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# The Legal Production of the Margin: Migrants Between Border and Territory

Bastien Charaudeau Santomauro

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**Legal marginalization – Border – Territory – Migrant Rights – Asylum – Schengen.**

*It has been more than six years since France reintroduced controls at its internal borders, thus derogating from Schengen's ordinary rules. A new border regime has emerged from this situation, one characterized by frequent reports of migrants' rights violations. Combining legal ethnography at the French-Italian border and legal theory, this article explores the notion of "legal margin" to understand what happens between the border and the territory. This concept shows that the borderline affects how legal norms are applied within the territory next to it. It further unfolds through two ideas. Firstly, the maintenance of legal indeterminacies by the State updates and reinforces in an original way a fiction of a-territoriality—people apprehended near the border are considered as if they were not in the territory—which places migrants outside the protective dimension of the law. Secondly, the regime of admission (the refusal of entry) is applied without the corresponding detention procedure (the waiting zone), thus allowing for what appears to be extralegal detention practices. The concept of margin seeks to enable legal theory to grasp what transpires in the ambiguity of the territorial space near the borderline and further explain exclusionary bordering processes.*



### 3. THE LEGAL PRODUCTION OF THE MARGIN: MIGRANTS BETWEEN BORDER AND TERRITORY

*Bastien Charaudeau Santomauro,  
Ph.D. Candidate Sciences Po Law School, Yale University (Fox International Fellow),  
Institut Convergences Migrations (Fellow)*

#### A. Introduction

Since 2015, hundreds of migrants—men, women, and children—attempt to cross the Alpine border from Italy to France every week. They are [pushed back](#) to Italy by French border guards in disregard for fundamental rights enshrined in domestic, European and international law. This occurs even though the French-Italian border is internal to the Schengen area of free movement, and should not be subject to systematic migration controls. In European Union law (EU law), articles 1 and 22 of the [Schengen Borders Code](#) (hereinafter, SBC) provide for the absence of controls at internal borders – i.e., between the EU Member States – and lay down rules for controlling external borders – i.e., between an EU Member State and a third country. Nevertheless, first in the framework of the COP21 and then after the Paris terrorist attacks on 13 November 2015, France activated provisions contained in the SBC that allow for the “exceptional” and “temporary” reinstatement of controls at its internal borders (with Italy, Spain, Belgium, Germany, Luxembourg and Switzerland). Six years later, France's internal borders were still subject to [this derogation from the Schengen rule](#). The subsequent governments indeed renewed the measure [every six months](#) on the variable grounds of terrorist threats, the COVID-19 pandemic and, occasionally, “secondary movements” and the “situation at external borders”. Even in a situation of internal borders subject to border controls, migrants are entitled to their fundamental rights, including asylum, the right to family life and the right not to be arbitrarily deprived of their freedom of movement. Fieldwork carried out at the French-Italian border in the Briançon area shows that these rights are quasi-systematically infringed upon by French border guards. The police tend to pushback all third-country nationals (hereinafter, TCNs) intercepted in the border area regardless of their individual situation. Migrants scarcely have the chance to ask for France's protection. This observation is sustained by the work of international, national and local NGOs which have been monitoring the border since 2015 (such as [Amnesty International](#), [Human Rights Watch](#), [ECRE](#), [Anafé](#), [Médecins du Monde](#), [Tous Migrants](#), [Roya Citoyenne](#)) as well as reports from independent public institutions ([Commission nationale des droits de l'homme](#), [Contrôleur général des lieux de privation de liberté](#)) and the [Council of Europe](#). Administrative courts have equally condemned non-admission procedures analogue to pushbacks in individual cases (see, for instance, [Conseil d'État](#), 8 July 2020, N°[440756](#); Nice administrative court, 28 January 2018, N°[1800195](#); 25 April 2022, N°[2003638](#); 10 June 2022, N°[2100537](#); 30 June 2022, N°[2004754](#); Marseille administrative court, 8 July 2021, N°[1809222](#)).

This situation gave rise to an ongoing sociolegal controversy opposing public authorities and civil society around the legality of internal controls and the scope of migrant rights at the border. Consequently, this border became a laboratory of the law on internal border controls where different actors seek to assert their interpretation of French and EU law on the matter. One of the

characteristics of this newly installed border regime is that public authorities continuously justify, through a legal discourse, the border police practices disregarding migrant rights. A rather simple question arises from this: how can a legal discourse systematically support the deprivation of migrant rights that are embedded in international, European and French law? This article offers a conceptual exploration of the two legal categories that are at the heart of this issue: border and territory. Indeed, throughout the unfolding controversy, the problem of the applicable legal regime has crystalized around the ambiguous relationship between these two categories, and more specifically, the question of their delimitation: when and where does one end and the other begin? This ambiguity prompts us to think about the *margin* that connect these two notions.

The methodology of the research from which this article is derived combines legal ethnography, doctrinal analysis and legal theory. Firstly, legal ethnography consists of observing the manifestations of law in the field from a participatory position within migrant rights associations. This means that observations were not only made from an external point of view, but also from an internal point of view. The researcher himself practiced law at the border and provided legal counsel to NGOs and migrants. He was therefore confronted with the functioning of the law, its discourses and its effects. Legal ethnography unveils the interpretative indeterminacies that constitute the controversy and helps understand how they emerge and what they produce on the ground. Secondly, doctrinal analysis, which is more common for jurists, gives an account of the legal rationality at work and untangles the indeterminacies. It analyzes the controversy by grasping the technicality of the law and by interpreting the norms based on legal principles and logic. Finally, legal theory aims at identifying or constructing concepts that allow us to understand what is at stake in the interpretative struggles. It articulates empirical data, corresponding socio-legal knowledge, and doctrinal knowledge to elaborate an interdisciplinary theory of law on the politics of exclusion at borders. The central concept developed here is that of “legal margin” to shed light on the relationship between border and territory. After acknowledging the complexities of the border and the need for a supplemental concept (B.1.), the article examines two ways in which this unfolds on the ground (B.2.).

## **B. Discussion: Between Border and Territory**

### **1. The Complexities of the Border**

#### ***a. The Border in Law and its Limits***

The question of the regime applicable to border controls is linked to the legal understanding of the territory. Having a defined territory is one of the [four criteria of statehood](#) in international law. Because it conditions State sovereignty, it is subsequently defined as the space within which the legal system of one State applies to the detriment of another. The territory is therefore often a category of applicability of the law, for instance, through the territorial competence of an institution or the principle of territoriality as a criterion for the implementation of a legal regime. This functionality makes it imperative for lawyers to be able to strictly define the territory's boundaries to determine what legal regime – and, internationally, what domestic legal system – applies in a given area. This is why international law consistently defines the border – or [boundary](#) – as a simple geopolitical line dividing State territories and sovereignties. In this regard, territorial disputes in front of the

International Court of Justice often focus on [the delimitation of boundaries between two States](#). This leads the law to seize the question of the border and the territory through a binary perspective. Since the national territory is determined by a line marking the limit of State sovereignty, someone is either inside or outside of territorial space. Clearly and strictly delimiting State territories with an imaginary line is the primary function of the legal notion of the border.

In contrast, other social sciences – specifically in the field of [critical border studies](#) – tend to comprehend the border as a space, often thick and dynamic. Such works highlight that rather than fixed lines, borders are akin to [“lines in the sand”](#): they are represented according to a linear imaginary, but the line is constantly shifting. Borders are thus depicted as adaptive. For instance, [Tugba Basaran](#) has shown that the borders of policing tend to stretch out while the borders of rights tend to shrink. As a legal scholar, [Marie-Laure Basilien-Gainche](#) argues that migrants themselves eventually embody the border. Indeed, the technologization of immigration control and the multiplicity and variability of legal categories set the limits between inclusion and exclusion on the *person* rather than on the borderline. Ultimately, far from the acceptance of the geopolitical line, several social scientists refer to [“thickness”](#) to describe the border as a space that is wide and dense. These ambiguities of the border are also reflected in legal terms in the field. Firstly, from a geographical point of view, in the mountains, it is not always obvious whether one is in France or in Italy. The law must deal with this uncertainty. Secondly, the mere presence of the border line has consequences on the way the law is applied. For example, humanitarian aid to foreigners is allowed in France as long as it is not aid to cross the border. In theory, citizens can provide such assistance to migrants as long as they are in France. However, at the French-Italian border, any rescue operation is carried out near the borderline. In the framework of criminal proceedings, the doubt remains: when French citizens are stopped by the French police for helping migrants, the criminal justice system will ask, *inter alia*, whether this operation started in Italy – it would be illegal – or in France – it would be legal. During the investigation and the subsequent trial, the prosecutor will support the possibility of a border crossing by elaborating a *“set of clues”* (*faisceau d’indices*): the location of the arrest, which, inevitably will be close to the borderline; the potential contact that the defendant has had with Italians (such as cellphone calls); prior trips to Italy; the fact that the defendant’s cellphone activated an Italian cell tower, etc. In other words, the set of clues that allow authorities to prosecute migrant rights activists and humanitarian volunteers is deeply intertwined with the mode of existence of any border resident. The border produces ambiguity, which in this case, translates into the *potentiality* that the help started in Italy. In practice, this works against any humanitarian aid operation, even those limited to the French territory. These complexities invite the legal scholar to explore what transpires between the border and the territory. The notion of *“margin”* can help to think about these forms of *“in-between”* and grasp how they play out in terms of legal operations.

### ***b. Thinking Beyond the Line: The Margin***

Among the several meanings covered by the notion of margin, at least two can be productive for legal theory. First, starting from the [mid to late 14<sup>th</sup> century](#), and echoing its Latin origin *margo*, margin refers to a *space* established by the edges of an entity. While the contemporary border marks the strict separation of the inside and the outside, in this case by a geopolitical line, the margin designates a space which is located inside but characterized by its contiguity with the outside. It is

thus relative to both the inside which contains it and the outside which it integrates in a referential way. The use made of it as a printing technique perfectly illustrates this quality: the margins of this text are indeed part of the page, but they signal its borders and thus propose a zone that visually marks the distinction between the text of this page and its term. The second meaning that margin takes on from [the 18th century](#) is that of latitude available within certain limits. This is exemplified in the expressions "to have a margin of error" and "margin of appreciation", which illustrate a relatively plastic dimension. This second meaning is instrumental to question the possible liberties taken by certain legal actors when they act and interpret the law in this space adjacent to the border. It should be noted that the margin is a challenging notion for legal thought because the borderline is essential to determine which State has jurisdiction over a piece of land. But by conceptualizing the margin, we can maintain the crucial role that boundaries take in international law, while thinking about the junction of the inside and outside of the legal system and questioning what nests in-between.

## 2. The Manifestation of the Margin

### *a. The Terms of the Controversy at the French-Italian Border*

In French immigration law, hints of a legal in-between first arise in the regime of external border controls which is based on the fiction that individuals presenting themselves at the border have not yet entered France, even if they are physically on French territory. This is what we have called a "[fiction of aterritoriality](#)" which founds the detention regime at France's external borders, namely [waiting zones](#). Foreigners held in a waiting zone are considered not to have entered France as a result of being notified a [refusal of entry](#) during the (non-)admission procedure. This fiction marks the distinction between two regimes that capture the potential irregular standing, in the broad sense, of a foreigner in France: the regime of stay and the regime of entry (or admission). Regarding irregularity, the first regime involves [return decisions](#) and [administrative detention centers](#), while the second regime includes refusals of entry and waiting zones. If, in any case, the legal framing of irregularity always limits the freedoms and the rights of migrants, it should be underlined that the regime of entry is more limited than the regime of stay as regards fundamental rights. To give just one example, the appeal against a return decision is suspensive, whereas the appeal against a refusal of entry is not. In other words, foreigners who are refused admission to the territory can be effectively deported within a very short time, or even immediately. A request for asylum can delay or prevent deportation in some cases.

The temporary reintroduction of internal border controls raises many questions about the relevant procedure. EU law makes a strict distinction between external and internal borders. This is reflected by the Court of Justice of the European Union (hereinafter, CJEU) in a judgement of 19 March 2019 in which it refused to equate the two notions, even in the event of the reintroduction of controls ([Arib](#), § 62). It is therefore disputable that the French admission regime, intended for external borders, immediately applies to internal borders when controls are re-established. What is the legal status of an internal border and how is it delimited? This brings us back to the legal understanding of territory: do interceptions of migrants on the French side of the boundary take place on French territory or "at its border"? Since the border is legally defined as a line, or even circumscribed for controls at crossing points, it should in essence be extremely limited – in the case

of crossing points – or even fleeting – in the case of a line. What is at stake is the determination of the applicable legal regime, between stay and admission, with all the consequences that this entails. Among these, the fate reserved for the fiction of aterritoriality is at the forefront. Indeed, the way in which the border area is apprehended by the law will determine the regime for assessing the regularity or irregularity of third-country nationals arriving in France from Italy by land. The choices made will have implications, as we shall see, on the establishment of this marginal space that characterizes border contiguity.

### ***b. The Edge: A Revamped Fiction of Aterritoriality***

At first, following the reintroduction of border controls in November 2015, pushbacks were justified – [but not legally grounded](#) – [by the French state of emergency](#) (2015-2017). The Nice administrative court occasionally sanctioned these practices [when they concerned minors](#). Concomitantly, public authorities decided to [almost systematically refuse entry](#) to third-country nationals arriving from Italy, thus favoring the admission regime over the regime of stay. The refusals of entry were initially issued in an irregular manner, as French law only provided for them in case of *external* border crossings. By an [Act of 10 September 2018](#), the government legalized this procedure by inserting article [L. 213-3-1](#) in the Code for Entry and Stay of Foreigners and the Right to Asylum (hereinafter, CESEDA; codification prior to 1 May 2021). This article provided that, in the event of the reinstatement of controls, a decision to refuse entry may be delivered to a TCN who has crossed an internal land border and has been "controlled in an area between that border and a line drawn ten kilometers away." This provision carries out two operations. The first *de facto* assimilates controlled internal borders to external borders by applying the same deportation procedure. Correspondingly, the fiction of aterritoriality started to apply to the French-Italian border. TCNs arriving in France by this route are since considered not to have entered the national territory. The second operation extends this regime, and therefore the fiction, to an entire area constituted by a ten-kilometer strip along the borderline. The fiction of aterritoriality is thus renewed, because it applies, in an unprecedented way, to a substantial piece of the territory rather than to a crossing point as is the case for external borders. This virtually materializes the notion of legal margin, a space within the national territory that extend the exclusionary function of the border while still being distinguished from it.

The application at internal borders of the regime of admission through the procedure of refusal of entry was called into question by the French *Conseil d'État* (Council of State) in [a decision of 27 November 2020](#). Several associations had produced an appeal for excess of power aimed at having the implementing decree of the September 2018 Act annulled. Among the contentious provisions was the insertion of article [R. 213-1-1](#) emanating from article [L. 213-3-1](#). Building on the CJEU [Arib](#) decision, the Council of State determined that the issuance of refusals of entry at internal borders is not in compliance with EU law. Indeed, as an internal border cannot be equated with an external border, the provisions of the "return" directive (regime of stay) must be applied to France's internal border – or more precisely, to the territory nearing the borderline. This decision directly challenges article [L. 213-3-1](#) by invalidating the corresponding provision of the implementing decree. In doing so, it contradicts the two operations carried out by the 2018 Act: the application of the

admission regime at internal borders and, at the same time, the extension of this regime to a ten-kilometer strip.

Despite the Council of State ruling, observations made in the field at the French-Italian border and the work of the associations show that controls continued to result in the daily issuance of entry refusals after 27 November 2020. In addition, a new type of decision has been introduced into administrative practice: the obligation to leave French territory (*obligation de quitter le territoire français*, hereinafter, OQTF). The OQTF stems from the regime of stay as it transposes the "return" directive into French law. As a result, the prefecture and the border guards apply two contradictory regimes to identical situations, the crossing of an internal border by a third-country national. The refusal of entry and the OQTF are mutually exclusive, as the former can only be issued to an individual who is not considered to have entered France, while the latter applies to someone who is illegally residing on French territory. This contradiction echoes the ambiguities of the Council of State itself, which has recognized, in other decisions, that people stopped at the French-Italian border cannot be considered as being on the territory (5 July 2017, *Anafé et autres*, N° 411575, §6), or that the issuance of a refusal of entry to a TCN who present themselves at the border is not manifestly incompatible with EU law (23 April 2021, N°450879, §18-19). In future works, a detailed examination of the ambiguities in the Council of State's interpretations of this issue must be carried out. For the time being, it should be noted that these legal developments in the jurisprudence and administrative practice maintain a considerable degree of indeterminacy, since the oscillation between the two regimes still characterizes the law of internal border control, more than six years after the temporary reinstatement of controls.

These indeterminacies are not trivial. On the contrary, it is possible to argue that they are even structural vis-à-vis the constitution of the margin. They play out in such a way that they enable state actors to arrange their practice in an innovative manner.

### ***c. A Leeway: Uncertain Legal Qualifications***

This leads us to the second meaning of the notion of margin, which characterizes the latitude available between certain limits. On the border between France and Italy, this latitude is linked to the maintenance of legal indeterminacies. In order to illustrate this mechanism, we will take the case of migrant detention [on the premises of the border police of Menton Pont-Saint-Louis and Montgenèvre](#).

In French law, detention is strictly regulated, as it constitutes, in itself, a serious restriction on many fundamental freedoms. With regards to immigration law, the structure of the CESEDA distinguishes between the detention associated with illegal stay (administrative detention centers) and that associated with non-admission (waiting zones). This goes back to the distinction between the regime of stay and the regime of entry. The procedural and substantive rules and guarantees differ from one regime to the other. Since the reintroduction of controls, the French administrative authority has not placed third-country nationals in administrative detention centers. It has given preference to the admission regime. However, waiting zones have not been used as a legal framework either, although they are linked to the admission regime. The waiting zone, much like the refusal of entry, was only intended for the crossing of external borders by rail, sea or air. Thus, the government and, in some respects, the legislator supported the application of the regime of refusal



of entry at internal borders without matching it with the associated regime of detention: that of the waiting zone. In the law, this was reflected in the adoption of article L. 213-3-1 which provides for the issuance of entry refusals at internal borders, but not for the establishment of waiting zones. In practice, however, the control procedure does incorporate [detainment of TCNs](#) within the premises of the border police.

The legal qualification of these proceedings remains unresolved. Between 2017 and 2019, the State has been qualifying these spaces as a “provisional detention zone” (*zone de rétention provisoire*), a *sui generis* category that does not have any legal basis. On 5 July 2017, the Council of State considered that third-country nationals could be detained for a maximum of four hours while their non-admission was being processed (*Anafé et autres*, §6). NGOs noted that detainees were often being kept for more than four hours and demanded the closure of these spaces. Secondly, they asked to be able to access them in the same way they can access administrative detention centers and waiting zones. In response, since 2019, the French government began to use an alternative qualification, that of a “sheltering space” (*espace de mise à l’abri*) rather than a space for detention. This was ultimately brought to court as NGOs contested the notion of shelter to qualify unconsented detainment. In its latest decision, on 21 April 2021, the Council of State ruled that there is no need to close these detention spaces. It acknowledges that the border police premises are used both for sheltering and detention (N°[450879](#), [450987](#), §13). Concerning the latter, the judges reaffirmed that these facilities are neither administrative detention centers nor waiting zones as one applies to undocumented TCNs on national territory and the other at external borders. They equally recognized that these spaces are not based on any legal text and are *sui generis* (§13). They nonetheless refused the associations' request for closure on the grounds that these spaces meet three objectives: sheltering, preservation of public order and the implementation of an effective removal policy (§20). While allowing for the perpetuation of the detention procedure, this decision does not resolve the issue of the legal qualification of *sui generis* detention spaces that do not have any legal founding.

To take the wording of the Marseille administrative court, these detention premises “do not obey any of the [existing] statuses and their legal nature remains to be determined” (N°[2102047](#), §12), a statement which holds true to this day. This indeterminacy is problematic from a legal point of view in general, and that of fundamental rights in particular. Indeed, the subjective rights of detainees are only guaranteed by specific mechanisms provided for in existing detention regimes. For example, in waiting zones, detention is monitored by the judiciary (*juge des libertés et de la détention*), and migrants can have their right to asylum enforced in front of an administrative court, although this system is already strongly restrictive. The absence of clear categories underlying the border control procedure thus nurtures the latitude given to the law in the border area. This latitude seems to play out through the maintenance of indeterminacies, specifically regarding legal categories of detention.

### C. Conclusion: Parajudicial Arrangements?

The notion of a legally established margin aims to explore how the borderline affects the way in which legal norms are applied and interpreted on the territory next to it. Building on two meanings of the term “margin”, this article examined how bordering practices and law-making can both extend the exclusionary function of the border to the national territory (refusals of entry and the revamped fiction of aterritoriality) and facilitate a leeway in the daily implementation of border controls (the

unqualified detention spaces). The nature of this latter phenomenon must be further explored in later works. One lead consists in understanding this procedure as being made of parajudicial arrangements, in both senses of the prefix. “Para-judicial” is what is articulated *around* the law, on its margins, but also, sometimes, *against* the law. Border controls and migrant detention sometimes take on the trappings of one regime, sometimes the other, and finally, they tend to constitute a parajudicial practice of law. Courts seem unable to rule out the general economy of these legal practices. One could hypothesize that the composite form of these arrangements allows judges to invalidate parts of it, but not their overall functioning. These arrangements thus tend to become a mode of migration governance by the margin of the law. It is as if the indeterminacy inherent in the maintenance of a laconic derogatory legal regime makes it possible for a State to derogate from certain fundamental rights and administrative procedures that should apply.

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