conceiving and then carrying out debordering and re-bordering operations?[113]

iii) The notion of extraterritoriality is undoubtedly implied and stretched by the fictions employed in migration law. However, might it also be contended that extraterritoriality is undergoing a reversal, not only in its interpretation and implementation but also in the goals it aims to fulfil?

[113] F Schimmelfennig, 'Rebordering Europe: External Boundaries and Integration in the European Union' (2021) 28 *Journal of European Public Policy* 311; K Goettlich, *From Frontiers to Borders. How Colonial Technicians Created Modern Territoriality* (Cambridge University Press 2025).

In conclusion, attention can be drawn to this final point, which is closely linked to the preceding two, while also offering a few parting observations. Maine, who has been referenced multiple times in relation to *fictio iuris*, himself asserted that

> '[p]erhaps the fiction most celebrated among international lawyers is that of ex-territoriality. The fiction of ex-territoriality is in fact founded on a metaphor. A man in a foreign country or a ship in foreign waters *is conceived as still within the limits of the original sovereignty to which he belonged*. Sometimes, it has been said, the ship is conceived as a portion of the sovereign state floating about in the high sea or elsewhere. […] I have been discussing certain legal fictions which are signified through legal metaphors, and especially one of them by which places and things not actually within the territorial jurisdiction of a state *are supposed to be* within that state for the purpose of collecting into a group the rules of law which apply to them'.[114]

The reversing of extraterritoriality, as mentioned in the final question, arises from the peculiar dynamic in current non-entry fiction: individuals who are physically present within the geographical boundaries of a Member State are treated as though they are not within its territory. The primary objective of this mechanism is to disguise or deny the jurisdiction of the Member States, thereby avoiding associated legal responsibilities.[115]

This reversal is ultimately achieved through an alternative approach outlined in the Protocol between Italy and Albania, which has been signed in 2023. Here, extraterritoriality functions in a manner where individuals physically located outside Italy's territorial jurisdiction are supposed to be within it. However, Italy does not exercise its jurisdiction outside the Albanian centres: the use of coercive force outside the centre to carry out the direct return clearly takes place on Albanian territory and, above all, is not subject to any Italian judicial control.

As has been emphasised,[116] it may be viewed as entirely reasonable for a State to employ legal fictions to a certain extent, as Blackstone reminds us of their origins in the pursuit of equity. However, problems arise when such fictions are extended beyond the State's territorial boundaries, taking on extraterritorial implications. This is the case when a legal fiction equates the denial of entry with never having set foot on the State's territory or – such as in the case of the Italy-Albania Protocol – conceal the true extraterritorial nature of return centres. In both scenarios, the legal fictions concretely employed exceed the limits of what can be deemed legally permissible,

[114] HS Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge* (Heny Holt and Company 1888) 85 ff, 93 (emphasis added).

[115] V Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control' (2024) 71 *Netherlands International Law Review* 21.

[116] A Del Valle Gàlvez, 'Inmigración, derechos humanos y modelo europeo de fronteras- Propuestas conceptuales sobre "extraterritorialidad", "desterritorialidad" y "externalización" de controles' (2020) 8 *Revista de Estudios Jurídicos y Criminológicos* 178 (my translation).

effectively resulting in formal or substantive rightlessness.[117] This occurs when human rights are not applied or upheld in any meaningful way within areas such as 'transit zones', 'waiting zones', or 'extraterritorial return centres', thereby violating international law and undermining fundamental constitutional principles.

Faced with such circumstances, there are two possible paths forward:[118] either these fictions must be abandoned entirely, or they must be rigorously contested by legal scholars and brought before competent national and European judicial bodies.

[117] Thym (n 101) 28.
[118] Mitsilegas (n 56) 280.