



Working Title:
**The Status and Rights of Third-Country Nationals applying for Asylum
at the EU's Borders**

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Research Objectives



- Comprehensive analysis of the asylum procedures at the EU's Borders
- Combine law and philosophy to explain the 'non-entry' legal fiction
- Analysis of the impact that asylum procedures premised on the 'non-entry' fiction have on the fundamental rights of those seeking international protection
- In-depth analysis of the case of Greece (case study)
- Topical due to the mainstreaming of border procedures at the new EU Pact on Migration and Asylum



Theoretical Framework: The ‘*non-entry*’ Legal Fiction

- **Traditional theory of statehood:** defines the border as an imaginary **static line** drawn upon a unitary landmass at the frontier of the country to connote sovereign control over territory
- Theory of **Shifting Borders** (Ayelet, 2019): in the migration context fixed notions of state are destabilized (interior/ exterior)

Shifting the border **within** the state’s territory: when while there is no doubt that this constitutes actual territory of the state, it is framed either as ‘non-territory’ or the third-country nationals present at the borders are perceived as ‘not-entered’ for immigration-related purposes.

- A profound example of ‘shifting borders’ to the **interior** is the establishment and operation of **border procedures**: *‘A procedure in which the applicant for international protection is not granted entry to national territory during the time that the authorities examine his or her application’.*
- **‘Non-entry’ fiction:** treats individuals present in the country without authorization as though they had been stopped at the border, depriving them of the traditional protections enjoyed by non-citizens who have actually made it into the interior (entered/not-entered).
- **‘State of Exception’** (Agamben, 2005): borders constitute places where the legal exclusion of certain groups from specific rules can be noticed (sovereignty-decision)

The EU legislation allows the creation of a ‘lighter’ legal order at the borders where the presence of a third-country national in the territory does not suffice to ensure access to rights and guarantees related to presence on the territory



Asylum Border Procedures: Historical Evolution

- ▶ **1st Generation:** Article 35, 2005 original APD:

1. *Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on applications made at such locations.*
2. *However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force on 1 December 2005, **procedures derogating from the basic principles and guarantees described in Chapter II** [..]*

Thus, from the beginning of the negotiations of a CEAS, borders were seen as places where states could derogate from specific guarantees and rights that were otherwise applicable for third-country nationals that were not applying for asylum at the borders. Borders could be seen as areas where states could even establish below-minimum standards.

- ▶ **2nd Generation:** Recast APD (2013)

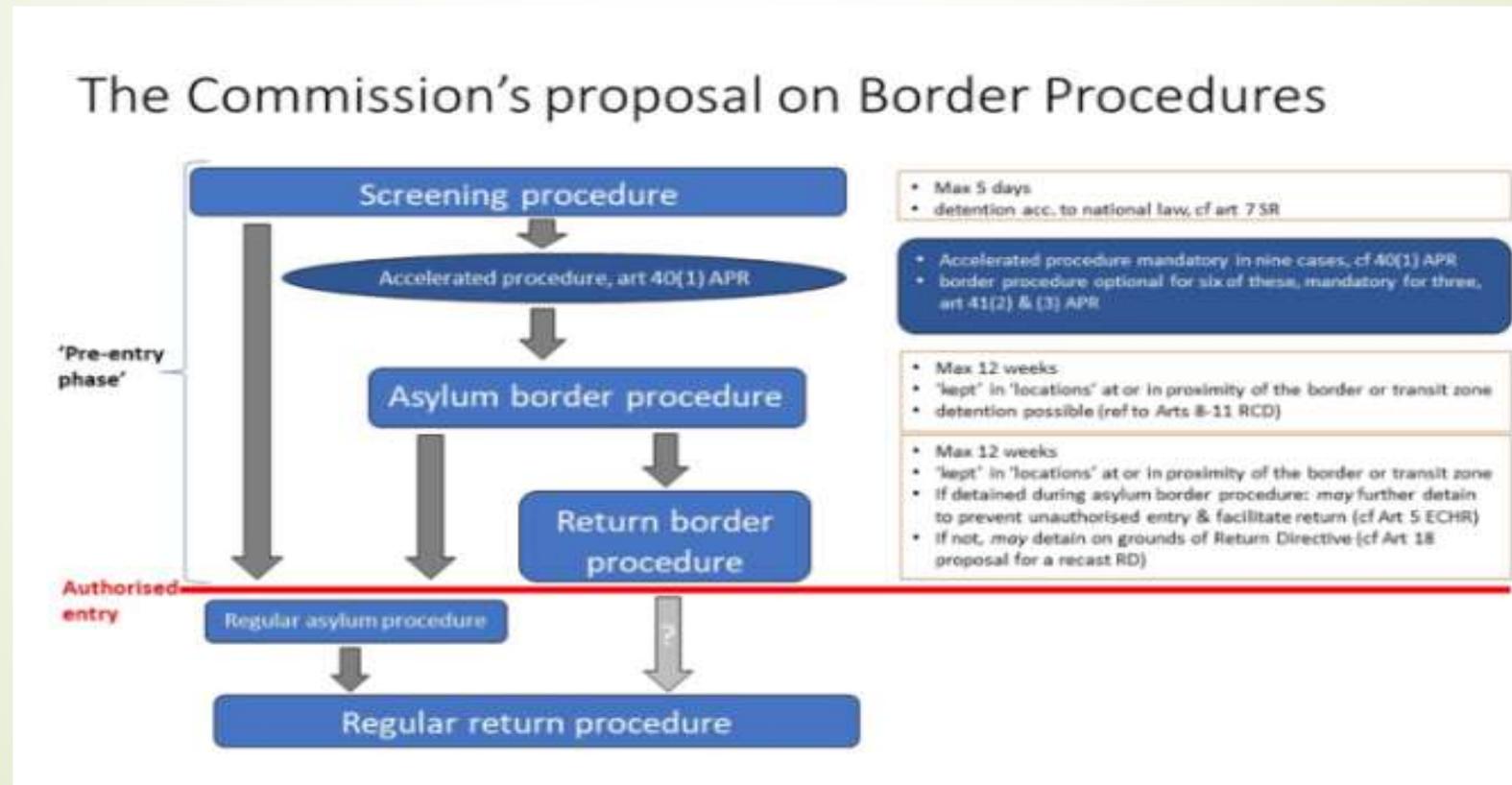
Deal with 'abusive' claims (articles 43, 31 (8) substance, 33 admissibility)

- ▶ **3rd Generation:** Proposal for an APR (2016) → Deal with applications from third-country nationals with a low recognition rate (Article 41)

Article 41 of the proposed Regulation that regulates border procedures proved challenging with respect to various aspects, such as the deadline for keeping persons at the border, and the possibility to use such a procedure, in case of disproportionate numbers of arrivals, in other locations. However, the most difficult and divisive question was whether the application of the border procedure should be optional or mandatory.

The New EU Pact on Migration and Asylum

- 'pre-entry' phase (non-entry fiction) aims to establish a 'seamless' link between asylum and return
- Extensive use of border procedures (even obligatory)





The Impact on Human Rights and Refugee Protection

➤ **Screening Procedure**

- Impact of the outcome
- Formalities of the decision
- Data protection
- The right to appeal
- Access to legal assistance and interpretation
- Detention
- Access to asylum

➤ **Asylum Border Procedures**

- Restriction of movement/ Detention (de-facto)
- Access to asylum and *non-refoulement*
- Suspensive effect of appeals
- Procedural guarantees (legal aid, interpretation, information)
- Vulnerable persons and unaccompanied children
- Access to social rights

➤ **Return Border Procedures**

- Parallel legal regimes
- Exclusion from EU Law
- Procedural safeguards: i.e Voluntary departure
- Detention



Conclusion

- ▶ From a proper equilibrium between border controls and refugee protection, in the new Pact the reference is in 'migration management', 'mixed-migration flows' and 'crisis response'
- ▶ Special treatment to those applying for asylum at the borders (*non-entry*)
- ▶ Important repercussions on human rights
- ▶ Case Study: Greece

The question that remains is how the fundamental rights of asylum-seekers can be protected in procedures that are premised on the fiction of 'non-entry' and if actually the fundamental rights framework can fit in border procedures.

Fresh ideas: how migration can be better managed at the EU's borders in a way that respects the rights of those seeking asylum