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About this paper

This paper analyses the legal fiction of non-entry following the implementation of the New Pact on Migration and Asylum. In particular, it examines the recent judgment of the Court of Justice of the European Union in *Danané and Others* and reflects on the implications of this new border management model for access to international protection and the protection of fundamental rights, with particular attention to vulnerable applicants

The Legal Fiction of Non-Entry under the New Pact on Migration and Asylum: Reflections on the *Danané and Others* Judgment

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Abstract: This paper examines the legal fiction of non-entry within the framework of the New Pact on Migration and Asylum, with particular attention to the judgment of the Court of Justice of the European Union in *Danané and Others* (Joined Cases C-50/24 to C-56/24). The analysis explores how the progressive functionalisation of borders within the Common European Asylum System has transformed the traditional territorial conception of the border into a differentiated legal regime based on screening procedures, border procedures and mechanisms of early classification. Against this background, the paper assesses the implications of *Danané and Others* for the development of a functional conception of the border and for the operation of the legal fiction of non-entry under EU asylum law. It argues that, although the judgment confirms the possibility of maintaining applicants under a border regime despite their physical presence within the territory of a Member State, it simultaneously reaffirms that effective control over the individual continues to trigger obligations derived from fundamental rights. Particular attention is paid to the role of effective control, *non-refoulement* and access to international protection as material limits to the operation of territorial fictions in contemporary European migration governance.

Keywords: New Pact on Migration and Asylum; Court of Justice of the European Union (CJEU); European Union law; Legal Fiction of Non-Entry; Border Procedures

Summary: 1. Introduction. 2. The functional transformation of european borders under the new european pact on migration and asylum. 3. The *danané and others* case: A consolidation of the legal fiction of non-entry? 4. Vulnerable applicants as a material limit to legal fiction of non-entry. 5. Conclusions.

1. Introduction

Recent developments in European migration policies have profoundly transformed the legal and functional significance of the European Union's external borders. Far from being configured exclusively as territorial limits intended to regulate physical access to the territory of the State, European borders today operate as complex spaces for the preventive management of human mobility, articulated through identification, classification and control mechanisms developed both inside and outside the territory of the Member States. In this context, the Common European Asylum System has undergone a progressive expansion of border procedures, screening mechanisms and forms of externalisation of migration control aimed at anticipating and containing migratory movements before the full activation of the guarantees associated with international protection.

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The entry into application of the New European Pact on Migration and Asylum¹ on 12 June 2026 constitutes a particularly significant milestone in this evolution². Instruments such as Regulation (EU) 2024/1356, which establishes a screening procedure at the external borders, and Regulation (EU) 2024/1348, on common procedures for international protection, consolidate a migration management model based on accelerated mechanisms for filtering and early classification of migrants and applicants for international protection. In this context, the so-called legal fiction of non-entry, according to which certain persons subject to border procedures are legally considered not to be admitted to the territory of the Member State despite being physically under the effective control of its authorities, acquires central importance³.

The use of this legal construct reflects a deeper transformation of the contemporary European model of migration control. The fiction of non-entry makes it possible to formally disassociate the physical presence of the migrant in state territory from the full activation of certain legal guarantees associated with access to the territory and the international protection procedure. Through this regulatory technique, European Union law articulates border legal regimes prior to formal admission into the territory aimed at facilitating identification, accelerated examination or return procedures in border contexts characterised by limited access to procedural and material guarantees.

However, the increasing expansion of these mechanisms raises important questions from the perspective of international human rights law and international refugee law. Both the jurisprudence of the European Court of Human Rights and that of the Court of Justice of the European Union have progressively evolved towards material conceptions of State jurisdiction based on the effective exercise of authority and control over the person and not exclusively on formal categories of territoriality or legal admission. From this perspective, the mere use of territorial fictions does not automatically neutralise the positive obligations of protection arising from fundamental rights and the principle of *non-refoulement*.

These tensions are particularly evident in relation to applicants requiring enhanced protection measures within the international protection system. The operation of screening mechanisms, border procedures and legal constructions based on non-entry raises important questions regarding their compatibility with the guarantees owed to persons whose specific circumstances require special reception conditions, procedural safeguards or individualised

¹ On 23 September 2020, the European Commission presented the New Pact on Migration and Asylum as an attempt to establish a common, comprehensive and balanced approach to migration management, based on the principles of solidarity and fair sharing of responsibilities. European Commission, Communication from the Commission on the New Pact on Migration and Asylum, COM(2020) 609 final, 23 September 2020. After three years of negotiations, the European Parliament and the Council reached a political agreement on the content of the Pact in December 2023, culminating in the formal adoption, on 14 May 2024, of ten legislative acts: Regulation (EU) 2024/1347 on the requirements for the recognition of third-country nationals or stateless persons as beneficiaries of international protection (OJEU L, 22 May 2024); Regulation (EU) 2024/1348 establishing a common procedure in the field of international protection (OJEU L, 22 May 2024); Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down rules for the reception of applicants for international protection (OJEU L, 22 May 2024); Regulation (EU) 2024/1349 on the border return procedure (OJEU L, 22 May 2024); Regulation (EU) 2024/1350 establishing the Resettlement and Humanitarian Admission Framework (OJEU L, 22 May 2024); Regulation (EU) 2024/1351 on asylum and migration management (OJEU L, 22 May 2024); Regulation (EU) 2024/1356 on the introduction of triage of third-country nationals at the external borders (OJEU L, 22 May 2024); Regulation (EU) 2024/1358 regulating the Eurodac system (OJEU L, 22 May 2024); and Regulation (EU) 2024/1359 on crisis situations and force majeure in the field of migration and asylum (OJEU L, 22 May 2024).

² The entry into force of the New European Pact on Migration and Asylum on 12 June 2026 has been preceded by an intense process of regulatory and operational adaptation by Member States and the competent European agencies. In its third report on the state of implementation of the Pact, published on 8 May 2026, the European Commission underlined the need to strengthen national capacities in terms of screening, border procedures, Eurodac, reception and return, with particular emphasis on the obligation to ensure adequate facilities, effective referral mechanisms and systems capable of preventing “leakage” and “secondary movements” during the development of the border procedures. The Commission also recalled that persons subject to the border procedure “must not enter the national territory” and must remain in designated areas while their situation is processed. Vid. European Commission, *Report on the State of Play on the Implementation of the Pact on Migration and Asylum*, COM(2026) 210 final, Brussels, 8 May 2026, especially pp. 6–12.

³ See Article 1(3) of Regulation (EU) 2024/1356, according to which persons subject to the screening procedure “shall not be authorised to enter the territory of a Member State” for the duration of that procedure. In similar terms, Article 43 of Regulation (EU) 2024/1348 regulates border procedures for international protection based on the applicant’s stay at the external border or in transit zones of the Member State, without formal admission to the national territory.

forms of protection. In this regard, vulnerable applicants, as unaccompanied or separated migrant children⁴, provide a particularly useful perspective from which to assess the practical and legal limits of the functional conception of the border consolidated under the New Pact.

In this context, this paper analyses the consolidation of the legal fiction of non-entry within the framework of the New European Pact on Migration and Asylum, paying particular attention to the implications of the CJEU's judgment in *Danané and Others*⁵ and to the legal limits arising from fundamental rights and international protection standards. To this end, the study is based on the functional transformation of European borders and the contemporary development of mechanisms of preventive control and migratory externalisation; it then analyses the scope of the CJEU's judgment in *Danané and Others*; and finally examines the tensions between the use of territorial fictions and the positive obligations of protection arising from international and European law, with particular attention to vulnerable applicants as a material limit to the operation of the legal fiction of non-entry.

2. The functional transformation of european borders under the New European Pact on Migration and Asylum

Recent developments in European migration policies have profoundly transformed the legal configuration of the European Union's external borders. Traditionally, the border operated as a territorial limit intended to delimit the exercise of state sovereignty and to regulate the conditions of access to the territory⁶. However, the progressive integration of European asylum, migration and external border management policies has favoured a transformation of this classical conception towards control models characterised by anticipation, early classification and preventive

⁴ The definition of "unaccompanied minor" as "any minor who arrives in the territory of the Member States unaccompanied by an adult who is responsible for him/her, either under the law or practice of the Member State concerned, until that adult actually takes care of that minor, including the one who ceases to be accompanied after having entered the territory of the Member States", it is included in several of the regulations that make up the New Pact: art.3 of Regulation (EU) 2024/1348; Art.2 of Regulation (EU) 2024/1356; art.2 of Regulation 2024/1358; art.2 of Regulation (EU) 2024/1347. In this paper we also refer to separated childhood, that is, those who have been separated from their parents or other habitual caregivers, but who are not necessarily alone, since they may be with other members of their extended family or responsible adults. This category is distinguished from unaccompanied children, although it shares with it the need for enhanced protection due to their special situation of vulnerability. The inclusion of separated children in the analysis is essential, even if the normative texts that make up the New Covenant do not expressly mention it, since the international obligations of States in the field of child protection do not allow for a restrictive interpretation. On the particularities of separated migrant childhood, it is recommended to read: PETIT DE GABRIEL, Eulalia W. (2022), "Separated Minors of the Dilemma between General and Individual Interest in the European Union Migration Law Compliance", *Cuadernos europeos de Deusto*, nº Extra-6, (Issue dedicated to: The EU Migration, Border Management and Asylum Reform in the Aftermath of the "Refugee Crisis": Towards an Effective Enforcement), pp. 87-116.

⁵ CJEU, Joined Cases C-50/24 to C-56/24, *Danané and Others v. Commissaire général aux réfugiés et aux apatrides*, judgment of 16 April 2026, ECLI:EU:C:2026:301.

⁶ The classical conception of the border as a territorial limit linked to the exercise of state sovereignty and the control of the admission of foreigners constitutes one of the structural elements of classical international law. On the relationship between territorial sovereignty and control of the entry of foreigners, see SHAW, Malcolm N. (2021). *International Law* (9th ed.). Cambridge: Cambridge University Press, pp. 483-485; HATHAWAY, James C. (2021). *The Rights of Refugees under International Law* (2nd ed.). Cambridge: Cambridge University Press, pp. 286-289.

management of migratory movements⁷. As a result, border control has ceased to be linked exclusively to the physical moment of territorial crossing and has increasingly been projected on phases before and after effective access to European territory.

The creation of the Schengen area is one of the main starting points for this development. The gradual abolition of internal border controls between Member States was accompanied by a parallel strengthening of external borders and the construction of common mechanisms for migration surveillance and cooperation⁸. As GUILD points out, the disappearance of internal controls did not imply a reduction in border control, but rather its reconfiguration and displacement towards new spaces and mechanisms of action⁹. In similar terms, MITSILEGAS highlights that the Schengen area favoured a growing Europeanisation of migration policies through common information systems, police cooperation and supranational border management mechanisms¹⁰.

This process intensified especially after the increase in arrivals at Europe's external borders from 2015 onwards¹¹. Since then, European migration policies have progressively evolved towards models focused on the prevention and containment of migratory movements considered irregular. The external border began to be conceived not only as a space for verifying entry conditions, but also as an instrument aimed at identifying, classifying and chan-

⁷ The progressive integration between European policies on asylum, migration and external border management has developed especially since the construction of the Schengen area and the progressive *communitarisation* of these matters after the Treaty of Amsterdam. Currently, Article 67 of the Treaty on the Functioning of the European Union (TFEU) configures the Area of Freedom, Security and Justice as a common framework that integrates policies on border control, asylum and immigration, while Articles 77 to 80 TFEU jointly articulate the European Union's external border control, asylum and immigration policy. See consolidated version of the Treaty on the Functioning of the European Union, (OJEU C 202, of 7 June 2016). This development has also been reflected in the development of the Common European Asylum System and in the consolidation of integrated migration and border management mechanisms, through the strengthening of Frontex, interoperable information systems and screening and ex-ante control procedures introduced by the New European Pact on Migration and Asylum. On this evolution, see MITSILEGAS, Valsamis (2015). *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Cham: Springer, pp. 25-31; MORENO-LAX, Violeta (2018). "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm", *JCMS: Journal of Common Market Studies*, vol. 56, no. 1, pp. 119-140; CARRERA, Sergio et al. (2019). *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*. Brussels: CEPS, pp. 19-23.

⁸ The abolition of internal border controls is one of the central elements of the so-called Schengen area. However, this process was accompanied from its origins by a parallel strengthening of external borders and by the development of common mechanisms for surveillance, police cooperation and migration control. See Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders, signed at Schengen on 14 June 1985 (OJL 239, 22 September 2000); Convention implementing the Schengen Agreement of 14 June 1985, signed on 19 June 1990 (OJL 239, 22 September 2000, in particular Arts 2, 3 and 6).

⁹ On the relationship between free internal movement and the strengthening of external borders, see GUILD, Elspeth (2001). *Moving the Borders of Europe*. Amsterdam: Intersentia, pp. 5.7.

¹⁰ MITSILEGAS, Valsamis, *op.cit.*, pp. 25-31. This explains why the external border has become the main arena of tension between state sovereignty, European cooperation and international protection. The concept of "integrated management of the external borders", provided for in Article 77(1) TFEU, has evolved into a regulatory and institutional framework based on the coordinated action of the Member States and the European agencies. Vid., ILLAMOLA DAUSÀ, Mariona, "Hacia una gestión integrada de las fronteras: El Código de Fronteras Schengen y el cruce de fronteras en la Unión Europea", *documentos CIDOB*, Serie: Migraciones, 2008, pp. 1-100, pp. 19-20.

¹¹ In 2015, more than one million irregular arrivals were recorded at the European Union's external borders, especially through the Eastern and Central Mediterranean routes, prompting an intensification of European migration control and integrated border management policies. According to data from the International Organization for Migration (IOM), in 2015 alone, more than 1,032,000 migrants and refugees arrived in Europe by sea. Vid. INTERNATIONAL ORGANIZATION FOR MIGRATION (2015). On the impact of the so-called "refugee crisis" of 2015 on the evolution of European policies and border control, see, FERRERO-TURRIÓN, Ruth and PINYOL-JIMÉNEZ, Gema (2016), "La mal llamada "crisis de los refugiados" en Europa: crisis, impactos y retos para la política de inmigración y asilo de la Unión Europea", *Documentación Social*, núm. 180, pp. 49-69; In institutional terms, the United Nations has stressed that "(...) this is not just a crisis of numbers; it is also a crisis of solidarity". UNITED NATIONS, Secretary-General (2016). *Refugee Crisis about Solidarity, Not Just Numbers, Secretary-General Says at Event on Global Displacement*, SG/SM/17670-REF/1228, 15 April 2016. Available at: <https://press.un.org/en/2016/sgsm17670.doc.htm> (last accessed June 2026).

nelling migrants early based on differentiated procedural categories¹². Cooperation with third States, the operational expansion of Frontex and the development of prior control mechanisms reflect precisely this evolution towards an administrative rationality based on the advance management of migratory risk¹³.

This transformation is not limited to a geographical or spatial dimension alone. The most significant phenomenon lies in the progressive configuration of the border as a functional legal regime for migration management¹⁴. In this model, the border is no longer exclusively identified with a physical territorial delimitation and begins to operate as a set of legal and administrative mechanisms aimed at regulating access to the territory, the asylum procedure and the guarantees associated with international protection in a differentiated manner.

This logic is particularly clear in the New European Pact on Migration and Asylum. Regulation (EU) 2024/1356 on the screening of third-country nationals at the external borders introduces a mandatory preliminary procedure applicable to certain categories of migrants before their eventual formal admission to the territory of the Member State¹⁵. During this screening phase, identity, health and safety checks are carried out, biometric data are collected and a preliminary assessment is carried out to determine the subsequent procedure applicable to the individual¹⁶.

Although screening is formally presented as a phase prior to entry into the territory¹⁷, its legal configuration reveals a different reality. Persons subject to the procedure remain under the effective control of the State authorities and subject to relevant restrictions on movement while their legal status is determined¹⁸. In this sense, screening is not only a technical identification mechanism, but also an early classification tool that conditions subsequent access to the different procedural channels provided for in the CES¹⁹.

The relevance of screening should also be analysed in conjunction with the system of border procedures consolidated by Regulation (EU) 2024/1348 on common procedures for international protection. The combination

¹² The so-called “Common Manual” was the first instrument aimed at jointly regulating the conditions of entry and control of external borders in the Schengen area. Following the Treaty of Amsterdam, its content was progressively incorporated into the *acquis Communautaire* and subsequently replaced by the Schengen Borders Code, currently regulated by Regulation (EU) 2016/399 and its subsequent amendments, thus consolidating an integrated model of common external border management. See Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 (OJ L 105, 13 April 2006); Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 (OJEU L 77 of 23 March 2016). In turn, this Regulation is partly amended by Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 establishing a Union Code of Rules for the movement of persons across borders (OJEU L 1717, of 20 June 2024).

¹³ MORENO-LAX, Violeta (2018). *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, *op.cit.*, pp. 119-124; y GAMMELTOFT-HANSEN, Thomas (2011). *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, *op. cit.*, pp. 15-22.

¹⁴ DEL VALLE GÁLVEZ explains that the contemporary European border has evolved from a simple “dividing line between state entities” to a functional model of control linked to the Schengen area and European integration. Vid., DEL VALLE GÁLVEZ, Alejandro (2016), “Los refugios, las fronteras exteriores y la evolución del concepto de frontera internacional”, *Revista de Derecho Comunitario Europeo*, n.º 55, pp. 759-777.

¹⁵ See, arts. 1, 5 and 8 of Regulation (EU) 2024/1356, relating to the scope of screening, the categories of persons subject to the procedure and the development of identification, safety, health and vulnerability controls.

¹⁶ See, arts. 10 to 14, relating to health and vulnerability controls, security controls, identity verification and registration of biometric data, as well as art. 17, relating to the screening form and the reference to the applicable subsequent procedure.

¹⁷ The configuration of screening as a phase prior to formal admission to the territory is deduced from the very object and structure of Regulation (EU) 2024/1356. See especially arts. 1, 5 and 6, as well as recital 25.

¹⁸ As SIMÕES points out, the legal configuration of the screening procedure reveals a tension between the formal fiction of non-entry and the material reality of the exercise of State control over the persons subject to the procedure. Although Regulation (EU) 2024/1356 presents screening as a phase prior to admission to the territory, during this procedure States exercise powers of identification, surveillance, restriction of movement and procedural referral, configuring a space of effective control over migrants. Vid. SIMÕES, Mariana de Botelho (2026), *The Screening Regulation (EU) 2024/1356: Fundamental Rights Challenges and Vulnerability Assessment*, JusGov Research Paper Series, Paper 2026-03, especially pp. 4-6, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6458979 (last accessed June 2026).

¹⁹ On the function of *screening* as a mechanism for early classification and articulation between asylum, border and return procedures, see TSOURDI, Evangelia (Lilian) (2024). *The New Screening and Border Procedures: Towards a Seamless Migration Process?* Brussels: FEPS/FES/EPC, pp. 5-9; EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) (2025). *Comments on the Screening Regulation*, pp. 3-5; DE LA ORDEN BOSCH, Gustavo (2024). “Pre-entry Screening and Border Procedures as New Detention Landscape in the EU Pact on Migration and Asylum. The Spanish Borders as a Laboratory for Immobility Policies”, *Peace & Security – Paix et Sécurité Internationales*, no. 12, pp. 1-6; DE BRUYCKER, Philippe (2016). “The New Pact on Migration and Asylum: What Role for Screening and Border Procedures?”, in CARRERA, Sergio and CORTINOVIS, Roberto (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*. Brussels: CEPS, pp. 10-12.

of the prior screening regulated in Regulation (EU) 2024/1356 and the border procedure provided for in Regulation (EU) 2024/1348 configures a regulatory sequence aimed at classifying migrants early and determining the legal regime applicable to their situation²⁰. In this way, certain persons may be referred to expedited border procedures or to return procedures before full admission to the territory in legal terms takes place²¹.

It is precisely in this context that the so-called legal fiction of non-entry acquires centrality. Through this normative technique, persons subject to border procedures can remain physically in the territory or under the effective control of State authorities without being legally considered as admitted to the territory. This construction allows for the development of accelerated procedures for the examination of applications for international protection or return in border areas or transit zones without fully activating certain legal consequences traditionally linked to regular entry into the territory of the State²². Access to territory is thus no longer configured as a binary category – entry or non-entry – to become a legally graduated situation conditioned by mechanisms of early classification and procedural differentiation.

As a result, the New Pact favours a growing fragmentation of the legal status of migrants from the earliest stages of border control. Screening and border procedures make it possible to differentiate between people referred to the ordinary asylum procedure, people subject to accelerated procedures at the border, people considered susceptible to return or people affected by exceptional mechanisms in crisis situations. This differentiation directly determines the level of applicable guarantees, the real possibilities of access to the international protection procedure and the scope of the rights recognised during the proceedings²³.

For these reasons, the consolidation of the legal fiction of non-entry poses significant tensions from the perspective of International and European Human Rights Law. The jurisprudence of the European Court of Human Rights has repeatedly insisted that State obligations under the European Convention on Human Rights depend fundamentally on the effective exercise of jurisdiction and control over the person and not exclusively on formal categories of territoriality. In cases such as *Hirsi Jamaa and Others v. Italy*²⁴, the Court expressly stated that States cannot

²⁰ Regulation (EU) 2024/1356 regulates the pre-screening procedure applicable after unauthorised crossing of external borders or after disembarkation operations, while Regulation (EU) 2024/1348 provides for the subsequent referral to ordinary, border or return procedures. See Articles 5, 8 and 17 of Regulation (EU) 2024/1356 and Articles 42 to 45 of Regulation (EU) 2024/1348.

²¹ Regulation (EU) 2024/1356 establishes a pre-screening mechanism aimed at determining the subsequent procedure applicable to each migrant through a referral form (art. 17). On the basis of that initial classification, Regulation (EU) 2024/1348 distinguishes between applications examined under the ordinary procedure, accelerated procedures or border procedure, in particular in Articles 42 to 45 thereof, relating to the cases in which the accelerated and border procedure applies. In addition, Regulation (EU) 2024/1359 on crisis situations, instrumentalisation and force majeure exceptionally extends the use of the border procedure and makes certain guarantees more flexible in contexts of migratory pressure (see in particular Articles 4, 5 and 11 of Regulation (EU) 2024/1359).

²² See, recital 25 of Regulation (EU) 2024/1356 and Article 43 of Regulation (EU) 2024/1348, which allow the border procedure to be carried out in respect of persons who have not yet been formally authorised to enter the territory of the Member State despite being physically under the control of its authorities. In addition, Article 45 of Regulation (EU) 2024/1348 provides for the mandatory application of the border procedure in certain cases linked, among other factors, to the low rate of recognition, security risks or applications considered manifestly unfounded, thus allowing the accelerated examination of applications before formal admission to the territory.

²³ The doctrine has pointed out that this normative architecture favors a growing fragmentation of the legal status of migrants through mechanisms of early classification and procedural differentiation that condition effective access to the guarantees associated with international protection. Vid. THYM, Daniel (2023). “Border Procedures and the Gradual Transformation of European Asylum Law”, in THYM, Daniel and TSOURDI, Evangelia (eds.), *Reforming the Common European Asylum System. The New Pact*. Baden-Baden: Nomos, pp. 326-331; TSOURDI, Evangelia (Lilian) (2024). *Op.cit.*, pp. 5-9; DE LA ORDEN BOSCH, Gustavo (2024), *op.cit.*, pp. 10-16.

²⁴ ECHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012, especially paras. 73-82 and 174-180, ECLI:CE:ECHR:2012:0223JUD002776509. In this judgment, the Court stated that the interception of migrants on the high seas by Italian authorities fully activated the jurisdiction of the State for the purposes of Article 1 of the ECHR, regardless of whether the events took place outside the national territory, stressing that States cannot evade their international obligations by means of formal constructions relating to territoriality or border control.

circumvent their international obligations by means of legal constructions designed to artificially displace the scope of application of fundamental rights²⁵.

Consequently, the progressive functionalization of the European border forces us to rethink the classic categories of territory, jurisdiction and access to international protection. The central issue is no longer only to determine where the border is physically located, but to identify under what conditions the State exercises effective control over the migrant and what are the legal consequences derived from that control. It is precisely in this context that the relevance of the judgment in *Danané and Others* must be situated, the importance of which lies in the fact that it legally consolidated this evolution towards a functional conception of the border within the Common European Asylum System.

3. The *Danané and Others* case: A consolidation of the legal fiction of non-entry?

The judgment of the Court of Justice in *Danané and Others* constitutes a turning point in the legal evolution of the fiction of non-entry into the Common European Asylum System. Its relevance lies not only in the interpretation of the rules governing border procedures, but, above all, in the consolidation of a functional conception of the border that allows certain exceptional legal regimes to be extended beyond the strict territorial limit of the external border. In this sense, the resolution clearly reflects the progressive transformation of the European model of migration control: the border ceases to operate exclusively as a delimited geographical space and is now configured as a legal technique of migration management linked to the procedural status attributed to the migrant.

The dispute arose from a few applications for international protection lodged in Belgium by third-country nationals subject to border proceedings²⁶. The questions referred to the Court for a preliminary ruling essentially revolved around two questions. First, whether the border procedure provided for by Directive 2013/32/EU could be carried out in respect of persons physically located within the territory of the State, specifically in closed centres located in Belgium. Second, what were the legal consequences of the expiry of the maximum period of four weeks laid down for the implementation of the border procedure and whether the person should be considered admitted to the territory for legal purposes²⁷.

²⁵ Since *Hirsi Jamaa*, the ECtHR has continued to state that the application of the ECHR depends fundamentally on the effective exercise of jurisdiction and control over the individual, including in border or extraterritorial contexts. See ECtHR, *Khlaifia and Others v. Italy* [GS], Application No. 16483/12, Judgment of 15 December 2016, paras. 71–81 and 90–92, ECLI: CE:ECHR:2016:1215JUD001648312; ECHR, *N.D. and N.T. v. Spain* [GS], applications nos. 8675/15 and 8697/15, judgment of 13 February 2020, paras. 102–110 and 185–201, ECLI:CE:ECHR:2020:0213JUD000867515; ECtHR, *M.K. and Others v. Poland*, Applications Nos. 40503/17, 42902/17 and 43643/17, Judgment of 23 July 2020, paras. 178–199, ECLI:CE:ECHR:2020:0723JUD004050317; ECtHR, *Shahzad v. Hungary*, Application No. 12625/17, Judgment of 8 July 2021, paras. 47–56, ECLI:CE:ECHR:2021:0708JUD001262517; ECtHR, *A.R.E. v. Greece*, Application No. 15783/21, Judgment of 7 January 2022, paras. 209–227, ECLI:CE:ECHR:2022:0107JUD001578321; and ECtHR, *A.B. and Others v. France*, Applications Nos. 11593/12, 11603/12 and 11910/12, Judgment of 12 July 2016, ECLI:CE:ECHR:2016:0712JUD001159312. On this jurisprudential evolution, see MORENO-LAX, Violeta (2020). “The Architecture of Functional Jurisdiction: Unpacking Contactless Control — On Public Powers, S.S. and Others v. Italy, and the ‘Operational Model’”, *German Law Journal*, vol. 21, no. 3, pp. 385–416; and GAMMELTOFT-HANSEN, Thomas and TAN, Nikolas Feith (2017). “The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy”, *Journal on Migration and Human Security*, vol. 5, no. 1, pp. 28–56.

²⁶ Joined Cases C-50/24 to C-56/24 arose from several applications for international protection lodged at Brussels airport by third-country nationals arriving between September and October 2023. Following the submission of those applications, the Belgian authorities adopted decisions refusing entry and agreed to detain the applicants in centres physically located within Belgian territory – the Caricole transit centre and the Sint-Gillis-Waas reception centre – although the national legislation legally treated them as centres “located at the border” for the purposes of applying the border procedure provided for in Article 43 of the Directive 2013/32. After the expiry of the four-week period provided for in that provision, the applicants were authorised to enter Belgian territory but remained detained based on new decisions adopted because of another legal basis relating to the risk of absconding and the need to continue the investigation of their applications. CJEU Judgment of 16 April 2026, *Danané and Others*, *op.cit.*, paras. Verses 25–31.

²⁷ The requests for a preliminary ruling made by the Belgian Conseil du contentieux des étrangers related, in essence, to the interpretation of Article 43 of Directive 2013/32/EU and Articles 8 and 9 of Directive 2013/33/EU. In particular, the referring court asked, first, whether a border procedure could be conducted in respect of applicants detained in facilities physically located within the territory of the Member State, but legally treated as border centres under national law; and, on the other hand, what were the legal consequences arising from the expiry of the maximum period of four weeks provided for the border procedure, in particular in relation to the continued detention and the legal situation of the applicant after the expiry of that period (*Ibid.*, paragraphs 37–44 and 46–52).

The CJEU starts from the idea that the border procedure constitutes an exception to the ordinary regime for examining applications for international protection and recalls that its application must be interpreted strictly. At the same time, however, it accepts that the exact physical location of the centre where the procedure is carried out is not decisive provided that the applicant remains legally subject to the border regime provided for by EU law²⁸.

The Court thus accepts that persons physically present in the territory of the Member State may continue to be legally treated as not being admitted to the territory for the purposes of the asylum procedure²⁹. The non-entry fiction thus ceases to depend exclusively on the physical place where the person is located and becomes linked to the applicable legal regime during the processing of the application. The consequence is especially significant because it confirms that the border space can be functionally projected into the interior of the state territory by means of normative techniques of classification and migration containment.

On this point, the Advocate General's Opinion is particularly illustrative of the logic underlying the judgment³⁰. The Advocate General submits that the legal fiction of non-entry constitutes an autonomous construction of EU law intended to allow the application of specific procedures at the border without this implying formal admission to the territory of the Member State. From that perspective, it considers that the decisive factor is not the exact geographical location of the applicant, but the maintenance of his legal subjection to the border regime. The relevant criterion therefore becomes functional and not strictly territorial³¹.

However, the Advocate General also points out that such a fiction cannot have the effect of excluding the person from the jurisdiction of the State or neutralising the obligations arising from fundamental rights³². Precisely because the applicant is under the effective control of the State authorities, the requirements arising from the Charter of Fundamental Rights of the European Union, the principle of effective judicial protection and the guarantees associated with any limitation of personal liberty continue to be fully applicable. This idea also appears in the judgment itself when the Court recalls that exceeding the maximum period of the border procedure prevents the person from being kept indefinitely under the exceptional border regime and makes it necessary to authorise his entry into the territory for the continuation of the ordinary procedure³³.

The judgment thus reflects a structural tension between two different legal logics. On the one hand, the Court validates the use of the non-entry fiction as a legitimate instrument of migration management and confirms the possibility of developing border procedures with respect to persons physically present in the state territory. On the other hand, it rejects that this fiction can generate spaces completely removed from legal control or immune to the application of fundamental rights. Physical presence under State control remains legally relevant, even where Union law allows the person not to have been formally considered not to have been admitted to the territory.

Indeed, the importance of *Danané* and *others* lies precisely in the fact that they consolidate the evolution towards a functional conception of the border already visible in the New European Pact on Migration and Asylum. As part of the doctrine has pointed out, European borders have been progressively transformed into differentiated legal spaces characterised by the flexibility of certain guarantees and using early classification mechanisms aimed at selectively managing access to the territory and the asylum procedure³⁴. In this logic, screening, border procedures

²⁸ *Ibid.*, pp. 53-55 and 60-69.

²⁹ The Court expressly states that Article 43 of Directive 2013/32/EU does not necessarily require that the border procedure be carried out in facilities geographically located at the border or in a transit zone, and that Member States may apply such a procedure in centres physically located within the national territory provided that these are legally considered to be border centres under national law. The CJEU also points out that the persons subject to this procedure "have not been authorised to enter the territory of the Member State" while the border procedure continues to apply. See, *Ibid.*, paragraphs 63 to 69, in particular paragraph 65 ("Article 43 of Directive 2013/32 does not specify the exact place where the border procedure must take place") and paragraph 68, where the Court accepts that the applicant may remain in a centre located within the national territory without having been legally authorised to enter the territory of the Member State for the purposes of the asylum procedure.

³⁰ Opinion of Advocate General Emiliou delivered on 23 January 2026 in Joined Cases C-50/24 to C-56/24, *Danané and Others*, EU:C:2026:47.

³¹ *Ibid.*, paras. 58-66 and 70-74.

³² *Ibid.*, paras. 75-85 and 97-103. In those paragraphs, the Advocate General emphasises that the use of the non-entry fiction does not make it possible to circumvent the requirements arising from Articles 6 and 52 of the Charter or the guarantees provided for in Articles 8 and 9 of Directive 2013/33 relating to the detention of applicants for international protection.

³³ CJEU *Danané* and *others*, *op.cit.*, paragraphs 70-78 and 83-89.

³⁴ DE BRUYCKER, Philippe (2016). "The New Pact on Migration and Asylum: What Role for Screening and Border Procedures?", *op. cit.*

and the fiction of non-entry operate together as instruments aimed at classifying migrants early and determining whether they will access the ordinary asylum procedure or whether they will remain subject to exceptional border regimes aimed at expedited examination of their applications or their eventual return.

The ruling reinforces precisely this legal architecture. If the border regime can be maintained with respect to persons located within the territory of the State, this implies that the border is no longer exclusively identified with the external physical boundary of the State and is now configured as a specific legal status associated with certain categories of migrants. Border control is progressively detached from classical territoriality and is increasingly articulated through normative techniques of legal differentiation. This also contributes to deepening the fragmentation of the legal status of migrants, who are subjected from very early stages to differentiated procedural categories – people in screening, applicants in border procedure, applicants in ordinary procedure or people subject to return – on which different levels of guarantees and protection depend³⁵.

This development is particularly problematic in relation to migrant children. The functional logic underlying the fiction of non-entry can hinder precisely those guarantees that international and European law considers essential for the protection of migrant children, such as the early identification of situations of vulnerability, the determination of the best interests of the child, effective access to legal representation or the individualised assessment of international protection needs. The risk is that procedures conceived primarily from parameters of speed, classification and control end up negatively conditioning the activation of positive obligations of reinforced protection for children.

In this sense, the judgment highlights one of the main legal questions raised by the New Covenant: to what extent a systemic logic of border management based on the fiction of non-entry is compatible with the reinforced legal status that international human rights law recognizes for migrant children. Although the Court recalls that fiction does not exclude the applicability of fundamental rights or eliminate the State obligations derived from the effective control exercised over the person, the very normalization of these exceptional regimes contributes to consolidating legal spaces in which the ordinary guarantees of the right to asylum appear weakened.

Danané and Others does not merely involve a technical interpretation of the border procedure governed by EU law. The judgment confirms a more profound transformation of the European model of migration control, characterised by the functional expansion of the border and the consolidation of legal mechanisms that allow certain people to be kept in a situation of conditional, limited and legally differentiated access with respect to European territory. Precisely for this reason, its relevance goes beyond the procedural scope of asylum and directly affects the way in which EU law today redefines the relations between territory, jurisdiction, migration control and the protection of fundamental rights.

4. Vulnerable applicants as a material limit to the legal fiction of non-entry

The legal fiction of non-entry raises broader concerns regarding the protection of vulnerable applicants within the Common European Asylum System. Although the judgment in *Danané and Others* confirms the possibility of maintaining certain applicants under a border regime despite their physical presence within the territory of a Member State, the operation of this legal construct remains subject to the obligations arising from fundamental rights and international protection standards. This is particularly relevant in relation to individuals whose specific circumstances require enhanced procedural and substantive safeguards. The extent to which the legal fiction of non-entry can operate without undermining those guarantees therefore constitutes one of the main challenges posed by the contemporary European model of border management.

³⁵ This idea is inspired by the broad understanding of the right to asylum proposed by PINTO OLIVEIRA, who argues that international protection should not be understood exclusively through the traditional categories of refugee status, but rather as part of a broader framework of protection against serious violations of fundamental rights. The author emphasises, on the one hand, the continuity between asylum and subsidiary protection and, on the other, the possibility that individuals who do not fulfil the requirements for refugee status may nevertheless be protected against expulsion due to obligations arising from the principle of *non-refoulement* and other international human rights instruments. From this broader understanding of asylum law, it becomes possible to observe a progressive diversification of intermediate legal situations of protection that increasingly blur the traditional boundaries between immigration law, asylum law and international protection. See PINTO OLIVEIRA, Andreia Sofia (2017), “Direito de Asilo”, in OTERO, Paulo and GONÇALVES, Pedro (coords.), *Tratado de Direito Administrativo Especial*, vol. VII, Coimbra, Almedina, pp.6, 20-21, 34-37.

Among the various categories of vulnerable applicants, unaccompanied or separated migrant children provide perhaps the clearest illustration of the tensions generated by the functional logic of the border³⁶. Their situation highlights the difficulties of reconciling accelerated border procedures and mechanisms of early classification with the positive obligations of protection derived from international and European law.

The question is not only whether EU law allows a person physically present in the territory to be subject to a non-entry legal regime, but whether such a technique is compatible with the enhanced legal status that international and European law recognises for migrant children³⁷. In this context, the legal fiction of non-entry ceases to be a purely procedural issue and becomes a problem of effective protection.

Unaccompanied or separated migrant children cannot be treated as just another category within the general mechanisms of border management. Their situation requires a specific approach due to the concurrence of factors of dependency, absence of family references and possible previous experiences of violence, exploitation, trafficking or persecution. However, this vulnerability should not be understood as an abstract or inherent condition of the minor, but as a situation that may be aggravated by certain institutional contexts³⁸. Precisely for this reason, border procedures, prior screening or prolonged stay in containment spaces can intensify situations of lack of protection when they delay the identification of the minor, the appointment of a representative or effective access to the international protection procedure.

From this perspective, the main problem with the legal fiction of non-entry lies in the fact that it places the minor in an intermediate legal space during a decisive phase of access to protection. Although the applicability of fundamental rights is not formally excluded, the procedural configuration may lead to a material weakening of guarantees. The identification of the minor, the detection of specific protection needs, the assessment of the best interests of the child and appropriate assistance are not ancillary actions, but necessary conditions for access to the asylum procedure to be real and effective.

International and European law imposes, in this area, clear positive obligations. When a minor is under the authority or effective control of the State, appropriate protection mechanisms must be activated, regardless of whether or not there is formal admission to the territory. Both the Convention on the Rights of the Child (Art. 3) and the Charter of Fundamental Rights of the European Union (Art.24) require that the best interests of the child be

³⁶ Unlike previous EU asylum instruments, the New Pact on Migration and Asylum does not establish a general category of “vulnerable persons”. Rather, it relies on a functional approach based on the identification of applicants requiring specific protection measures, notably “applicants with special reception needs” under Directive (EU) 2024/1346 (Arts. 2(8) and 24) and applicants requiring special procedural guarantees under Regulation (EU) 2024/1348. Among these categories, unaccompanied or separated children remain one of the groups most consistently recognised as requiring enhanced protection under both EU and international law.

³⁷ This strengthened legal status of migrant children derives, inter alia, from articles 2, 3, 20, 22 and 37 of the Convention on the Rights of the Child, which recognize the principle of the best interests of the child, the special protection of children deprived of a family environment and the specific protection of asylum-seeking or refugee children; Articles 3, 4 and 8 of the European Convention on Human Rights, Articles 1, 4, 18, 19, 24 and 47 of the Charter of Fundamental Rights of the European Union, relating to human dignity, the prohibition of inhuman treatment, the right to asylum, the prohibition of refoulement, the rights of the child and effective judicial protection; as well as various provisions of secondary Union law, including Articles 15 and 25 of Regulation (EU) 2024/1348, Article 13 of Regulation (EU) 2024/1356 and Articles 14 and 16 of Directive 2013/33/EU, which impose specific obligations of identification, representation, reception and enhanced protection with respect to unaccompanied or separated minors.

³⁸ Specialized doctrine has warned that the vulnerability of migrant children should not be conceived exclusively as an inherent characteristic derived from age, but also as the result of legal, institutional and administrative contexts that can aggravate situations of dependency, invisibility or lack of protection. From this perspective, vulnerability has a structural and relational dimension linked to the specific conditions in which migration control, access to the asylum procedure, deprivation of liberty or reception deficiencies take place. Vid. FINEMAN, Martha Albertson (2008). “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law & Feminism*, vol. 20, no. 1, pp. 8-15; PERONI, Lourdes & TIMMER, Alexandra (2013). “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law”, *International Journal of Constitutional Law*, vol. 11, no. 4, pp. 1064-1069; SMYTH, Ciara (2014). *European Asylum Law and the Rights of the Child*. London/New York: Routledge, pp. 31-36; and POBJOY, Jason M. (2017). *The Child in International Refugee Law*. Cambridge: Cambridge University Press, pp. 68-74; SERRANO SÁNCHEZ, Lucía (2022), “Undocumented migrant persons claiming to be minors: jurisdiction, applicable law, and cooperation”, *Spanish Yearbook of International Law (SYbIL)*, vol. 26, pp. 91-106.

a primary consideration in all decisions affecting the child³⁹. Consequently, if the State controls the location, freedom of movement, identification or eventual return of the minor, it is exercising a legally relevant power that activates reinforced obligations of protection.

European jurisprudence has consolidated this reading. The ECtHR has repeatedly stated that the special vulnerability of migrant children requires protection adapted to their age, family situation and specific circumstances, especially when minors are subject to detention, border control or institutional dependency. In cases such as *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *Rahimi v. Greece* or *Darboe and Camara v. Italy*, the Court has linked deficiencies in the identification, reception or assistance of migrant children with the violation of treaty obligations⁴⁰. Vulnerability thus operates not as a merely descriptive category, but as a legal criterion that makes it possible to assess whether the State has acted with the level of enhanced diligence required with respect to minors subject to its effective control⁴¹.

The logic adopted by *Danané* and *others* is problematic precisely because it allows the border to function as a differentiated legal regime even with respect to persons physically present in the territory of the State. Transferred to the field of migrant children, this conception can encourage the first contact with the system to be organized as a priority from categories specific to migration control – irregular entry, admissibility, return or procedural acceleration – before the guarantees derived from child protection are fully activated. The risk lies not only in the speed of the procedure, but also in the fact that the specific needs of child protection are subordinated to the logic of early classification characteristic of contemporary models of border management⁴².

³⁹ The Committee on the Rights of the Child has interpreted the best interests of the child as a substantive principle, an interpretative criterion and a procedural rule that should guide any decision that directly or indirectly affects children. According to the Committee, this principle requires an individualized assessment of the specific circumstances of each child, considering his or her situation of vulnerability, age, degree of maturity, identity and specific protection needs. It also stressed that the best interests of the child must be applied in a reinforced way in migratory contexts, where state decisions regarding border control, reception, detention or return can seriously affect the development, security and fundamental rights of children. See Committee on the Rights of the Child, General Comment No. 14 (2013), on the right of the child to have his or her best interests be a primary consideration, CRC/C/GC/14, 29 May 2013, paras. 6, 36-40 and 75-76; and Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment Nos. 3 and 22 (2017), *General Principles concerning the Human Rights of Children in the Context of International Migration*, CMW/C/GC/3-CRC/C/GC/22, of 16 November 2017, Paras. Verses 27-33.

⁴⁰ In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the ECtHR held that the detention of a five-year-old unaccompanied girl in an adult facility, without adequate accompaniment, assistance and protection measures, violated Article 3 ECHR, stressing that her age and situation of extreme vulnerability imposed reinforced positive obligations on the State. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006, paras. 55, 81-83 and 101-104, ECLI:CE:ECHR:2006:1012JUD001317803. In *Rahimi v. Greece*, the Court also found a violation of Articles 3 and 5 of the ECHR by the detention and subsequent institutional abandonment of an unaccompanied Afghan minor, noting the absence of adequate measures for reception, guardianship and assistance. ECtHR, *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 April 2011, paras. 86-94 and 108-110, ECLI:CE:ECHR:2011:0405JUD000868708. In *Darboe and Camara v. Italy*, the ECtHR linked deficiencies in age identification, the absence of adequate procedural safeguards and the prolonged accommodation of an alleged unaccompanied minor in an adult facility with a breach of Article 3 ECHR. ECtHR, *Darboe and Camara v. Italy*, Application No. 5797/17, Judgment of 21 July 2022, paras. 145-157 and 173-182, ECLI:CE:ECHR:2022:0721JUD000579717. This line has recently been reinforced in *A.N. et al. v. Greece*, concerning the living conditions of unaccompanied minors in the RIC of Samos, and in *H.D. v. Italy*, concerning the placement of an unaccompanied minor in an adult centre despite the existence of documentation proving that he or she is a minor. ECtHR, *A.N. and Others v. Greece*, Application Nos. 65267/19 and Others, Judgment of 22 January 2026, ECLI:CE:ECHR:2025:0122JUD0006526519; ECHR, *H.D. v. Italy*, Application No. 41645/23, Judgment of 9 April 2026, ECLI:CE:ECHR:2026:0409JUD0004164523.

⁴¹ Thus, in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the Court stressed that the age and absence of family references required the authorities to act with “particular care” (*op.cit.*, paras. 55 and 83). In *Rahimi v. Greece*, it also stated that unaccompanied minors belong to “one of the most vulnerable categories of society” (*op. cit.*, para. 87). In *Darboe and Camara v. Italy*, it linked the absence of adequate guarantees of identification and legal representation to the intensification of the child’s vulnerability to State authorities (*op.cit.*, paras. 152-157).

⁴² Regulation (EU) 2024/1356 on border screening is also applicable to minors, including unaccompanied minors, as it does not provide for a general exclusion for minors. For its part, Regulation (EU) 2024/1348 provides, as a general rule, that unaccompanied minors are excluded from the border procedure (recital 62). However, Articles 53(1) and 42(3)(b) exceptionally allow the application of this procedure when the unaccompanied minor represents a danger to the national security or public order of the Member State, or there are reasonable grounds to consider that he or she constitutes a threat to public security. Likewise, Regulation (EU) 2024/1359 on crisis situations and force majeure significantly expands the cases of application of the border procedure, allowing Member States to extend it to unaccompanied minors in contexts of migratory crisis, instrumentalization or force majeure. In particular, Article 11 authorises Member States, in certain exceptional situations, to apply the border procedure to wider categories of applicants for international protection, including unaccompanied minors.

This is particularly sensitive because access to international protection for migrant children depends on a cumulative sequence of guarantees. It is not enough to formally allow an asylum application to be made⁴³. It is necessary for the minor to be identified as such, to assess whether he or she is unaccompanied or separated, to be assigned adequate representation, to receive understandable information and for his or her protection needs to be examined individually. Risks related to trafficking, domestic violence, exploitation, persecution or lack of effective protection in the country of origin do not always appear immediately or explicitly⁴⁴. If any of these guarantees fail, the right of access to the procedure is weakened from the outset. For this reason, a system built on short procedures, accelerated filtering and restriction of movements can make it difficult precisely for these risks to emerge and be legally assessed before decisions on inadmissibility, return or procedural acceleration are adopted⁴⁵.

In this sense, *Danané* and *others* offer an ambivalent teaching. On the one hand, it consolidates a functional conception of the border that expands the possibilities of application of the legal fiction of non-entry within the state territory. On the other hand, the Court itself recalls that such a fiction does not exclude the application of the guarantees derived from EU law nor does it allow restrictions of freedom to be maintained indefinitely without sufficient legal basis. This statement is especially relevant with respect to migrant children, since it confirms that the exercise of effective control over a minor activates positive obligations of protection that cannot be neutralized by formal categories of non-admission.

In conclusion, unaccompanied or separated migrant children show the clearest limits of the legal fiction of non-entry. The functional boundary cannot displace the obligations arising from the best interests of the child, the principle of *non-refoulement* and the right of effective access to international protection. The decisive question is not, therefore, whether the legal fiction of non-entry can exist in the abstract, but to what extent it can operate without materially emptying the reinforced guarantees that International and European Law recognises for migrant children.

5. Conclusions

The judgment in *Danané* and *Others* is one of the most significant manifestations of the contemporary transformation of the European model of migration control. Its real relevance goes beyond the technical scope of border procedures to focus on a much deeper issue: the legal redefinition of the border in European Union law. In effect, the border no longer operates only as a physical boundary of the territory of the State, but also as a functional legal regime that can be projected onto persons physically present under the effective control of the authorities.

In this context, the legal fiction of non-entry acquires a structural centrality within the New European Pact on Migration and Asylum. Through this regulatory technique, EU law makes it possible to keep certain migrants in an intermediate legal situation: physically present under effective state control but formally considered as not being admitted to the territory. The combination of screening, border procedures and accelerated examination and return mechanisms thus reflects a broader evolution of the Common European Asylum System towards preventive

⁴³ As ARENAS HIDALGO points out, "(...) it would be useless to enshrine this right at the highest level if the appropriate circumstances are not created for the effective exercise of it", in ARENAS HIDALGO, Nuria, (2023), "El derecho de acceso al procedimiento de protección internacional de la infancia extranjera no acompañada: interés superior del menor y enfoque de género en el sistema europeo de asilo", en LARA AGUADO, Ángeles (Coord.), *Protección de menores en situaciones transfronterizas: análisis multidisciplinar desde las perspectivas de género, derechos humanos y de la infancia*, Tirant lo Blanch, Valencia, pp. 1419-1477, p. 1429.

⁴⁴ Doctrine and specialized international organizations have warned that the international protection needs of migrant children tend to manifest themselves progressively and require adapted procedures, sufficient time and specialized assistance to be properly identified. See Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No. 3 and No. 22 (2017), *op.cit.*, paras. 32, 35 and 40; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, paras. 72-75; and POBJOY, Jason M. (2017). *The Child in International Refugee Law*, *op.cit.*, pp. 236-242. From this perspective, the absence of early identification, adequate representation or individualized assessment can materially compromise effective access to the international protection procedure from its earliest stages.

⁴⁵ See, in this regard, the study developed by MILANO, Valentina (2025), *Los derechos de los menores extranjeros no acompañados en la frontera: normativa internacional y práctica española a la luz de la jurisprudencia del Comité de los Derechos del Niño y de los Tribunales Europeos*, Dykinson, Madrid, 2025.

management models aimed at filtering, channelling and containing migratory movements from the early stages of border contact.

However, precisely because these dynamics affect people subject to state authority and control, the use of territorial fictions cannot neutralise the obligations arising from international and European human rights law. The judgment in *Danané and Others* highlights this structural tension. First, the Court validates a functional conception of the border which considerably extends the potential scope of border procedures within the territory of the State. On the other hand, it expressly recalls that the fiction of non-entry does not exclude the applicability of fundamental rights nor does it allow the creation of legal spaces immune to judicial control or to the guarantees derived from the CEFEU.

From this perspective, the main contribution of *Danané and Others* lies in demonstrating that the contemporary expansion of European legal frontiers does not eliminate the relevance of effective control as the legal basis for State obligations towards individuals subject to its authority. The decisive issue is therefore not the formal location of the person concerned, but the existence of a relationship of authority and control capable of triggering obligations derived from fundamental rights, international protection standards and the principle of *non-refoulement*.

This conclusion is particularly significant in relation to applicants requiring enhanced protection measures under EU asylum law. The operation of the legal fiction of non-entry raises important questions regarding the compatibility of accelerated border procedures with the guarantees owed to individuals whose specific circumstances require a heightened level of protection. In this regard, the New Pact itself recognises the need to identify applicants with special reception needs and applicants requiring special procedural guarantees, thereby acknowledging that differentiated treatment may be necessary to ensure the effective enjoyment of rights within border procedures.

Among these categories, unaccompanied or separated migrant children provide perhaps the clearest illustration of the tensions generated by the functional logic of the border. Their situation demonstrates that effective access to international protection does not depend solely on the formal possibility of lodging an asylum application, but also on the existence of a cumulative sequence of safeguards, including adequate identification, legal representation, individualised assessment and the early detection of specific protection needs.

In sum, *Danané and Others* allows us to better understand both the scope and the limits of the legal fiction of non-entry within the asylum model consolidated by the New Pact. While the judgment confirms the possibility of maintaining applicants under a border regime despite their physical presence within the territory of a Member State, it simultaneously reaffirms that the exercise of effective control continues to generate legal obligations that cannot be displaced through territorial fictions. The fundamental challenge, therefore, is not whether the fiction of non-entry may operate in the abstract, but to what extent it can do so without undermining the guarantees that European Union law, international refugee law and international human rights law require States to ensure for all persons under their jurisdiction, particularly those in situations of heightened vulnerability.

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