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## **Governing Borders in France: From Extraterritorial to Humanitarian Confinement**

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In recent decades, increasing population movements and constraints in global migrations have framed new distributions of power according to access to mobility. These developments are rooted in an ambivalent, double-sided reality of the borders: while they vanish for socio-economic entities engaged in processes of deterritorialization, they simultaneously solidify around practices of exclusion that affect individuals on the move. Since the end of the East–West divide in Europe, research in the social sciences and in political science has shown that nation-states are being reshaped through new lines of rupture, shifting from concerns about competing social and economic models to concerns about security and citizenship and transformations in the conceptualization of borders.<sup>1</sup> Violence and state discriminatory practices toward migrants have been analysed from this perspective of the nation-state in crisis. The idea of the “border” has acquired new theoretical uses by reference to institutionalized and deterritorialized technologies of exclusion inside national and social spheres. No longer the mere markers of territorial limits, borders have become areas of negotiation and definers of the political community, shifting from the margins into the heart of public space. Interestingly enough, while metaphors and new conceptualizations of the border were used to question the definition of national politics, the border stations of European states have undergone essential transformations. By finding new ways to carry these debates into daily life, material facilities, and surveillance technologies, the apparatuses of border detention have emerged throughout the European Union (EU) and its neighbouring countries. These developments widely rely on national constructions of a migratory “problem” or “crisis,” which translate into political agendas that promote the closure and enforcement of borders. Border confinement is part of a wider EU policy based on a security–immigration–asylum nexus,<sup>2</sup> which focuses resources and priorities on the control of illegal migration. In this regard, studies of border detention point to a shift from reception to control structures, from control to detention, and finally to the infringement of rights where the

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<sup>1</sup> See especially Etienne Balibar, *Nous, citoyens d'Europe? Les frontières, l'Etat, le peuple* (Paris: La Découverte, 2001). See also Mark Duffield, *Development, Security, and Unending War: Governing the World of Peoples* (London: Polity Press, 2007).

<sup>2</sup> Didier Bigo, *Police en réseaux, l'expérience européenne* (Paris: Presses de Sciences Po, 1996), 303.

“borders of democracy” are delineated.<sup>3</sup> These administrative forms of confinement raise substantial issues about fundamental rights and appear legally problematic.<sup>4</sup>

In France, conditions of entry have become more restrictive since the early 1980s. Policies of migratory restriction have been applied through stopping labour migration, restricting the asylum procedure,<sup>5</sup> and building centres for the detention and expulsion of irregular migrants.<sup>6</sup> These policies have entailed a change in the practices of border control, leading to the institution of systems of detention at the borders. These practices apply to a heterogeneous population. In Western states, depending on the national context, several categories of “clandestine migrants,” “asylum seekers,” “economic refugees,” and so on are either categorized and maintained in different centres—asylum seekers waiting in specific centres for their demands to be registered, and other “illegal migrants” waiting in prison-like environments for expulsion—or mixed together in one centre that can process both asylum requests and expulsions. Such is the case of the Immigration Prevention Centre in Laval, Quebec, or of the “waiting zone for people in proceedings” at the Roissy–Charles de Gaulle airport in France, where undocumented aliens and asylum seekers are held for up to 20 days. As the largest international airport in Europe in terms of air traffic, Roissy–Charles de Gaulle is a major entry point to France; in 2007, it received 58.87% of all undocumented aliens held at the borders and 79.86% of those held at airport borders.<sup>7</sup> This article is based on ethnographic fieldwork I conducted from 2004 to 2007 while working as a legal counsellor to detainees at the Roissy detention centre, as well as on interviews with institutional actors and former detainees.<sup>8</sup>

Looking back to the origins and history of airport detention, this article questions the complexities of border government. As places of exchange and tension, border apparatuses call attention to the relationships of control, categorization, and care between the state and individuals on the move. They depict borders as dense habitable zones with their own time, space,

<sup>3</sup> Balibar, *Nous, citoyens d'Europe?*, 175.

<sup>4</sup> As a judicial oddity, waiting areas have been an object of study by jurists. See Denis Salas, “Incrimines, discriminés ...” *Immigration illégale et pratiques judiciaires en France*, *Hommes et migrations* 1241 (2001), 178 (on the inefficiency of legal control on administrative detention). See also François Julien-Laferrrière, “La rétention des étrangers aux frontières françaises,” *Cultures et conflits* 23 (1996), for a comparative approach to the confinement and expulsion of aliens, highlighting the administrative rationalities at stake.

<sup>5</sup> See Sandra Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security* (Aldershot, UK: Ashgate, 2001).

<sup>6</sup> See Nicolas Fischer, “Entre urgence et contrôle. Les centres de rétention dans la France contemporaine,” *Asylons* 2 (2007), <http://terra.rezo.net/article663.html>.

<sup>7</sup> Figures from the French Ministry of Immigration, Integration, National Identity and Mutually Supportive Development (June 3, 2008), archived at ANAFÉ, <http://www.anafe.org/download/generalites/CR-reunion-annuelle-ZA-2007.pdf>.

<sup>8</sup> Ethical issues related to this fieldwork are discussed in Chowra Makaremi, “Étudier et assister les étrangers aux frontières,” in *Les politiques de l'enquête : épreuves ethnographiques*, ed. Didier Fassin and Alban Bensa (Paris: La Découverte, 2008).

and power relations that generate unique social and political experiences for those subjected to them.<sup>9</sup> Looking into the different mechanisms that gave birth to these places, this article focuses on the relations among sovereignty, law, and discipline in shaping new systems of confinement. More specifically, what is the status of discretion in this management of borders? How is it reframed by the law and used as a technique of government? My analyses do not seek to oppose these two trends; rather, I seek to understand how they work together through an empirical case study.

In France, detention of aliens at the borders emerged in a zone free from national law. First, the state declared a portion of its own territory to be “outside,” then it claimed administrative and legal authority over this extraterritorial zone. How did this happen? Curiously, the situation was created not by an arbitrary top-down imposition but, rather, through a liberal process of public mobilization, the demands of certain groups within civil society, and state responses to basic rights issues. Pre-existing administrative practices of detention were legalized through the adoption of waiting zones. Since the early 1980s, the Interior Ministry has applied the sovereign prerogative of the state over its borders and has complied with EU migration policies through a set of material facilities, administrative procedures, and legal provisions that organizes a system of deportation in real time at the country’s borders. In answer to the protests of human-rights defenders against detention practices in the 1990s, the state institutionalized these practices by designating the border as a space where an exceptional law would be applied. The protests have denounced airport detention as a space of “no-law,”<sup>10</sup> a rhetoric that ultimately led opposition to border control to be framed in terms of civil liberties. In this regard, I argue that these zones are not discretionary legal loopholes: they are progressively reinforced through a complex process of legalization. Anti-detention activists’ emphasis on civil liberties resulted in a situation of legal dichotomy that characterizes alien detention in Western societies: on the one hand, legalized practices of exclusion and control; on the other hand, a defence of detainees’ fundamental rights that opposes such practices in the field of law but faces their reconfiguration in elusive

<sup>9</sup> These issues have been developed in the literature on border camps and deportation that has emerged in the last decade. See especially Alessandro Dal Lago, “Non-persons,” *Associations: Journal of Social and Legal Studies* 3 (2001); Nicolas Fischer, “Les expulsés inexpulsables. Recompositions du contrôle des étrangers dans la France des années 1930,” *Cultures et conflits* 53 (2005); Suzan Bibler Coutin, “Illegality, Borderlands, and the Space of Nonexistence,” in *Globalization Under Construction: Governmentality, Law and Identity*, ed. Richard W. Perry and Bill Maurer (Minneapolis: University of Minnesota Press, 2003); Federico Rahola, “La forme-camp. Pour une généalogie des lieux de transit et d’internement du présent,” *Cultures et conflits* 68 (2007); Marc Bernardot, *Camps d’étrangers* (Broissieux: Éditions du Croquant, 2008); Henri Courau, *Ethnologie de la forme-camp de Sangatte. De l’exception à la régulation* (Paris: Éditions des Archives contemporaines, 2007); Carolina Kobelinsky and Chowra Makaremi, eds., *Confinement des étrangers: entre circulation et enfermement* [special issue], *Cultures et conflits* 71 (2008).

<sup>10</sup> On the qualification of alien detention as situations of “no-law,” see Liora Israel, “Building French Immigration Laws through Litigation: The Paradoxical History of the GISTI’s First Years,” *Politix* 62 (2003), especially at 116.

legal structures. In this context, discretion does not appear as accidental excess, and even less as a “sovereign decision.”<sup>11</sup> Instead, it is a technique to manage migration flows in real time with the purpose of confining or displacing bodies: a technique of management that carves its leeway through the vacuum and the contradictions of tangled legal and administrative systems.

### Extraterritoriality

For undocumented aliens travelling by train, boat, or plane, the problem is that they have already *de facto* arrived in France when the border police deny them entry. The intensification of global mobility has thus created situations in which the borders of a state are crossed not at the boundaries of a territory but at its core. When travellers are refused entry, the administration cannot make them leave immediately, or push them back to “the other side,” as in the case of road borders. How did the practice of bordering develop at these specific nodes of entry? As sites of contemporary politics,<sup>12</sup> airports demand modes or experiments of governance that both enforce control and comply with imperatives of speed and mobility. Empirical investigations of public and private technologies in airports<sup>13</sup> point out how their administration is organized around the concern for “security,” insofar as it is focused on notions of sorting, normalization, and differential management of flows.<sup>14</sup> In her study of airport detention and deportation in Canada, Anna Pratt questions the ways in which border detention articulates state sovereignty and governmentality through the interaction of state and non-state authorities, practices, the reorganization of public powers, legislation, and discourses.<sup>15</sup> Legal power does not appear to be in contradiction with discretion; rather, its application depends on the existence of administrative and discretionary techniques, which are not exclusively located in the state. As empirical studies of border detention in France show, discretion is not a condition of the application of legal power; rather, legal and discretionary practices combine in a tangled system that organizes differential regimes of governance, including rights-based governance, for unwanted populations and coordinates “highly juridified states of dispossession”<sup>16</sup> within liberal democracies. In the following section, I examine different thresholds in the institution of airport detention and different steps in the administrative journey within the borders, from control in terminals to detention in holding facilities and

<sup>11</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1934), trans. George Schwab (Chicago: University of Chicago Press, 2005), 5. Schmitt’s concept is discussed in Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

<sup>12</sup> Marc B. Salter et al., eds., *Politics at the Airport* (Minneapolis: University of Minnesota Press, 2008).

<sup>13</sup> Ibid.

<sup>14</sup> Michel Foucault, *Sécurité, territoire, population : cours au Collège de France, 1977–1978* (Paris: Seuil/Gallimard, 2004).

<sup>15</sup> Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).

<sup>16</sup> Judith Butler and Gayatri Chakravorty Spivak, *Who Sings the Nation-State? Language, Politics, Belonging* (New York: Seagull Books, 2007), 42.

deportation. A closer look into these historical and procedural moments shows how rules and legalization are not necessarily in opposition to the blurred margins of state discretion but can actually help to produce and shape them. The legalization of border detention reveals the changing relationships between legal and administrative practices, as well as how they frame state sovereignty and discipline in new ways.

The Aliens (Entry and Residence in France and Right of Asylum) Act<sup>17</sup> imposes a few conditions for access to French territory. In conformity with these rules, three types of travellers are likely to be arrested at the borders: people lacking (one or more) required documents of entry; people transiting through France, but whose transits are “interrupted” because they lack a “transit visa,”<sup>18</sup> or who are refused permission to board by the transport company or by the destination country’s operating controls at departures; and people seeking asylum. However, the 1951 Convention relating to the Status of Refugees,<sup>19</sup> to which the French state is a signatory, exempts asylum seekers from presenting documents of entry while crossing borders. According to international law and the general presumption about the right of asylum, undocumented aliens who are registered as asylum seekers at the borders cannot be refused before their claim is reviewed. In order to activate a refusal of entry or to examine an asylum claim, the Police aux frontières (Frontier Police), or PAF, detain the undocumented alien within a border zone until his or her deportation or admission. Until 1992, undocumented aliens held at Roissy airport were detained in any available space located within the international zone: police stations, customs offices, airline companies’ waiting rooms, and so on. In airports, the international zone or zone under custody is the space between the transit zone (from the boarding area to the baggage carousel) and customs. Legally, this space was considered extraterritorial by the French administration: it was not regulated by specific international agreements,<sup>20</sup> and national law did not apply. The detention of undocumented aliens had no legal framework for its deadlines, conditions, and appeal possibilities, since it took place in a zone considered outside the

<sup>17</sup> Art. L221-1 *Ceseda (Code de l’entrée et du séjour des étrangers et du droit d’asile)*, abrogating the *Ordonnance n°45-2658 sur les conditions d’entrée et de séjour des étrangers en France du 2 novembre 1945*, J.O., 4 November 1945, 7225, art. 35.

<sup>18</sup> “Transit visas” are documents allowing travellers to travel via France during their flight to a third country. These “visas” are instituted by decree for a list of countries, corresponding to the list of main countries of origin of asylum seekers. This is why they have been identified as an important technique of bypassing Geneva Convention obligations to protect refugees (see note 19 below) and controlling asylum claims. See Gérard Beaudu, “La politique européenne des visas de court séjour,” *Cultures et conflits* 50 (2003). Indeed, since the institution of “transit visas,” the number of asylum claims has sometimes dramatically decreased, even as the conflict or political situation in the country of origin has not improved—quite the opposite, in fact.

<sup>19</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954).

<sup>20</sup> By default, it was then ruled by the international obligations of the state relating to the *European Convention on Human Rights*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221, and the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.



country, a soil without a land.<sup>21</sup> Without a normative reference, the everyday conditions of detention and deportation within the international zone depended on practices of the police and on the priority procedure for asylum interviews implemented in the mid-1980s.<sup>22</sup>

The first era of airport detention conveys a definition of discretionary practices that relates to the absence of any regulating legal framework: a legal no man's land. The various testimonies from airport staff and human-rights activists about this period refer to the development of the arbitrary in the absence of established norms. However, the development of administrative rules of border enforcement in these first years shows a more puzzling picture.

### Regulation

In 1982, a ministerial decree specified the treatment of asylum seekers at the borders. The decree overturned a founding principle of the Geneva Convention, according to which an asylum seeker does not need specific documents to cross the borders of a host country, by implementing Interior Ministry control over asylum claims at the borders.<sup>23</sup> Asylum claims were to be examined by the Interior Ministry in consultation with the Office Français de Protection pour les Réfugiés et Apatrides (French Protection Office for Refugees and Stateless Persons), or OFPRA, commonly responsible for asylum claims in the country. This administrative procedure did not recognize refugee status but filtered the asylum seekers who were authorized to enter the country in order to direct their claims to the authorities in charge of asylum—the others were deported.

Moreover, the Interior Ministry modified the rules of entry in order to give the PAF the latitude to “assess” at their discretion the “motivations” of aliens entering the country. The ministerial circulars dated September 17, 1986, and August 8, 1987,<sup>24</sup> implemented a major tool in border control. They granted a discretionary power to the police in assessing justifications and documentary evidence, especially with respect to the conditions of residency and the purpose of alien's visit. In other words, the administrative rules connected the decision of border detention not to the legality or illegality of an alien's situation but, rather, to the discretionary judgment of the police—and, notably, to their practice of suspicion. The circular of September 17 states that

[m]otivations for refusal of entry being until now restrictively enumerated, control services could not assess the real motivations of the alien, and thus had no means to oppose the entry of candidates for irregular migration, provided that the latter were in possession of required

<sup>21</sup> I thank Veronique Nahoum-Grappe (personal communication) for this expression.

<sup>22</sup> See note 23 below.

<sup>23</sup> *Decret n° 82-442 pour l'application des articles 5, 5-1 et 5-3 de l'Ordonnance n°45-2658 du 2 novembre 1945*, J.O., 27 May 1982, 7225, art.12.

<sup>24</sup> Interior Ministry, *Circulaire du 17 septembre 1986*, INT/D/86/00338/C; *Circulaire du 8 août 1987*, INT/D/87/00224/C.



documents and that their presence did not constitute a threat to public order.<sup>25</sup>

In a pro-active way, detention practices addressed not only asylum seekers and “irregular” aliens (lacking visa, proof of residency, etc.), but also aliens who are indeed “regular” but may be suspected of wanting to settle in France. The circular does not specify how to distinguish good visitors from “clandestines-to-be” who will become clandestine only once they have overstayed the terms of their visas. This risk-based dimension of control is still applied today, and suspicion is based on a series of empirical details or indications drawn from the practical knowledge that police agents have acquired on the job. These practices of identification are aligned with rudimentary socio-economic distinctions: poor people do not travel for pleasure, and thus they are suspect. Among regular travellers, people who have too much money in comparison to their modest appearance and their employment status (the profession mentioned on the visa affixed to the passport) are refused entry. In 2005, a group of 15 Bolivians travelling to Santiago de Compostela on pilgrimage were inspected during their transit at Roissy and expelled back to Bolivia. Their expulsion was not backed by any legal consideration, since they were heading to Spain, which does not require visas from Bolivian nationals, and crossing the borders of the Schengen Area<sup>26</sup> in Paris, where they were in transit. They were refused entry because French border police suspected them of trying to migrate illegally, based on the fact that, as mentioned on the refusal report, “their socio-professional situation does not fit with the purpose of their visit.”<sup>27</sup>

The change brought about by these circulars shows a paradoxical trend. The right of entry upon presentation of the required documents is suppressed in favour of discretionary control; the application of this new rule becomes flexible and blurred, connecting the practice of control to an indefinite exercise of suspicion. However, this situation is not the consequence of a lack of, or a loophole in, regulation; rather, it is produced through texts and decisions that seek to define, at best, the exercise of control in the unique situation of the international zone. Here, regulatory practices appear to redefine and empower discretionary prerogatives as pillars of enforcement.

## Legalization

During the 1980s, the rising number of travellers detained in the international zone brought the conditions of their detention to the attention of airport and airline employees. In December 1991, facing pressure from organizations

<sup>25</sup> Ibid., *Circulaire du 17 septembre* [translated by author].

<sup>26</sup> Within the Schengen Area, created by the Schengen Agreements, 25 European countries have abolished all internal border controls. The Schengen Agreements, signed in 1985 and expanded in 1997 and 1999, “abolished checks at the internal borders of the signatory States and created a single external border where immigration checks for the Schengen area are carried out in accordance with identical procedures. Common rules regarding visas, right of asylum and checks at external borders were adopted to allow the free movement of persons within the signatory States without disrupting law and order.” *The Schengen Area and Cooperation* (Europa 2009), [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm).

<sup>27</sup> Author’s field notes, February 20, 2005 [report translated by author].

and unions and threatened by several judicial actions, the interior minister of the time, the socialist Philippe Marchand, introduced, as an amendment to a bill, an article creating “zones of transit.” The amendment made the border detention of undocumented aliens and asylum seekers legal. However, the initiative created some confusion and opposition. At the urging of a group of senators, the prime referred the bill to the Constitutional Council; ultimately, the council censured the amendment, arguing that

... detention in a transit area, given the degree of constraint exerted, has the effect of affecting the individual’s freedom in a manner to which Article 66 of the Constitution applies; while the power to decide on detention is conferred by the statute on an administrative authority, the legislature must provide appropriately for the intervention of the judicial authority ... to authorize its renewal and to review the need for the measure in practical terms; in any event, the duration may not exceed what is reasonable. It follows that ... the Act referred is, as it stands, unconstitutional.<sup>28</sup>

The bill proposed by the subsequent interior minister, Louis Quilès, took into account this requirement: the extension of administrative detention had to be reviewed by a judge after four days and then every eight days, and detention could not exceed 20 days. This provided a legal framework for contested administrative practices, which were renamed using a series of euphemistic technical expressions created for the occasion, such as “waiting zone for people in proceedings.” The law, which was modified several times over the next decade,<sup>29</sup> defined the “waiting zone” in the following terms:

- I. An alien who comes to France at an air or sea frontier and who either has not been authorized to enter or has applied for admission as an asylum seeker may be *held* in the *waiting zone* of the port or airport for such time as is strictly necessary for his departure or for an examination to determine that his application is not manifestly unfounded ... That area shall be demarcated by order of the Prefect and shall include the points of embarkation and disembarkation on French territory at places where persons are checked upon entering and leaving the territory. It may include one or more places of accommodation within the port or airport domain.
- II. ... the alien ... may ask for the assistance of an interpreter or a doctor and communicate with any person of his choice; he must be informed of his rights at the time of the detention decision.
- III. Within four days of the initial decision, the president of the court or a judge appointed by him can authorize detainment in the waiting zone [...]. The order can be appealed ... The right of appeal belongs to the

<sup>28</sup> Constitutional Council, Decision 92-307 DC, February 25, 1992, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a92307dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a92307dc.pdf).

<sup>29</sup> The latest modifications came with *Loi n° 1631 du 20 novembre 2007* [Act on the control of immigration, integration and asylum], J.O., 21 November 2007, 1893.

person concerned, to the public minister, and to the state representative in the department. The appeal does not have a suspensive effect.<sup>30</sup>

The period of detention, which is decided by the police and reviewed by a judge, cannot exceed 20 days. During this time a quite sophisticated process of verification and examination takes place that involves several actors: the Directorate of Public Freedom and Legal Affairs of the Interior Ministry (DLP AJ); the Immigration Affairs Analysis and Follow-Up Group (GASAI), a specialized section of the PAF in charge of decisions about admission, deportation, and investigations into irregular migration; the Office of Asylum at the Borders (BAF), a section in charge of examining asylum claims, initially under the authority of Foreign Affairs and, since 2004, under that of the Office for Refugee Protection; and the regional court (*tribunal de grande instance*) of Bobigny. Based on French law, the “waiting zone for people in proceedings” overrode the presumed extraterritoriality of the international zone. However, the 1992 provision set up a system of custody and detention that escaped the common rules of the country. It was more restrictive in terms of basic rights, as the struggle between the Interior Ministry and the Constitutional Council shows. In a twofold move, the administration institutionalized airport detention by fixing the border as a space where a national law of exception would be applied.

### Confinement

However, the question of legitimacy, as posed by judicial censures and institutional reports,<sup>31</sup> remained, and was subsequently addressed by the administration. The Interior Ministry responded to the judicial condemnation of airport detention by renaming it a “holding” process. Their argument made two points. First, there was no deprivation of freedom, since “the alien shall be free to leave the waiting area at any time for a foreign destination”; travellers were now “held” rather than “detained.” However, the 96-hour deadline for administrative custody in the airport was still far longer than that permitted in any other penal system in the country. Second, the holding procedure was not new; on the contrary, it represented the application of an old provision—the *ordonnance* of November 2, 1945.<sup>32</sup> As the Interior Ministry explained in a circular specifying the application of the law of July 6, 1992,

This text fixes a legislative frame to an old administrative practice. This practice has been applied without any difficulty or opposition for decades to non-admitted aliens, passengers in transit, or asylum

<sup>30</sup> *Loi n°92-625 du 6 juillet 1992* [Act on waiting zones in ports and airports], J.O., 9 July 1992, 9185 [translated by author; emphasis added].

<sup>31</sup> Further discussion of these reports appears below in the section on mobilization against border detention.

<sup>32</sup> See note 17 above.

seekers at the borders because it was tightly linked to the services of border control by the Ordinance of 1945.<sup>33</sup>

The waiting zone was also a real physical place defined by a specific topography: created and delimited by the department prefect (*préfet*), it extended from the landing strip to customs—encompassing the landing strips, waiting and transit areas, shopping services located in the terminals, and police offices—and corresponded to the international zone. However, it could be also extended to one or several housing facilities offering “hotel-like accommodations.” The ministerial circular specifies that “[t]he decree creating and delimiting the waiting zone can take two forms: either a written description of the limits of the waiting zone ... or the adoption of a map on which the limits of the zone are drawn.”<sup>34</sup>

The first (written) solution was systematically applied, creating more than 120 waiting zones in the country. However, the exact number and the specific locations of these zones are still difficult to determine; the majority exist only on paper. Most commonly, waiting zones are activated and deactivated according to need. They materialize through spaces—police offices, hotel rooms, waiting rooms—requisitioned by the administration and designated as “waiting zones” when undocumented aliens need to be held. The only exception is at Roissy–CDG airport, which receives the majority of undocumented aliens detained in France. Here, permanent holding centres have been built, referred to by the name “Zapi” (for *zone d’attente pour personnes en instance*, “waiting zone for persons in proceedings”).<sup>35</sup> The first Zapi centre—Zapi 1—was located on the second floor of a hotel, which was leased on an annual basis by the Interior Ministry, but this solution was temporary. A newly built holding centre opened in late 2000, and a third such centre opened in late 2001. Zapi 2 was located in a wing of the detention centre for illegal immigrants (Centre de Rétention Administrative, or CRA): in July 2000, half of the CRA was transformed into a waiting zone because Zapi 1 was not large enough to receive all the detainees. At Zapi 2, aliens apprehended at the borders and *sans-papiers* awaiting expulsion were held in the same building, which was modelled on a prison: lack of personal space, limited mobility, surveillance, and communal meals at fixed times. The superimposition of the two systems of alien confinement was not coincidental; it revealed how they complemented each other from a political, social, and legal point of view, constituting the apparatus through which the country “put aside”<sup>36</sup> its unwanted aliens. Like its predecessor, Zapi 2 had a temporary and emergency character. The transformation came in 2001, when an

<sup>33</sup> Interior Ministry, *Circulaire du 9 août 1993*, INT/D/93/00185/C [translated by author].

<sup>34</sup> Ibid.

<sup>35</sup> See also Chowra Makaremi, “Alien Confinement in Europe: Violence and the Law. The Case of Roissy-Charles de Gaulle Airport in France,” in *The Literature of Concentration Camps*, ed. Colman Hogan and Marta Marín-Dòmine (Newcastle, UK: Cambridge Scholars Press, 2007).

<sup>36</sup> *L’Europe des camps : la mise à l’écart des étrangers* (2) [special issue], *Cultures et conflits* 57 (2005); *Étrangers : la mise à l’écart* [special issue], *Politix* 1 (2005). See also Pratt, *Securing Borders*.

independent detention centre was built in the airport industrial zone, under the authority and direct management of the PAF, to meet the specific purposes and needs of border detention. Zapi 3 gave the system of border detention its definite, yet hybrid, form by simultaneously establishing the security apparatus and delegating the daily management of detainees to humanitarian actors.<sup>37</sup> Zapi 1 was shut down at the beginning of 2001, and, beginning in 2004, Zapi 2 was emptied of undocumented travellers and returned entirely to its initial purpose as a detention centre for illegal immigrants, leaving Zapi 3 the only permanent waiting zone in France. Nevertheless, the definition of Roissy–CDG’s waiting zone has remained as distorted as those in other points of entry to the country: holding centres are designated as constituting the “zone,” but the waiting zone can also extend back to the fragmented international zone, where additional holding areas can be activated and deactivated according to need. For instance, a fourth holding area, Zapi 4, was made operative in a prefabricated building located near the landing strips in the international zone for a few weeks between December 2007 and January 2008, when the police faced a massive arrival of Chechen asylum seekers. About 100 asylum seekers per day were held there, and, with few exceptions, most were deported back to Georgia, the point of origin of their flights to France.<sup>38</sup>

The origins of the Zapis show how the shift toward “hotel-like accommodation” under the 1992 legislation not only witnessed the creation of new norms in response to criticisms about the living conditions in the international zone but also institutionalized an established administrative practice. As a transit agent at the Paris Airports (ADP) Corporation reported in March 1991, the extension of holding practices outside the international zone and into housing facilities had already taken place even before the first amendment on “transit zones” was proposed in December 1991:

For some time now, the transit area in the international zone has been more quiet. “The so-called rooms that were there have been closed because they were not standardized. This neglected place, where people were sometimes beaten up, offered a scene that might not have been the best thing to show to the public,” comments Jean-Marie Balanant, a transit agent at the Paris airports. Not far from there, at the exit of the subway (RER) station, the second floor of the Hotel Arcade has been “reserved.” Easy to locate because of the bars on the windows, about 25 rooms have been declared a “customs zone.” On the first floor, the ordinary guests eating their steaks or their sandwiches do not suspect that above their heads, women and men are confined. It is the “corridor of the *Inads*” [a short name for

<sup>37</sup> On the humanitarian system of border detention see Chowra Makaremi, “Les « zones de non-droit » : un dispositif pathétique de la démocratie,” *Anthropologie et société* 32 (2008).

<sup>38</sup> See Morgane Iserte, “Récit de la « crise tchétchène » (décembre 2007–février 2008) : Eclairages circonstanciés sur le dispositif de confinement des étrangers dans la zone d’attente de Roissy–Charles de Gaulle,” in *Enfermés dehors : le confinement des étrangers*, ed. Carolina Kobelinsky and Chowra Makaremi (Bellecombes en Beauges: Éditions du Croquant, 2009).

“non-admitted” aliens], well guarded on each side by police. And for potential visitors, it is impossible to enter *incognito*. In the middle of the stairway, the door opens automatically: evidently, access is monitored by electronic devices . . .<sup>39</sup>

The birth and evolution of holding facilities at Roissy airport, further legalized by the institution of the waiting zones, are interesting for several reasons. First, ambiguously enough, alongside a desire to improve living conditions—which was indeed achieved—the extension of the zone to housing facilities answered real managerial needs in the detention of undocumented aliens by maximizing manpower and means and minimizing financial and symbolic costs. While the fragmented space of the international zone included many police offices, requisitioned waiting halls, and so on in five terminals, there was a need to centralize asylum seekers for their interviews and non-admitted aliens for their deportation. There was also a need to hide the growing spaces of detention from the public, as illustrated by the *ad hoc* practice of detaining aliens in the Hotel Arcade in 1991. This evolution shows the process that took place in order to normalize a much-debated situation: contested disciplinary practices were included in the new law, while legalization solidified the latest advances in the practice of control.

Second, the article quoted above points out that “about 25 rooms have been declared a ‘customs zone’ [i.e., an international zone]”: the hotel is located in France for the “ordinary guests” on the first floor, but it is considered outside of France for the undocumented aliens detained on the second floor. This extension, further legalized in 1992, reveals an interesting development in relation to detention. Extraterritorial border detention was founded on the ambiguous status of the place where aliens stood in the airport: a space *behind* the customs checkpoint that marks the borders of the state, and thus legally *outside* the territory. While the international zone began as a geographic argument (these aliens are not yet on French territory), the use of the Hotel Arcade and, more broadly, the creation of the waiting zone brought a radical shift. The extraordinary system of detention was no longer based on the extraterritorial status of places of detention—as was the case in the international zone in Roissy, and is still the case in places like Guantánamo. Rather, it was the legal status of detainees “held” at the border that redefined the places where they were detained as part of the border. This flexible definition of places according to the extra/ordinary status of the traveller, well illustrated by the Hotel Arcade, represents a new outlook on the notion of territoriality. The logic initiated in 1991 and 1992 was achieved through a recent modification of the law that helps us to understand the issues at stake. The law of November 2003, called the Sarkozy Act, specifies that “the waiting zone extends, without the need for a specific decision, to the places where the alien shall go, either within the [judicial, administrative] procedure or for medical needs.”<sup>40</sup> With this last development, the border

<sup>39</sup> GISTI, “Roissy : un filtrage sélectif,” *Plein Droit* 13 (1991) [translated by author].

<sup>40</sup> *Loi n° 1119 du 26 novembre 2003* [Act on the control of immigration, residency of aliens, and nationality], J.O., 27 November 2003, 20146 [translated by author].

argument has acquired a radical flexibility that, in turn, questions notions of the extraordinary. Based on the sovereign prerogative to control borders, an exceptional law has been instituted to govern unwanted aliens, a law that affects the notion of sovereignty in at least two ways. First, the idea of the border—something existing between an inside and an outside—is becoming more fluid. Second, through this process the extraordinary has become not a suspension of the ordinary but, rather, a status that can cohabit with the normal and can be activated and deactivated without any “specific decision” or distinction.

While state borders are being reactivated in administrative encounters and border detention becomes a legal condition that detainees carry with them, new definitions of territoriality emerge that change the conceptualization of state sovereignty. Borders acquire a plasticity that relates both to their elasticity and to their capacity to be activated and deactivated for specific populations. In migratory patterns, they appear as spaces of state confinement. At the same time, they open up spaces cleared of state rights: state boundaries are not seen as unifying and enclosing the territory; instead, they allow the opening of new space in order to adjust control over certain categories of the population within a wider context of rights-based liberal government. However, the unique aspect of the French case, in comparison to, for instance, the techniques of confinement used in the Celebrity Inn Immigration Holding Centre in Ontario,<sup>41</sup> is the extent to which these changes in sovereignty and new disciplinary practices are made through battles and negotiations between civil society and the administration; it is these conflicts that are examined in the following section. In some respects, the way in which civil society framed the issue of alien control—in terms of arbitrary detention and the rule of law—shaped, in turn, the evolution of border detention and the institution of “holding centres.” As an executive member of ANAFÉ, the influential NGO board opposing border detention, told me, “Without us, the waiting zone would not exist.”<sup>42</sup>

### Mobilizations against Border Detention

The administrative treatment of migrants and asylum seekers at French airports became a subject of public debate as police practices became visible to airport and airline employees in the early 1980s. Unions reported the daily situations they witnessed to human-rights and migrants’ defence associations. As a CFDT Air France union representative remembers,

Transit agents were quite shocked by the expulsive measures faced by families and political or economic refugees who were refused entry. At the time, there was also the problem of visas, as the air transport company with whom you fly must also bring you back ... in brief, the spectacle faced by many colleagues was a disastrous combination of police violence and these people who gave everything to rebuild their lives elsewhere and were forced to go back, with the risks this implied ... because we were asking ourselves how these people

<sup>41</sup> Pratt, *Securing Borders*.

<sup>42</sup> Author’s field notes, interview with G.S., March 24, 2005 [translated by author].



could ... when they returned to their country, we didn't receive any news on what happened to them: Were they imprisoned?

... [Once] we went into a room in Terminal A, which was in the custody zone. The room measured a few square metres, and inside there were about 30 people in unbearable heat: women, children, men were urinating in plastic bottles, some were ill. When we got there, there was one guy with his ears covered in blood; the police had beaten him, he couldn't hear anymore. There were traces of blood. It was ... the misery of the world ... unbearable ... the room was a few metres away from the passengers, they had closed a zone under the stairs where the room was.<sup>43</sup>

As another airport employees' union representative states,

We received a call from a refugee-rights defence organization, which asked us for a briefing on the conditions of people detained in the international zone. We contacted colleagues working in the transit area, talked with other unions, human-rights defence organizations, there was also a union member who was the head of a police office in the terminals and talked very badly about the ministerial circulars according to which "you could do anything." We organized a group casually called the "Roissy working group": about 40 people met regularly for several months. We led our first information campaign among the staff, saying, "If you witness any problem, you can report the situation by calling this number," and we handed out several human-rights organizations' phone numbers. After a few months of these meetings and information campaigns, we decided to create an association, which would consist of founding organizations. The objective was to take united action on this specific issue: humanitarian and legal assistance to aliens in the international zone. And it gave us a tool for negotiating with public authorities.<sup>44</sup>

In 1987, a working group formed around these issues that gave birth two years later to a board of NGOs, lawyers, and labour unions: the Association nationale d'assistance aux frontières pour les étrangers (National Association for Assistance to Aliens at the Borders), or ANAFÉ.<sup>45</sup> Practices of border detention and the principle of extraterritoriality were denounced;<sup>46</sup>

<sup>43</sup> Author's field notes, interview with M.D., June 15, 2007 [translated by author].

<sup>44</sup> Author's field notes, interview with L.R., June 15, 2007 [translated by author].

<sup>45</sup> At the beginning, ANAFÉ comprised both NGOs—Amnesty International, the Cimade (Service Écumenique d'Entraide), the COMEDE (Comité Médical pour les Exilés), the CAIF (Conseil des Associations Immigrées en France), France Terre d'Asile, the GAS (Groupe Accueil et Solidarité), the GISTI (Groupe d'Information et de Soutien des Immigrés), the LDH (Ligue des Droits de l'Homme), the MRAP (Mouvement contre le Racisme et pour l'Amitié entre les Peuples)—and professional associations or unions—the Association of Lawyers for the Recognition of Fundamental Rights to Immigrants (ADDE), the CFDT Union of Air France employees, the CFDT Union of Paris airport employees, the union of civil aviation pilots, the unitary union of commercial flight attendants, the Paris regional association of CFDT Unions, and, last but not least, the CFDT Union of Frontier Police.

<sup>46</sup> ANAFÉ, *Zones d'attente des aéroports et des gares ferroviaires—visite des associations habilitées. Rapport 1998–1999* (ANAFÉ, 2000), <http://www.anafe.org/download/rapports/rapport98-99.pdf>.

articles and collective press releases argued against the secrecy of PAF practices and against arbitrary detention, which stand in contradiction with the basic rights and fundamental principles of political life in France. As a representative of ANAFÉ wrote, "At least since the Declaration of the Rights of Men and of the Citizen of 1789 no one can be detained except in cases and modalities mentioned by the Law."<sup>47</sup> The association included organizations such as the Groupe d'information et de soutien des immigrés (Information and Support Group for Migrant Workers), or GISTI; Cimade (an NGO offering support to migrants and displaced persons); and the Magistrates' Union (Syndicat de la Magistrature), which had led previous efforts to defend aliens' rights in the mid-1970s, opposing the arbitrary detention of irregular migrants awaiting expulsion. The waiting zones were not the only front of alien defence for the associations engaged in ANAFÉ, but they existed within a larger activist movement in the field of immigration. This mobilization extended against the entire apparatus of "separation" or confinement of aliens in French society, including imprisonment, "double penal sanction" (*double peine*),<sup>48</sup> *sans-papiers*, and detention centres for illegal immigrants (*centres de rétention administrative*). These founding associations were also involved in the field of asylum rights (Amnesty International, Ligue des droits de l'homme), legal assistance to asylum seekers (Cimade, GISTI), providing legal counselling in detention centres for illegal immigrants (Cimade),<sup>49</sup> and defending *sans-papiers* and critiquing the construction of immigration laws (GISTI). While migration control first appeared as an economic, political, and social process, for these actors, the issue of borders and border control questioned the frontiers of the rule of law, leading them to frame their own opposition to anti-migration policies in terms of civil liberties. This tradition of defending rights was already in play during the first instance of action in the mid-1970s, when the associations first discovered the existing practices of administrative detention and deportation. ANAFÉ has inherited the strategy of collective action developed in the 1970s by some of its founding members, such as CIMADE, GISTI, and the Magistrates' Union, and first directed against the secret detention centre for illegal migrants in the port of Arenc (near Marseille) in 1975.<sup>50</sup> At that time, civil society's response combined a variety of actions: (1) the use of legal tools to sue the state and obtain a condemnation of detention practices in the name of basic rights;<sup>51</sup> (2) an information campaign in the press with the aim of breaking the

<sup>47</sup> Stéphane Julinet, "Dans les zones d'attente : Atteinte aux libertés et inefficacité," *Plein Droits* 44 (1999) [translated by author].

<sup>48</sup> The term *double peine* refers to the expulsion after imprisonment of migrant prisoners, who will then serve another sentence in their home country. See Abdelmalek Sayad, "Immigration et « pensée d'État »,” *Actes de la recherche en sciences sociales* 129 (1999).

<sup>49</sup> See also Nicolas Fischer, "Les territoires du droit," *Vacarme* 34 (2006), <http://www.vacarme.org/article538.html>.

<sup>50</sup> See Alex Panzani, *Une prison clandestine de la police française. Arenc* (Paris: François Maspero, 1957).

<sup>51</sup> On this point see Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

“clandestine”<sup>52</sup> and secret nature of airport detention and asking for visibility and access to detention zones; (3) political pressure at the state and European levels for the “legalization” of administrative detention. In the same way, the creation of the “waiting zones for people in proceedings” in the early 1990s resulted from an *ex-post* institutionalization of contested administrative practices. This process took place in the context of continuous negotiations and repositioning, which I will now explore, between the administrative desire to control borders and a societal watch over practices defined as threats to the core definition of the rule of law.

First, in 1990, ANAFÉ member organizations with legal expertise in the field of alien defence backed a group of travellers detained in the international zone who had been admitted to the country as asylum seekers and who eventually sued the French state for arbitrary detention. The trial resulted in the condemnation of airport detention, qualified as an “infringement of fundamental rights” (*voie de fait*).<sup>53</sup> On March 25, 1992, the court of Paris declared the Ministry of Interior guilty of having “seriously infringed the freedom” of six asylum seekers by detaining them at Roissy airport. The administration was ordered to pay 33,000 francs in damages to the claimants and one symbolic franc to GISTI, a founding member of ANAFÉ’s NGO board.<sup>54</sup> Against the argument of extraterritoriality put forward by the administration since the early 1980s, the court’s decision asserted the illegality of border detention in the international zone.

Second, lawyers working in collaboration with the NGO board referred the matter to the European Court of Human Rights, which confirmed in 1996<sup>55</sup> that detention in the international zone violated art. 5 of the European Convention on Human Rights, since it was neither provided for by law, nor submitted to review by a judge, nor defined in its duration.<sup>56</sup> In parallel, the Parliamentary Assembly Committee on Migration, Refugees, and Demography of the Council of Europe had decided in 1988 to lead an investigation into the arrival of asylum seekers in European airports. The committee’s report, published in 1991, points out the absence of housing facilities, the incoherence of the refugee determination procedure, and the inhumane

<sup>52</sup> While the threat of clandestine migration is the main legitimizing rationale for detention of aliens (see Interior Ministry, *Circulaire du 17 septembre 1986*, cited at note 24 above), denunciations and journalists’ investigations into these issues have subverted the state rhetoric by using the word “clandestine” to label the secrecy and discretionary dimension of detention. See, e.g., the titles of journalistic investigations dedicated both to Arenc and Roissy: Panzani, *Une prison clandestine*; Anne De Loisy, *Bienvenue en France. Six mois d’enquête clandestine en zone d’attente* (Paris: Le Cherche-Midi, 2005).

<sup>53</sup> Trib. gr. inst. Paris, 25 March 1992, *Gaz.Pal.*1992.2° sem.Jur.1802

<sup>54</sup> Ibid.

<sup>55</sup> *Amuur v. France* (1996), 3 E.C.H.R. (Ser. A) 826, 22 E.H.R.R. 533.

<sup>56</sup> Let us note here that the indefinite duration of detention, which was one reason for condemning French border detention as a violation of art. 5 of the European Convention on Human Rights, still applies today to immigration detention centres in Quebec, Canada, where some asylum seekers have been held for up to 21 months (the French administration limited border detention to 20 days in 1992, as mentioned above). In Ontario, too, Pratt, *Securing Borders*, has found that a substantial number of those detained in “temporary” facilities were “long-term” detentions.

living conditions of asylum seekers detained in the airport. The committee observed, for instance, that “asylum-seekers sleep on the floor or on plastic chairs [...] some of them having lived in these conditions for six weeks.”<sup>57</sup> In September 1991, on the basis of this report, the Council of Europe adopted a recommendation inviting member states “to provide sufficient accommodation and acceptable humanitarian treatment for asylum-seekers.”<sup>58</sup>

The 1992 legislation that created the waiting zones was enacted in response to these legal and institutional mobilizations in favour of aliens’ rights. The enforcement of border control and the institution of a specific system of airport detention thus came into wider practice with “cause lawyering,”<sup>59</sup> and national dynamics among legal, administrative, and non-governmental powers. A paradoxical outcome of these legal and institutional struggles is that, over the past 30 years, French immigration law has been “built through litigation,”<sup>60</sup> and the resistance of civil society. As the emergence of the Zapis shows, judicial condemnation of border detention led to the creation of legalized confinement; the denunciation of poor living conditions led to the construction of neo-penal facilities. The organization of a complex apparatus at the borders was based on the “solidification” of certain practices in a general movement to acquire a greater hold on the subjects being controlled. This was achieved through the adoption of laws extending and plasticizing the waiting zone, as well as through the construction of specialized facilities that rationalize and securitize the management of detainees. The birth of border detention illustrates how disciplinary and sovereign powers are not two distinct moments or modes of government but, rather, exist in a tangled system. The administration improved and eventually took control at each stage of this institutional solidification. At the same time, it managed to make room for a formal guarantee of individual rights and improvements in the apparatus, integrating civil society and judges within the system that was being fixed. As mentioned earlier, the intervention of a judge in the detention decision was mandated by law in July 1992; visitors’ permits to detention centres have been distributed to human-rights associations since the beginning of the 1990s; and, finally, on 5 March 2004, the then interior minister, Nicolas Sarkozy, signed an agreement allowing ANAFÉ permanent access to Zapi 3, thus facilitating the organization’s mission of providing legal counsel to detainees.<sup>61</sup>

<sup>57</sup> Committee on Migration, Refugees and Demography, *Report on the Arrival of Asylum-Seekers at European Airports*, Doc. 6490 (Parliamentary Assembly of the Council of Europe, September 12, 1991), <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc91/EDOC6490.pdf>.

<sup>58</sup> *Recommendation on the Arrival of Asylum-Seekers at European Airports*, Doc. 1163 (Council of Europe, 14th Sess., 1991).

<sup>59</sup> Sarat & Scheingold, *Cause Lawyering*.

<sup>60</sup> Israel, “Building French Immigration Laws,” 115–44.

<sup>61</sup> The text of this agreement is available online via ANAFÉ at <http://www.anafe.org/acces.php>.

### “Paradoxical Gains”

Ambivalent developments of state control and resistance can be understood within Foucault’s critical approach to “juridicism,” his term to describe the way in which power dynamics are both at play in and irreducible to the political and legal structure.<sup>62</sup> The history of collective actions against border detention, from Arenc to the Zapis, points to some of juridification’s dilemmas. When the secret practices of migrant detention were discovered in a hangar at the port of Arenc, the Marseilles office of the Magistrates’ Union appealed for the “immediate closing of the housing centre in Arenc and a return to legality.”<sup>63</sup> At the same time, however, this union and other associations involved in the field (Cimade, GISTI) asked for the inclusion of a judge in the administrative procedure of *retention*.<sup>64</sup> Between these two positions—closing the centre altogether and opening it to judicial control—remains the ambivalence of a resistance framed using the tools and grammar of law. Eventually, the strategy adopted in Arenc was to ask for the “legalization” of detention practices (not their suppression) and for judicial review. Meanwhile, these organizations denounced the lack of autonomy and leeway of judicial authority as precisely one of those “institutionalized” borders that should be redefined.<sup>65</sup> This trend was confirmed with border detention, while the expertise and experience of legal resistance has grown since 1975. In the early 1990s, the collective action of associations was not directed toward suppressing border detention—it did not question the principle of such control—but asked for the application and enforcement of the law. A judge active at ANAFÉ and in the Magistrates’ Union recognized that the institution of waiting zones represented progress: “At least we can know where people are detained—and we have to know where people are detained because it is one of the worst characteristics of lawless countries: defined places are better than illegal places.” Indeed, “the state does not provide rights but counter powers do extract their rights.”<sup>66</sup>

However, the rights conceded by the state have been scarce and ambiguous in border detention, while legalization has provided opportunities to organize new mechanisms of control. This is why the magistrate quoted above sees the waiting zone as a “paradoxical gain”: “it is a sad gain to be able to delineate where people are detained.”<sup>67</sup> So should the organizations that oppose detention stay outside? Should they ask for permanent access to

<sup>62</sup> See Michel Foucault, *Surveiller et punir. Naissance de la prison* (Paris: Gallimard, 1975); Michel Foucault, *Il faut défendre la société* (Paris: Hautes Études/Gallimard, 1997); Michel Foucault, *Naissance de la biopolitique* (Paris: Hautes Études/Gallimard, 1997).

<sup>63</sup> Panzani, *Une prison clandestine*, 100 [translated by author].

<sup>64</sup> “Retention” is another euphemistic system of detention, equivalent to “holding” at the borders, for *sans-papiers* awaiting deportation. In France, the detention that takes place at the port of entry is organized by specific legislation and structures that are complementary to, but separate from, other apparatuses of alien confinement such as detention centres for *sans-papiers*.

<sup>65</sup> Salas, “Incriminés, discriminés.”

<sup>66</sup> Author’s field notes, interview with Ms B., March 31, 2005 [translated by author].

<sup>67</sup> Ibid. [translated by author].

the waiting zone, as they did in 2004? The paradox of legal mobilization “creates frustrations within activist associations and can eventually lead to conflict” between different member associations of the board, as the magistrate explained to me.<sup>68</sup>

The ambiguities of the legal option are indeed not incidental. An executive member of the NGO board recalls the ambivalent position of ANAFÉ, whose creation is linked to that of the waiting zone, and vice versa. Recalling ANAFÉ’s legal assistance to detainees at Zapi 3, he explains how the association has been fighting consistently for better registration and examination of asylum claims—notably since the rise of immediate expulsions, as mentioned above. The paradox is that the association “has never recognized the legitimacy of border asylum procedure”;<sup>69</sup> however, in the current system, “making the procedure fair will render it more legitimate.”<sup>70</sup> This system, as analysed by Foucault, is characteristic of the modern rule of law, whereby power emerges through dynamics of negotiation and confrontation between “a public law of sovereignty and a polymorphous mechanics of the disciplinary.”<sup>71</sup> The arena of legal action is a minefield, not only because the connections between executive and legal powers limit, in practice, the autonomy of the judiciary but also because the practices of lawyering base their reasoning on legal categories organized according to the idea and mechanism of sovereignty:

When we want to oppose disciplines and all the effects of knowledge and power that relate to them, what do we do practically? What do we do in real life? What do the Magistrates’ Union or other similar organizations do? What do we do other than appeal precisely to this law, this well-known formal and bourgeois law, which is in reality the law of sovereignty? And I think that we here are in a bottleneck, which cannot be activated indefinitely: it is not by appealing to sovereignty against discipline that we will be able to restrict the effects of disciplinary power.<sup>72</sup>

For Foucault, the possibilities of resistance lie in a legal power freed from the principle of sovereignty.<sup>73</sup> However, empirical observation points out that the meaning of “sovereignty” is itself subject to change. The history of border detention and emerging forms of borders reveal the concept of sovereignty to be a shifting, complex idea and show how the changes came about through tangled relations between legal and disciplinary systems. Investigating how discretion works within liberal rules of law thus requires stepping aside

<sup>68</sup> Ibid.

<sup>69</sup> The institution of border detention for asylum seekers and a specific system of asylum examination in the waiting zone pending a decision by police is an exception, and appears particularly restrictive compared to other situations in the European Union.

<sup>70</sup> Author’s field notes, interview with Mr S., March 16, 2005 [translated by author]. On the question of legal resistance and legitimacy and the issue of “involuntary legitimization” of lawyering see Dean Ellman, “Struggle and Legitimation (Symposium: Lawyering in Repressive States),” *Law and Social Inquiry* 20 (1995).

<sup>71</sup> Foucault, *Il faut défendre la société*, 34 [translated by author].

<sup>72</sup> Ibid., 35 [translated by author].

<sup>73</sup> Ibid.



from fixed definitions of sovereign and disciplinary powers in order to focus on the various ways—and the various topographies—in which sovereignty is reinventing itself so as to adjust control in the global context.

### Humanitarian Confinement

Holding of people within the international zone in airports first occurred in the late 1970s, in isolated cases, and emerged in the early 1980s as a systematic police practice. The Interior Ministry, in charge of this control mechanism, then responded to critics of detention by reminding them that the detention procedure was merely an application of an older provision: the *ordonnance* of November 2, 1945, which regulated state control over entries in the context of the new democratic constitution of the French Republic after World War II. To the contrary, this article has examined how administrative detention appeared and has been problematized in the public sphere as a new practice that first arose as an emergency response to new practices of mobility and was perpetuated through administrative regulations that were later reframed by the law. The birth of waiting zones is more than a change in the degree of control; yet their institution cannot be fully grasped as a rupture. Rather, it indicates a reshaping of control under the pressure of material and policy changes and their problematization in the public sphere.

The term “waiting zones” refers to two realities, designating both closed spaces of confinement and the particular legal condition of the detainees. The institutionalization of waiting zones as a system of confinement took place in three steps: first, secret police practices in terminals; second, practices of administrative detention occupying other places, such as a hotel and an immigration detention centre—the shift between the two structures conveying symbolic and material changes in the perception of migrant populations and their progressive criminalization; and, third, a specific place of confinement designed according to spatial and temporal frames of airport administration and humanitarian standards of management.<sup>74</sup> The ambivalent “humanitarian system of detention” appears as the laboratory of new forms of governance for populations that are both defined as vulnerable and criminalized. The border as a place of containment and suspension designates not so much the line that separates the political community from what remains “outside”<sup>75</sup> as the processes that perform this system of alterity.

Airport confinement raises the question of bordering in a context where national sovereignty is being redefined. My observations focus on the two ways in which techniques of government and discretionary political processes work at the borders. As these observations show, there is no suspension of law; instead, it seems that procedures are continually readjusted and improved: they organize national exclusion through a complex suspension of rights that remains within the legal framework of the rule of law. This process shows how borders have become new sites of government, which address concerns

<sup>74</sup> This argument is developed in Makaremi, “Les « zones de non-droit ».”

<sup>75</sup> Jacques Rancière, *Aux bords du politique* (Paris: Gallimard, 1998).



of security and mobility control through fluid, tangled articulations between disciplinary and legal forms of power. In this context, discretion appears neither as accidental excess nor as a sovereign decision but, rather, as a technique of managing populations—when it comes to confining and displacing bodies. This process shows how borders have become new sites of government, which address concerns of security and mobility control through fluid, tangled articulations between disciplinary and legal forms of power. Here, the aporia of border enforcement is that borders are not closing on a coherent and contained national space; rather, through new legal processes as well as ambiguous temporal and spatial frames, borders are dislocating in networks and habitable zones, and new spaces of government are emerging that definitely partake of globalization.

### Résumé

Dans les états occidentaux, les politiques migratoires restrictives des trente dernières années ont entraîné un changement dans les pratiques de contrôle, menant à la construction d'institutions de détention aux frontières. L'incarcération aux frontières suscite un questionnement important à propos des droits fondamentaux, questions portant sur les notions de légalité et de légitimité ainsi que sur la définition des nouvelles technologies du gouvernement. En France, les origines de l'incarcération aux frontières démontrent comment des pratiques administratives préexistantes ont été légalisées à l'aide de l'adoption de « zones d'attentes », nouveau régime d'incarcération qui rehausse les conditions de détention ainsi que le contrôle disciplinaire sur les détenus. Pour les activistes qui font la revendication des droits humains et qui s'opposent à l'incarcération aux frontières depuis la seconde moitié des années 1970, ce développement représente des gains paradoxaux et un dilemme difficile : les droits accordés par l'État aux voyageurs incarcérés aux frontières ont demeurés insuffisants tandis que la légalisation a permis la création de nouveaux mécanismes de contrôle. L'étude de l'incarcération aux frontières implique une analyse des paradoxes créés par les négociations constantes entre, d'une part, une administration voulant resserrer son contrôle sur les frontières et, d'autre part, certains groupes civils dont les préoccupations incluent la défense des droits de base et l'encadrement légal des pratiques du contrôle. Les conditions des processus d'exclusion de l'administration légale sont soulignées, en France, par la diffusion des modèles de l'administration pénitentiaire et l'ambiguïté de la loi. Qu'est-ce que ces processus révèlent sur l'évolution des régimes gouvernementaux à l'intérieur de systèmes libéraux basés sur les droits?

**Mots clés:** contrôle aux frontières, incarcération extraterritoriale, étrangers non documentés et demandeurs d'asile dans l'Union européenne, mobilisation légale

### Abstract

In Western states, restrictive migration policies over the last 30 years have entailed a shift in the practices of control, leading to the institution of systems of detention at international borders. Border confinement raises substantial issues about fundamental rights; it involves questions of legality and legitimacy, and the definition of new technologies of government. In France, the origins of border detention show how

pre-existing administrative practices of detention were legalized through the adoption of “waiting zones,” a new regime of detention that enhanced both conditions of detention and disciplinary control over detainees. This development confronts human-rights activists who have opposed border detention since the mid-1970s with “paradoxical gains” and a tough dilemma: the rights that have been granted by the state to travellers held at the borders are not enough, whereas legalization has opened the way for new control mechanisms. Understanding border confinement involves analysing these paradoxes produced by constant negotiations between the administration, willing to tighten control over its borders, and concerns of certain groups within civil society, willing to defend basic rights and give a legal framework to control practices. In France, the diffusion of penitentiary models of management and the ambiguities of law that this article explores further draw together the conditions for administrative processes of legal exclusion. What do such processes teach us about evolving regimes of government within rights-based liberal systems?

**Keywords:** border control, extraterritorial confinement, undocumented aliens and asylum seekers in the EU, legal mobilization

Chowra Makaremi  
PhD candidate  
Département d’anthropologie  
Université de Montréal  
CP 6128, Succ. Centre-ville  
Montreal, QC H3C 3J7  
chowra.makaremi@umontreal.ca