Exclusion From Rights Through Extra-Territoriality at Home: The Case of Paris Roissy-Charles De Gaulle Airport's Waiting Zone

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EXCLUSION FROM RIGHTS THROUGH EXTRA-TERRITORIALITY AT HOME: THE CASE OF PARIS ROISSY-CHARLES DE GAULLE AIRPORT’S WAITING ZONE

by

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Abstract

In this dissertation I argue that, since the 1980s, French airports have been designed to exclude people from legal, human and refugee rights. The particular space where this happens has been successively called “international zone”, “transit zone” and “waiting zone” and its scope has been significantly extended overtime. I contend that French authorities have used the concept of extra-territoriality in concert with the material design of the airport to sustain exclusion. While this research focuses on France, findings bear relevance to the global governance of migrants and refugees. The French case epitomizes how states creatively use the law (or absence thereof) and geography to keep undesirable non-citizens, including asylum claimants, away from their territories.

In the 1980s and early 1990s, the government established Paris airports’ international zones as non-French, extra-territorial spaces to circumvent domestic and international laws. I use the term “extra-territoriality” with a hyphen to refer to this deliberate excision of territory. When the Law on the Waiting Zone came into existence in 1992, exclusion was reinvented through another form of extra-territoriality, premised on the non-citizen’s legal status at the border. Since then, the term “waiting zone” has assigned both legal and geographical dimensions to this place.

This research topic matters as this law established a parallel, less protective legal framework for foreign nationals arriving at the border compared to the one applicable to their counterparts already deemed on French soil - who are either applying for asylum or are to be removed after being caught for staying illegally in the country -. Yet France is a liberal democracy bound by obligations under human rights and refugee conventions at the regional and international levels. Is a less
protective system of rights based on the distinction between physical and legal entry necessary?

I was drawn to the waiting zone for my research because it is an understudied area; the waiting zone is physically difficult to access, yet important to understand. I chose to focus on Paris Roissy-Charles de Gaulle (CDG) airport’s waiting zone, which detains the greatest number of individuals in France. I sought to answer several research questions. First, how did the Law on the Waiting Zone come to existence? Second, does the Law on the Waiting Zone constitute a break from the initial phase of extra-territoriality? In other words, is the term “extra-territoriality” inappropriate to describe the current situation of non-citizens placed under the waiting zone regime? Third, how do actors working in and on the waiting zone perceive this legal regime and their role therein? Finally, how are foreign nationals being treated in CDG airport’s waiting zone? Do they have access to rights, or do they face barriers?

Different research methods were used to answer these questions. I engaged in discourse analysis of a variety of sources and carried out 35 semi-structured expert interviews. Participants were asked to answer questions regarding their perception of the legal framework applying to the border zone, their role and actions therein. Finally, I used the participant observation method at CDG airport.
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List of abbreviations

Anafé. Association nationale d’assistance aux frontières pour les étrangers
[National Organization for Assistance to Foreign Nationals at Borders]

CDG. Charles de Gaulle. The full name of the airport is Roissy-Charles de Gaulle.

CESEDA. Code de l’entrée et du séjour des étrangers et du droit d’asile [Code on the Entry and Residency of Foreign Nationals and the Right to Asylum]

CFDT. Confédération française démocratique du travail [Democratic French Work Confederation]

Cimade. Comité Inter-Mouvements Auprès des Evacués [Inter-Faith Committee for Evacuees]

CNDA. Cour nationale du droit d’asile [National Court of Asylum]

DCPAF. Direction Centrale de la Police aux Frontières [Central Border Police Department]

EMN. European Migration Network

GASAI. Groupe d'analyse et de suivi des affaires d'immigration [Immigration Affairs Review and Monitoring Group of French Border Police]
GISTI. *Groupe d'information et de soutien des immigrés* [Group providing information and support to immigrants]

HRW. Human Rights Watch

IATA. International Air Transport Association

ICAO. International Civil Aviation Organization

IGC. Intergovernmental consultations on migration, asylum and refugees

INAD. Inadmissible person

ITF. International Transport Workers’ Federation

OFPRA. *Office Français de Protection des Réfugiés et Apatrides* [French Office for Protection of Refugees and Stateless persons]

ZAPI 3. *Zone d'attente pour personnes en instance* [Waiting zone for persons whose case is pending]
Introduction

In this dissertation I argue that, since the 1980s, French airports have been designed to exclude people from legal, human and refugee rights. The particular space where this happens has been successively called “international zone”, “transit zone” and “waiting zone” and its scope has been significantly extended overtime. I contend that French authorities have used the concept of extra-territoriality in concert with the material design of the airport to sustain exclusion. While this research focuses on France, findings bear relevance to the global governance of migrants and refugees. The French case epitomizes how states creatively use the law (or absence thereof) and geography to keep undesirable non-citizens, including asylum claimants, away from their territories.

In the 1980s and early 1990s, the French government argued that the international zone of Paris airports was not French territory, refusing to provide those confined there with domestic and international rights. When the Law on the Waiting Zone came into existence in 1992, non-citizens at the border ceased to be detained in a legal void premised on extra-territoriality. Since this time, designation of the term “waiting zone” has assigned both legal and geographical dimensions to this place. The Law on the Waiting Zone establishes a particular legal regime for non-citizens (French: ‘étranger’) denied entry into French or Schengen territory or claiming asylum at a French border arriving by train, boat or airplane (CESEDA, 2016 articles L221-1 to L224-41). Individuals located in the waiting zone are not governed by ordinary laws, but instead subjected to its particular legal regime. The regular refugee

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1 The French legal document “CESEDA” (Code de l’entrée et du séjour des étrangers et du droit d’asile) gathers all laws and policies applicable to the entry and residency of non-citizens (including asylum-seekers) in the country. It is available at: [http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158](http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158). The original Law on the Waiting zone and its subsequent updates and extensions can all be found in this online document.
determination procedures do not apply to asylum-seekers at the border. Unaccompanied minors are denied due process rights that children in France enjoy (Human Rights Watch, April 8, 2014).

This parallel – and less protective – legal framework builds on the premise that rejected non-citizens and asylum-seekers at the border find themselves at the threshold of, but not having yet entered French sovereign territory. They find themselves, instead, in territorial border zones where the state establishes the distinction between physical and legal entry: physical presence proves insufficient and only lawful admission amounts to entry into the territory (Basaran, 2011). Individuals falling under the purview of the waiting zone framework are detained during the time necessary for them to be returned or, if they are claiming asylum, to determine whether or not their claim is inadmissible or “manifestly unfounded”. As a general rule, only asylum-seekers passing this initial screening will be entitled to enter French territory where claims will be examined on their merits. Since the new law that passed on July 29, 2015, asylum-seekers may also be admitted to the territory when deemed particularly vulnerable by the refugee agency. When not considered as such, unaccompanied minors seeking asylum still have to pass the “manifestly unfounded test”, save in a very few cases.

At international airports, legal and cartographic borders do not map onto one another (Lochak, 1992). There, borders are artificially created at the heart of states’ territories, without a territorial delimitation between states. This artificial creation of borders, or what Del Valle Galvez (2005) refers to as the “legal fiction of the internal border,” is permissible under international law, as there is no human right to enter a country, except one’s own. The admission of an individual to a country is a state’s discretionary act. However, as Del Valle Galvez (2005) explains, this “legal fiction of
the interior border” can easily lead to an “extra-territorial legal fiction” (hyphen added). France implemented this extra-territorial legal fiction in the 1980s and early 1990s.

The French government considered individuals in international zones to be not on French territory for they had not gone through police control and customs. Thus, France transformed the legal distinction between de facto entry and formal entry (that characterizes the “legal fiction of the interior border”) into the dichotomy formal entry/no formal entry. This maneuver allowed the French government to circumvent domestic and international laws. When these events unfolded, France, like other Council of Europe states, was witnessing a surge in the number of asylum-seekers arriving at its gates (Parliamentary Assembly of the Council of Europe, 1988). France used the international zone as a buffer zone to keep undesirable migrants, and asylum seekers in their midst, at bay.

The Convention on International Civil Aviation (hereafter “Chicago Convention”) came into being on December 7, 1944 so that “international civil aviation may be developed in a safe and orderly manner” (Chicago Convention, 1944, preamble). Annex 9 to the Chicago Convention uses the term “direct transit zone”. This international legal instrument (July 2005, Twelfth Edition, Chapter 1.A²) defines such space as “a special area established in an international airport approved by the public authorities concerned and under their direct supervision or control, where passengers can stay during transit or transfer without applying for entry to the State”. However, Annex 9 does not specify the perimeter of the “direct transit area”. Kpatinde (1995) explains that the transit area “usually stretches from the runway to the first police checkpoint”. The international zone in airports is also called “sterile

² The first page of Annex 9 reads: “This edition incorporates all amendments adopted by the Council prior to 8 March 2005 and supersedes, on November 2005, all previous editions of Annex 9”.
zone” or “transit zone” in other countries. Under international law, international zones are not extra-territorial spaces. As soon as international legal scholars, international human rights courts and treaty monitoring bodies turned to the matter of the international or transit zone, they clearly stated that this space was integrally part of the state’s territory.

In my dissertation, I use the term “extra-territoriality” with a hyphen to refer to the deliberate excision of territory that occurred in the 1980s and early 1990s in France. There is an important literature demonstrating that states’ obligations under international human rights law do not stop at their borders (see Langford et al 2013; Gibney and Skogly, 2002; De Schutter et al, 2012). Such obligations extending beyond geographical boundaries have been called “extraterritorial obligations”. Specifically, Gammeltoft-Hansen (2011) has demonstrated that states retain some responsibilities under refugee and international human rights law when they exercise migration controls well outside of their borders, as for example in international waters or in areas under foreign territorial jurisdiction. The case of the French international zone is slightly different: the state refused to acknowledge its obligations over a part of its territory, deliberately establishing this space as extra-territorial.

I was drawn to the waiting zone for my dissertation research because it is an understudied area; the waiting zone is physically difficult to access, yet important to understand. In this dissertation, I seek to answer several research questions. First, how did the Law on the Waiting Zone come to existence? Second, does the Law on the Waiting Zone constitute a break from the initial extra-territorial legal fiction? In other words, is the term “extra-territoriality” inappropriate to describe the current situation

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3 I am aware that some scholars use the term “extraterritoriality” more broadly. For example, Weizman (2005) also uses the term to refer to “sites that are within the body of the state but over which it has lost control”. He observes that such extraterritorial sites can become “quasi-utopian spaces”.

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of non-citizens placed under the waiting zone regime? Third, how do actors working in and on the waiting zone perceive this legal regime and their role therein? Finally, how are foreign nationals being treated in Paris Roissy-Charles de Gaulle (CDG) airport’s waiting zone? Are their rights being respected? Do they have access to rights, or do they face barriers?

I chose to focus on CDG’s waiting zone. CDG is France’s main and Europe’s second largest airport (Human Rights Watch, 2009). The airport serves more than 60 million passengers every year, and CDG’s waiting zone detains the greatest number of individuals in France; in 2011, 6013 individuals were denied entry (Paris Airports 2012, 7; Anafé January 2013, 18) and more than 88 percent of asylum applications at French borders were made there (OFPRA April 11, 2012, 34). CDG is also the only waiting zone to feature a built-in detention center (called ‘ZAPI 3’).

This research topic matters as the Law on the Waiting Zone established a parallel, less protective legal framework. Since the implementation of this law, foreign nationals arriving at the border have been subjected to a watered-down legal framework compared to the one applicable to their counterparts already deemed on French soil - who are either applying for asylum or are to be removed after being caught for residing illegally in the country. Yet France is a liberal democracy bound by obligations under human rights and refugee conventions at the regional and international levels. Is a less protective system of rights based on the distinction between physical and legal entry necessary?

Research methods

This work called for several research methods. Firstly, I engaged in discourse analysis of a variety of sources. I studied minutes of parliamentary debates, domestic administrative documents, reports written by parliamentarians, documents produced
by activists, court judgments at the domestic and European level, government’s response to reports by the Council of Europe and by Human Rights Treaty-based bodies (such as the Committee against torture or the Committee on the Rights of the Child). This analysis shed light on how some ideas become common sense and set aside different interpretations (Waitt, 2010).

Secondly, I carried out 35 semi-structured expert interviews. Participants were asked to answer questions regarding their perception of the legal framework applying to the border zone, their role and actions therein. I interviewed many different actors who were interacting with or governing foreign nationals placed in CDG’s waiting zone: civil servants; volunteers and employees of domestic civil society organizations; employees of regional and international organizations; legal and religious practitioners; interpreters; members of parliament. Interviews showed the gaps between how policies and laws are written and how they are put into daily practice (Mountz, 2010). Unless otherwise specified, interviews were carried out in person between August 2013 and August 2014. Interviewees were identified through the snowball method described by Babbie and Benaquisto (2009), participant-observation at courts and information publicly available on the Internet. I did not interview those confined in the waiting zone.

Thirdly, I used the participant observation method. As Coutin and Fortin (2015) note, ethnographies provide insight into the workings of law on the ground, the consciousnesses of legal actors, the routine practices of legal institutions, the impacts of law in the lives of marginalized groups, the nature of legal advocacy and the differences between law’s claims and its realities, all of which have been key to seeing law as a social phenomenon rather than merely as doctrine.

I observed court proceedings before the court of first instance, the appeals court and the administrative court. Those placed under the waiting zone regime are presented to
a liberty and custody judge at the court of first instance after four and 12 days of detention. The role of this judge is to assess whether authorities treated the foreign national according to the law. Should this not be the case, the liberty and custody judge has the power to release the non-citizen from the waiting zone, de facto admitting the person to the territory. A judge at the appeals court hears appeals against the liberty and custody judges’ rulings. Finally, the administrative judge adjudicates appeals launched by asylum claimants against the Ministry of the Interior’s decision refusing them entry to the country on asylum grounds (cf figures 1 and 2). Court hearings are public and I did not need to seek permission to observe them. I had the opportunity of observing the work of a state-paid lawyer at the court of first instance at Bobigny.

I also engaged in participant observation at CDG. I visited the places where rejected travelers and asylum-seekers are detained: small cells -that can be found in almost every terminal- and CDG’s administrative detention center. I had sought the permission from the Ministry of the Interior to visit these places with the NGO Human Rights Watch (HRW). Permission was granted at the end of January 2014. I carried out eight visits from the end of January to the end of March 2014. I also visited Paris-Orly’s waiting zone (two visits) within this time frame: I visited the room at the airport where people are confined during the day and the rooms at the hotel Ibis where they are housed at night. Visiting Orly was interesting as it enabled me to compare the situation at the two Paris’ airports. This observational research was invaluable to study the interactions of non-governmental workers and civil servants with persons placed in the waiting zone. As Herbert (2000) observes, participant observation is a method that allows one to observe not only how people narrate their work, but how they actually go about doing it. All data on detainees were collected
through participant observation. I engaged in this method mindful of the fact that the researcher is not an omniscient observer but part of the social relations under study (Herbert, 2000; Hyndman, 2001). Paradoxically, my gender and age helped me during fieldwork. As a young woman, many authorities did not take me seriously and felt that they could talk to me.

Many years of antagonism between authorities and activists rendered the concurrent use of interviews and participant-observation at CDG impossible. Makaremi, who had researched CDG’s waiting zone as an anthropologist, had warned me of the dangers of being associated with an NGO: her volunteer position with the activist organization Anafé had precluded interviews with government officials and border police (Makaremi, personal communication, 2013). Yet, volunteering with an NGO was the only way of entering the waiting zone, as members of the general public and journalists are banned from this space. Sites that are difficult to access force researchers to take a role in the social interactions they study (Makaremi, 2008). I therefore attempted to interview as many officials as possible before visiting the airport’s spaces of confinement with HRW. Wilfrid Laurier University’s Research Ethics Board approved all research methods. Most participants were assigned pseudonyms in order to protect their identities. Real names were only used in four instances, when consent was explicitly given to disclose identity and when it could not be foreseen that such disclosure would be detrimental to the interviewee.

I collected data in French. This proved to be challenging, as I had to translate highly technical and specific terms into English. But it was also an opportunity, forcing me to reflect on vocabulary and to seek conceptual precision. I chose to translate the French term “étranger” by “non-citizen” or “foreign national”, as I found that these terms triggered a less negative emotional response than “foreigner”
or “alien”. I stopped collecting data from research participants in August 2014. Analysis ended in September 2016.

*Chapter outline*

The dissertation is structured to develop the argument that international zones and waiting zones in French airports have served to curtail access to domestic legal rights as well as access to human and refugee rights granted by international law. In chapter 1, I will demonstrate how the French government established Paris airports’ international zones in the 1980s and early 1990s as non-French, extra-territorial spaces to circumvent domestic and international laws. I will show how the international zone was an “abject space” (Isin and Rygiel, 2007) where people, deprived of the ability to enact rights, were rendered nonexistent. This chapter will illustrate how governments create extra-territorial legal fictions and the danger they pose to individuals who find themselves in these spaces. It will show that the international zone functioned as a “non-entrée” mechanism (Hathaway, 1992), designed to reduce the number of asylum seekers reaching sovereign territory.

Chapter 2 will trace how the Law on the Waiting Zone, a parallel and less protective legal framework premised on extra-territoriality, was established through regular democratic processes. Before the Law on the Waiting Zone came into existence, the same legislative provisions applied to all foreign nationals detained for immigration control purposes: the law did not establish any distinction between those at French borders and those already deemed to be on French territory. Non-citizens all benefited from the same rights. This equality before the law ended in 1992, with the Law on the Waiting Zone. As I will demonstrate, this less advantageous legal regime was premised precisely on the idea that international zones, renamed “transit zones” and then “waiting zones”, were somehow extra-territorial spaces.
Chapters 3 and 4 will further explore the notion of extra-territoriality. In chapter 3, I will argue that the initial construction of the international zone as an extra-territorial space has endured in both mindsets and practices. Amongst individuals working in or on the waiting zone can be found the deeply ingrained idea that the waiting zone is not French territory (at least) for non-citizen populations. This argument, just like in the 1980s and early 1990s, has been used to exclude non-citizens from rights. In other words, some individuals have been denied the protection of international law based on their presence in excised, non-French territory.

In chapter 4, I will contend that the Law on the Waiting Zone has reinvented exclusion through another form of extra-territoriality, premised on the non-citizen’s legal status at the border. Although physically in France, rejected non-citizens and asylum-seekers at the border are not present from a legal standpoint, for they have not crossed yet “law’s admission gate” (Shachar, 2007). In this chapter, I will show that the Law on the Waiting Zone excludes particularly vulnerable groups from the protection they are entitled to under international law. I will also situate the Law on the Waiting Zone within the global landscape of legal maneuvers deployed to control migrants and asylum-seekers’ arrivals. Finally, I will unveil stakeholders’ perspective on the waiting zone framework, demonstrating that to most actors working in or on CDG’s waiting zone, border control takes precedence over rights.

In chapters 5 and 6, I will share ethnographic findings, unveiling practices and mental landscapes in spaces inaccessible to the general public or journalists. Chapter 5 will focus on airport terminals while the next one will turn to the detention center, “ZAPI 3”. ZAPI 3 stands for zone d’attente pour personnes en instance, which can be roughly translated as “waiting zone for persons in process” in English. In chapter 5, I will argue that airport terminals are truly the border police’s realms. Third parties
rarely venture into these spaces. There, asymmetrical power relations prevail and both detainees and researcher experience arbitrariness. Airport terminals constitute the less visible part of CDG’s waiting zone. Some passengers may have difficulties reaching the waiting zone status, deprived of the “right to have rights” (Arendt, 1968) in the international zone. I will also show that some authorities’ mindsets towards non-citizens and their border enforcement jobs may be conducive to ill treatment.

In chapter 6, I will study the other part of CDG’s waiting zone: “ZAPI 3”. ZAPI 3 is the detention center located in CDG’s waiting zone. NGO presence in ZAPI 3 is unique: Anafé and the Red Cross are on site respectively two (or three) days a week and seven days a week, twenty four hours a day. I observed that liberty and custody judges at Bobigny often told non-citizens that they could find these organizations at ZAPI 3, as if NGO presence made confinement acceptable and guaranteed the respect of rights. Yet, as I will demonstrate, the presence of visitors or third parties does not guarantee satisfactory access to rights in ZAPI 3. In this space, the issues are not so much material conditions of detention but rather confinement per se as well as access to rights. ZAPI 3 very much remains a place of deprivation of liberty characterized by limited visibility and police omnipresence. It is a place where abuse and tension transpire, in contradiction with euphemistic discourses presenting it as a hotel or a place of recreation.

In chapter 7 I will study a “non-entrée” mechanism (Hathaway, 1992) that may come into play thousands of kilometers away from French and Schengen territory: carrier sanctions. In this chapter, I will unveil the symbiotic relations between carrier sanctions and the institution of the waiting zone, showing how the former finance the latter, making its very existence possible. Finally, in chapter 8, I will present evidence supporting the claim that the waiting zone in itself constitutes
the ultimate gate that asylum-seekers need to pass before finally reaching the regular refugee status determination system. These findings will buttress the argument developed throughout the dissertation: the waiting zone serves the same purpose as its predecessor, the international zone. It is one of many devices crafted by states to keep asylum claimants away from their territory. The waiting zone constitutes the last “non-entrée” mechanism when all the upstream ones have failed.
Figure 1. Current proceedings before the judicial judge after placement in the waiting zone at Charles de Gaulle (based on Anafé, August 2015)

1. Admission denied: placement under the waiting zone regime

   - Day 1
     - Custody and liberty judge (CLJ) Bobigny Court. First presentation
     - 24 hours to appeal
       - Admission to the territory
       - Detention is extended for another 8 days

   - Day 4
     - Paris Appeals Court
     - Rejects the decision of the CLJ
     - Confirms the decision of the CLJ

   - Day 12
     - CLJ Bobigny Court. Second presentation
     - 24 hours to appeal
       - Admission to the territory
       - Detention is extended for another 8 days

   - Day 20
     - Paris Appeals Court
     - Rejects the decision of the CLJ
     - Confirms the decision of the CLJ

End of detention-admission to the territory (in some cases detention can be extended up to 26 days (article L.222-2 CESEDA))

At any time

- Return
  - Detention in police custody for refusal to board the plane
  - Charges are dropped
  - Immediate presentation to the court of first instance at Bobigny (criminal offense)
  - Set free-admission to the territory

- Prison and/or prohibition to land or stay on French territory

Entry into French and Schengen territory

Entry denied: the applicant remains in the waiting zone
Figure 2. Current proceedings before the administrative judge applicable to asylum-seekers at French borders (based on Anafé, August 2015)

The claimant notifies the border police that he/she wishes to enter France on asylum grounds → OFPRA hearing (refugee agency) → Decision of the Ministry of the Interior (MI)

The claim is deemed "manifestly unfounded" → 48 hours to appeal

→ Appeal to the Administrative Court of Appeal

Appeal rejected without hearing → The court confirms previous decision → 15 days to appeal

→ Appeal to the Administrative Court of Appeal

The court rejects the MI’s decision: entry is granted on asylum grounds → The claimant may be returned while his/her appeal is pending

Entry into French and Schengen territory
Entry denied: the applicant remains in the waiting zone
Chapter 1. The establishment of the international zone as an abject space through extra-territoriality

Introduction

In the early 1980s, Council of Europe member states began to witness a tremendous increase in the number of asylum-seekers arriving at their gates (Parliamentary Assembly of the Council of Europe, 1988). For example, the number of individuals seeking international protection in France rose significantly over the 1980s, from 20,000 applications per year in the early 1980s, to 61,000 in 1989 (IGC, December 2012, 183). As Agier (2010) observes, the image of the refugee underwent a profound transformation over the course of this decade and the following. In the 1930s, 1940s or 1950s political exiles from Spain, Poland or Hungary were welcomed with open arms. They embodied strong personal honor and ideological meaning: the refugee was then a noble figure. Agier (2010) notes that the shift in the public perception of refugees occurred in the 1980s and 1990s, when massive population displacement took place in Africa and where ethnicized and de-personalized crowds received refugee status collectively as they crossed borders under the prima facie procedure. This is how Dr Felix Schnyder, a former United Nations High Commissioner for Refugees, explained the difference between individual and prima facie group determination:

In the case of group determination we are confronted with a mass of people who flee the consequences of political events in which they have not necessarily participated. In the case of individual determination a person claims to have been individually the victim of, or threatened personally by, persecution (quoted in Jackson, 1999, 3).

As refugees came to be seen as undesirable and vulnerable victims, political and intellectual solidarity gave way to fears. Tending to the biological needs of these
populations became the priority, relegating moral and ontological questioning aside. Personal stories became obscured; exiles lost their singularity (Agier, 2010). Johnson (2011, 1016) concurs with Agier’s analysis. As she explains, “over the past 60 years, the image of the refugee has been reframed: from the heroic, political individual to a nameless flood of poverty-stricken women and children”. As the Cold War ended, public perception viewed refugees’ testimonies as suspicious. The refugee figure was transformed into that of a migrant (Agier, 2010). The refugee was no longer useful to the West in its ideological war and became depoliticized, stripped of political agency (Johnson, 2011). Crépeau (1995) and Johnson (2011) also note that by the 1980s, the image of the refugee from the global South had replaced that of the European refugee in public imagination. Barnett (2002, 254) shares this analysis: “Alleged differences in race and culture have made refugees a source of suspicion and hostility since the developing world became the source of significant refugee flows to the West in the 1970s.”

International and European law and policies reflected this shift: on November 30, 1992, member states of the European Union adopted the London resolutions. One of these three resolutions was concerned with “manifestly unfounded applications for asylum”. It rested on the premise that a significant number of asylum-claimants were not genuine applicants. The resolution opened with the following words:

Aware that a rising number of applicants for asylum in the Member States are not in genuine need of protection within the Member States within the terms of the Geneva Convention, and concerned that such manifestly unfounded applications overload asylum determination procedures, delay the recognition of refugees in genuine need of protection and jeopardize the integrity of the institution of asylum […].

The resolution identified unfounded applications and agreed to treat them under accelerated procedures. Article 1 of the resolution defined manifestly unfounded applications:
An application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the Geneva Convention and New York Protocol for one of the following reasons:
there is clearly no substance to the applicant's claim to fear persecution in his own country; or
the claim is based on deliberate deception or is an abuse of asylum procedures.

The two other London resolutions laid down the concepts of “host third countries” and of “countries in which there is in general terms no serious risk of persecution”. Under the former, Member States of the European Communities agreed to send asylum claimants to countries that were not member states, when claimants had been granted protection or could have sought protection in such states. Under the latter, Member States agreed to treat applicants coming from countries deemed safe according to accelerated procedures. In short, EU countries found ways of delegating the responsibilities for claimants to other countries and of expediting asylum claims.

At the international level, the facilitation division of the Chicago Convention introduced the possibility of fining carriers at the 1988 meeting. The Schengen Convention transformed this possibility into a legal requirement, imposing penalties on carriers transporting third country nationals lacking appropriate travel documents (article 26)\(^4\). While article 26 explicitly stated that signatories had to honor their obligations under the Refugee Convention (1951) and its Optional Protocol (1967), in practice it forced companies to refuse passengers inappropriately documented, refugees or not (cf chapter 7).

Wealthy countries began to erect fences between refugees and themselves in the hope of curtailing the number of claimants reaching their territory. Hathaway (1992) first referred to such fences as “non-entrée” practices in 1992. In this chapter, I

\(^4\) The official name of the Schengen Convention is “Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990”. Hereafter the term “Schengen Convention” will be used.
will trace how the French government used the international zone in airports as a “non-entrée” mechanism, by establishing this space as extra-territorial. In order to situate these developments, I will begin with a brief description of the political and economic context in the country at the time. I will then describe the conditions of confinement in the international zone before demonstrating that such detention occurred in a legal vacuum; most non-citizens denied admission or waiting on an admission decision at French airport borders were deprived of liberty in a legal limbo. To justify these practices, the French government contended that the international zone had extra-territorial status. I will explain how activism inside and outside of the international zone coalesced to challenge the practices of border authorities. As I will demonstrate, the “legal fiction” argument was central to debunking the government’s extra-territoriality thesis. Finally, I will offer some explanations as to how the international zone could be established as an abject space.

I. Political and economic context in France in the 1980s: the rise of xenophobia and restrictive migration laws in the midst of economic difficulties

A clear correlation can be established between the rise of economic troubles and the development of laws restricting the entry and residency of foreign nationals in France. Like those of other industrialized and capitalist countries, France’s economic struggles began in 1973-1974, the date of the first oil shock. The two oil shocks (1973-1974 and 1979-1980) fueled the country’s economic difficulties: they put a sudden end to low prices on raw materials and hampered growth (Eck, 2004). Fernandez (2001, 107) explains that when the first oil shock took place, more than 70 percent of French energy resources relied on oil imports. A weak internal demand in France is also believed to have played a significant part in the economic crisis, as
households stopped consuming as much as during the 1960s (Eck, 2004). As a result, unemployment rose dramatically: while 2.6 percent of the working population was unemployed in 1973 (Eck, 2004, 45), this number rose to 8.9 percent in 1991 and 9.9 percent in February 1992 (Duhamel and Forcade, 2005, 114).

Prior to the crisis, France, whose prosperity was largely due to foreign workers, was a relatively open country (Gueslin, 1992). This changed with the first oil shock. While criteria for granting French citizenship were broadened in 1973, an array of restrictive measures appeared as early as 1974. France decided to stop recruiting foreign workers, issuing an administrative document (on July 5, 1974) putting “temporarily” an end to immigration (Gueslin, 1992, 226). As the 1970s drew to a close, the state developed a policy of assisted voluntary returns. The government even tried to force return by not renewing work and residence permits (Gueslin, 1992); in 1978 the government attempted to forcibly return 500,000 non-nationals over five years but encountered resistance from the States of origin, particularly Algeria and Morocco (Colombani and Portelli, 1995, 133).

Eck (2004) clearly rejects any causal link between the presence of foreign workers and the rise of unemployment. French workers were not interested in foreign workers’ jobs. Furthermore, foreign workers and their families positively impacted economic activity through consumption. Besides, assisted voluntary returns and the curtailment of migration did not curb unemployment. Yet, as Guiraudon (2006 a) explains, since the 1970s, hostility towards non-French citizens has grown in all the electorate, from the Right to the Left. Eurobarometer polls show that French public opinion disapproved of reforms bringing benefits to migrants. In 1989, 24 percent of the French population polled considered that rights granted to migrants should be curtailed (Guiraudon, 2006 a, 274). Another poll, organized by SOFRES, asked the
following question: “Would you prefer, over the next years, to prioritize the integration of migrants currently living in France or the departure of a significant number of migrants currently living in France?” Public opinion in the 1990s favored the departure of migrants rather than their integration (Balme, 2006, 400-401).

The National Front appeared on the French political scene in 1983 when it made inroads in local elections. Since this date the far-right, anti-migrant party has influenced the debate on migration at the local, regional and national levels (Guiraudon, 2006 a). The National Front was chosen by 11 percent of voters in the 1984 European elections (Grunberg, 2006, 461). It became gradually known as the authoritarian, nationalistic, xenophobic and “anti-establishment” party (Grunberg, 2006). During the first round of the 1988 presidential election Jean-Marie Le Pen, leader of the National Front, made a significant score, gathering 14.39 percent of the votes (Duhamel et Forcade, 2005, 107). Guiraudon (2006 a) explains how immigrants’ place in French society has been constructed as a “public issue”. Immigrants from former colonies have been chosen as the scapegoats of the far right political parties.

Public opinion is hostile or, at best, indifferent when it comes to immigrants. The latter tend not to vote and, in general, enjoy limited access to decision-making centers.5 Ruling parties therefore refrain from taking measures benefiting immigrants (Guiraudon, 2006 a). For example, the Socialist party’s stance on migration evolved to espouse anti-migrant sentiments amongst the population. During his presidential campaign, François Mitterrand had promised in January 1981 to grant the right to vote to non-citizens at local elections (after five years of presence on French

Facing hostile public opinion, he went back on his electoral promise as early as August 1981 (Gueslin, 1992, 226). As for Charles Pasqua, Minister of the Interior from 1986 to 1988 under the conservative government of Jacques Chirac and the presidency of Mitterrand, he sought to attract National Front voters by embracing the same discourse as the far-right party on nationalism and immigration. He declared: “Overall, the majority and the National Front have the same values” (Colombani and Portelli, 1995, 301). His 1986 law made entry into France subject to proof of financial resources and facilitated immigrant expulsion (Gueslin, 1992, 226). When Socialists returned to power in 1988, the Pasqua law was partly abrogated but a strict policy of border control was maintained (Gueslin, 1992, 227).

II. Long-term confinement in the international zone in inhumane conditions

Lochak (1992, 680) describes the legal framework in place for non-citizens (étrangers was the official terminology) willing to enter French territory in the years before and until the Law on the Waiting Zone came into force on July 6, 1992. At the time, the conditions of entry were set out by article 5 of the Ordinance from November 2, 1945 (hereafter: “the 1945 Ordinance”) and specified by the decree of May 27, 1982 and modified and completed by the decrees of July 30, 1987 and August 30, 1991. In order to enter France, a non-citizen had to carry the documents and visas required by international conventions and domestic laws in force. Access to French territory.

6 Cf point 80 of the election manifesto of the Socialist Party for the presidential election of 1981, available at: http://discours.vie-publique.fr/notices/083001601.html. Today, citizens of countries that are not members of the European Union still do not have the right to vote at local elections, even after five years of presence on French territory.

7 French political institutions allow for a peculiar configuration: the president and the parliamentary majority can be from different political parties. This situation is captured by the French word cohabitation, which can be translated in English as coexistence. A cohabitation took place from 1986 to 1988 when a parliamentary majority hostile to the President was elected on March 16, 1986 (Cohendet, 1993, 24 and 33). Out of the 577 seats at the National Assembly, the Left won 251, the Right 291 and the National Front 35 (Cohendet, 1993, 34).
French territory could be denied to anyone, even those who were in possession of the requested documents, whose presence would be deemed a threat to public order, or who had been banned from the territory or against whom a deportation order had been taken.

In the 1980s, numerous non-citizens were deprived of liberty in Paris airports’ international zones for extended periods of time. The airports’ international zones acted as a buffer zone, where authorities “stored” those denied admission to the country or waiting on an admission decision. Dominique Monget-Sarrail, lawyer at the time and counsel in the Amuur vs France (1996) case, recalls:

The French government told us: “no, they have not arrived in France yet since they did not exit the airport”. Some people arriving at Orly and Roissy airports were kept in the international zone, prevented by authorities from going beyond checkpoints-you know of admission to the territory- and people were kept like that, sometimes during months. There was an Iranian who lived there six months, I do not remember if it was (at) Orly or Roissy. So at night he slept in boarding rooms on benches, he would wash (in airports’ lavatories)… So at the time the situation of several groups of non-citizens like this had caught our attention. We had been told either by airline trade unions or by cleaners working at airports who were surprised to see the same kids play and sleep there for weeks. A certain number of (persons) were blocked like this. Even families. Not only isolated persons like the Iranian but also entire families (Interview, August 2014).

Employees working for Paris Airports or airline companies were distressed by the plight of these foreign nationals. Indeed, in the 1980s and early 1990s, some of these travelers turned away at Paris airports were detained in small holding rooms in the airport’s international zone and/or in nearby hotels, which were deemed an extension of the international zone. Airport and airline employees were confronted first hand with the suffering of non-citizens crammed in holding rooms at airport terminals, as they were tasked with guarding them. Some of these employees belonged to the CFDT trade union. It was the case of Christophe, Jean and Aurélien. At the time, Christophe occupied an important position in the Air France CFDT trade
union. CFDT stands for *Confédération française démocratique du travail* and can roughly be translated as “Democratic French Work Confederation”. CFDT is a trade union gathering employees that belong to different professions and work in different structures, ranging from public to private. CFDT does not have any political affiliation.\(^8\) Christophe recalls that CFDT trade unionists employed by Paris Airports, Air France and even the border police gathered to discuss the role that they were forced to play with respect to rejected passengers:

…We started discussions on this theme: we are confronted to things that are not our job; it is not our job to hold families. Why should we stay at the door and prevent people from leaving?

Researcher: It was not even the police?

Christophe: Oh no, often it was employees; they (non-citizens) were put in rooms and employees were in their office. And they were told “careful that they do not leave!”

Researcher: Employees that were working for?

Christophe: Air France or Paris Airports; who were on site

Researcher: What was these employees’ occupation?

Christophe: Station agents

Researcher: In the plane?

Christophe: No, not in the plane, at the counters. Basically people who are here when you enter the airport. Before you board the plane. They are in contact with passengers (Interview, February 2014).

Conditions of detention were inhumane and unhygienic: no provisions were made to provide the stranded travelers with food, water or basic hygienic supplies. In an attempt to mitigate this unbearable situation, airline and airport employees asked border policemen to bring these supplies themselves. Christophe went on:

We also had issues with meals, -I mean sandwiches- and sanitary supplies for babies and women. We were asking officers to bring (these things) for the next day, as people did not have anything

Researcher: But agents brought these things from where?

Christophe: From their home! Or went to buy it, we had to be resourceful (*c’était le système D*) because people were in rooms like that, imagine that you are left here (Interview, February 2014).

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\(^8\)Cf CFDT’s website: [https://www.cfdt.fr/portail/nous-connaitre/la-cfdt-en-10-points-asp_5025](https://www.cfdt.fr/portail/nous-connaitre/la-cfdt-en-10-points-asp_5025)

According to these (former) trade unionists, people could be detained for days in these small holding rooms where they lacked adequate access to toilet or shower (Interview, February 2014).  

III. Detention in the international zone in a legal vacuum premised on extra-territoriality

In addition to being detained in unsanitary and inhumane conditions, most non-citizens denied entry at airport borders experienced confinement in international zones in a legal void. Yet, domestic law at the time provided for the detention of passengers turned away at the border and equipped them with legal safeguards. The 1945 Ordinance (article 35 bis) allowed detention of non-admitted, non-citizens in administrative facilities for a maximum of seven days, time period deemed necessary for them to be returned. However, detention was to take place “in case of absolute necessity” during “the time strictly necessary for the departure” of the non-citizens. While the decision to detain was taken by an administrative agent (préfet), detainees had to be presented to a liberty and custody judge (juge des libertés et de la detention) after 24 hours. On an exceptional basis, the judge could extend the duration of detention to six more days, bringing the maximum amount of time spent in confinement to seven days in total. After this time, if return had not taken place, the non-citizen had to be set free. The judge’s decision could be appealed and the public prosecutor (immediately informed of the detention decision) always had the possibility of checking detention conditions. Important rights were attached to article 35 bis, including the rights to see a doctor and a counsel and to communicate with the...
consulate or any person of the detainee’s choosing. The non-citizen had to be notified of the rights aforementioned by an interpreter if he or she did not know French. It is important to note that this legislative provision also applied to those already deemed on the territory that were to be removed. The law provided all non-citizens detained for immigration control purposes with the same guarantees, whether they sought to enter France or were forced to leave the country.

According to the newspaper *Le Monde* (Bernard, January 21, 1992), 10,000 travelers per year were denied entry into France as a result of missing or improper travel documents. Less than one percent of these travelers were placed in administrative detention under the legal framework applicable at the time. Therefore, in the 1980s and the early 1990s, the bulk of non-citizens rejected at the border were held in the international zone without any legal framework. Detention outside of the 1945 Ordinance allowed the border police to keep non-admitted foreign nationals for more than seven days and generally to deny them the safeguards provided by article 35 bis of the 1945 Ordinance.

The government chose to leave rejected passengers outside of the protective reach of domestic laws. The case of asylum seekers was different: French legislation did not permit their detention. Indeed, the 1945 Ordinance authorized detention *only once a non-admission decision was made, not before*. At the time, a decree (May 27, 1982) stated that only the Ministry of the Interior could decide to deny entry to asylum-seekers, after consulting with the Ministry of Foreign Affairs. From September 1991 refugee agency representatives were delegated to the borders to hear asylum-seekers and advise the Ministry of Foreign Affairs before it offered its opinion to the Ministry of the Interior (Lochak, 1992, 680). Importantly, France was already a party to the 1951 Refugee Convention and to its 1967 Protocol. As such, the
French state had to honor its *non-refoulement* obligation and could not impose criminal sanctions against refugees for illegal entry (respectively articles 33 and 31 of the Refugee Convention). The duty of *non-refoulement* is the cornerstone of refugee law: it “prohibits states from exposing a refugee ‘in any manner whatsoever’ to the risk of being persecuted for a Convention reason” (Hathaway and Gammeltoft, 2015, 238). Domestic legislation acknowledged the obligation to take international conventions into account in entry decisions (article 5 of the 1945 Ordinance). Under domestic and international law, asylum seekers could not be denied entry for lack of travel documents. They could only be refused access for security reasons, under article 5 of the 1945 Ordinance: threat to the public order, previous banishment from territory or deportation order.

In practice, those seeking international protection could be confined for days or weeks in the international zone while the refugee agency, the Ministry of Foreign Affairs and the Ministry of the Interior decided on their cases. Some claimants also experienced *refoulement* (cf section V). To justify these practices, the French government argued that the international zone had extra-territorial status. As a result, domestic laws (including laws that incorporated international obligations) did not apply to populations held in this space. As explained by Hoop de Scheffer, Council of Europe rapporteur, who visited Roissy-Charles de Gaulle airport on November 20, 1989:

Asylum-seekers are detained in a so-called international zone at the airport, which means that they are not yet on French territory and the French authorities are therefore not under a legal obligation to examine the request as they would be if a request was made by someone already on French territory. The international zone has no legal background and must be considered as a device to avoid obligations […]. No legal basis for detention exists and a maximum term is not prescribed by law (Lord Mackie of Benshie, September 12, 1991,7).
French authorities at CDG assumed that they were under no legal obligation to examine asylum-seekers’ requests in international zones, since they were not on French territory yet. French authorities insisted that the duration of detention was limited to a week. However, some asylum-seekers told the Council of Europe Rapporteur that they had been waiting for six weeks in the international zone (Report N° 6490, 1992, 7).

In short, non-citizens denied admission or waiting on an admission decision at French airport borders were deprived of liberty in a legal limbo. The French government established the international zone as an “abject space”. There, non-citizens were stripped of the possibility of exercising rights (Isin and Rygiel 2007). Isin and Rygiel explain:

…abject spaces-extraterritorial spaces where international and national laws are suspended-have spread throughout the world in the past decade as spaces for holding refugees, asylum seekers, deportees, combatants, insurgents, and others caught in the new global policing and policies net. These spaces include various frontiers controlled by state authorities, zones where special rules and laws apply, and camps where laws are suspended (2007, 181).

They note that Agamben’s logic of exception (1998) cannot capture the essence of abject spaces. In internment camps conceptualized by Agamben (i.e. “spaces of abjection”) undesirables were eliminated. By contrast, “abject spaces” render people invisible and inaudible. Although Isin and Rygiel envision “abject spaces” as relatively new, their concept applies well to the situation of non-citizens in French airports’ international zones in the 1980s and early 1990s. In these international zones resistance was possible: non-citizens challenged their confinement with the assistance of lawyers, and a series of legal proceedings led to the birth of the Waiting Zone legislation in July 1992. International zones were spaces of politics.
IV. The coalescence of activism inside and outside of the international zone

Distressed by the plight of non-citizens, trade unionists decided to contact NGOs defending human and foreign nationals’ rights. Informal meetings led to the creation of the NGO Anafé in 1989. “Anafé” stands for Association nationale d’assistance aux frontières pour les étrangers, which can be translated as “National Organization for Assistance to Foreign Nationals at Borders”. The NGO was created “to provide legal and humanitarian assistance to foreign nationals in difficulty at French borders” (Anafé, 2010, 5). Anafé employees Lise and Anne explain that one of the first demands of the organization was to access international zones (Interview, December 2013). This original structure gathered diverse trade unions, NGOs, and lawyers representing foreign nationals. Aurélien, Christophe and Jean were all very active in the CFDT, some of them occupying key functions in the trade union’s airline section. As such they were instrumental in the creation of Anafé. Jean and Christophe recount how the NGO was born:

Christophe: People stayed in this room for two, three, four, five or six days. It was inhuman… People called us, trade unions, it fell on the CFDT. I suppose that others (trade unions) were called too but they said: “We cannot do anything”. Well I do not know, I do not know what they said (…) Jean: There were many families going back and forth: inadmissible in France and inadmissible in (other countries)… they were doing ping-pong. These are anecdotes but it contributed (to the flight attendants’ trade union joining Anafé).
Christophe: So this adventure began like this. We met the main NGOs: Amnesty International, the Cimade11, France Terre d’Asile. These contacts translated into a meeting that Jean organized at Roissy. Then we had a second and then a third meeting and quickly lawyers came, lawyers who were working on the case, who were defending foreign nationals. They came to these meetings and quickly the idea of creating an NGO appeared. It was original as Anafé was an NGO made of NGOs, and also of trade unions (Interview, February 2014).

Interestingly, the CFDT police trade union was even affiliated with Anafé at first:

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11 Cimade stands for “Comité Inter-Mouvements Auprès des Evacués” which can be translated as “Inter-Faith Committee for Evacuees”.

28
Researcher: The police trade union was a member of Anafé?
Christophe: Yes, at first. Then they left because it brought them too many problems. I think that, we can say it; at some point they provided an internal note that went into the press
Jean: It was when someone died
Christophe: It was the case of the guy who had been suffocated; he had been forcibly put on the plane, the policeman had seated on him a bit too hard, he had squashed his rib cage and the guy died. There was an internal report. Of course it was confidential. We got it through them and obviously…they were not upset when they left but said it was not possible: “it is no longer possible for us to be both inside and outside”.
Researcher: of course. And how long did they stay?
Christophe: Two years.
Jean: It was very small. At the time the police CFDT was very small (Interview, February 2014).

Activist lawyers who were close to Gisti (Groupe d'information et de soutien des immigrés), a group providing information and support to immigrants and one of Anafé’s member organizations, launched a series of trials at the end of the 1980s against the French government. They challenged the detention of their clients (of different origins and nationalities but all caught in similar situations) in the international zone on the basis that it amounted to an arbitrary deprivation of liberty. At the time, there were few lawyers specializing in foreign nationals’ rights in Paris. They were all activists and knew each other well. They were also at the forefront of legal fights in other fields such as labor law or the right to housing. Dominique Monget-Sarrail was one of them. She recalls:

They said there was no law, because we (lawyers) said “there is one, it is the one applicable to people to be removed”. Either there is no law and they have to be set free because you do not have the right to keep them since there is no law, or there is a law and you have to apply it, so they have to be set free. You have been keeping them long enough and not in decent conditions. So this translated into a series of trials organized by a group of friends. We all knew each other; we all had the same professional activity. At the time in the Paris area we must have been about twenty lawyers specialized in foreign nationals’ rights (Interview, August 2014).
V. Legal activism: the use of the “legal fiction” argument to challenge the extra-territoriality thesis

Lawyers used the term “legal fiction” as a weapon to challenge the government’s arbitrary practices in the international zone. They coined the term to debunk the French government’s extra-territorial theory according to which non-nationals present in the international zone were deemed outside of France (Interview with Serge Slama, law professor, Paris, July 2014). It is not a legal term and therefore cannot be found in legal textbooks (Interview with Danièle Lochak, law professor, Paris, July 2014). Activist lawyers using the term of legal fiction did not define it. According to the Oxford online English dictionary (accessed December 7, 2014), a fiction is “an invention or fabrication as opposed to fact”. The term legal fiction was precisely meant to convey the idea that the government fabricated the international zone as a lawless area. Activists found the term useful to denounce the exclusion of individuals located in the international zone from the guarantees offered by French law and international human rights and refugee law. In Del Valle Galvez (2005)’s terminology, they fought the government’s creation of an extra-territorial legal fiction: they refused to consider that individuals in the international zone encountered themselves in an extra-territorial space.

Lawyer Christian Bourguet explains that the term originated from a visit to Orly’s police station, which he made with fellow activist Patrick Mony (Israel, 2002). The policemen told them that the international zone was the fiction according to which they were able to deprive people of liberty. Bourguet seized this idea: he argued before the courts of first instance that the international zone was a legal fiction. As of 1988 he started to litigate against the Ministry of the Interior on behalf of people held at airports (Israel, 2002). From this date onward, many lawsuits were
introduced against the Ministry of the Interior. The goal was to obtain a ruling that would release the asylum-seekers in question from the international zone on the grounds that detention in this space was tantamount to arbitrary sequestration and therefore resulted in severe infringement upon a fundamental liberty (Lochak, 1992, 682). The newspaper *Le Monde*, dated November 21, 1989, described one of these trials (Peyrot, 1989).

Isabelle arrived at CDG from Zaire on November 4, 1989. She had fled her country where she had been imprisoned, beaten, and raped by soldiers on account of her religious opinions. In spite of presenting a regular passport, visa and financial means, she was denied entry at the border and detained at the Arcade hotel at CDG. Bourguet paid her a visit on November 11 and made her sign a refugee status request, which he forwarded immediately to the director of OFPRA (*Office français de protection des réfugiés et apatrides*), the refugee agency. A photocopy of the request was also forwarded to the border police. As his client remained deprived of liberty, Bourguet sued the Ministry of the Interior before the Paris court of first instance\(^\text{12}\). He pleaded that his client’s arbitrary detention had severely infringed upon her fundamental rights (*voie de fait*). But Isabelle was released just before the judge heard her case. The judge could not rule on “a situation that had ended”. As the newspaper notes, the government had already resorted to the same maneuver several times. The Ministry of the Interior had always made sure that the non-citizen was no longer held in the international zone at the date of the hearing. Since the foreign national had either been sent back to his or her country of departure or admitted to French territory, the point of contention had disappeared (Bourguet, 1992). Therefore, the judge had no

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\(^{12}\) The Harrap’s dictionary (2007) translates “*Tribunal de grande instance*” as “Court of first instance” (cf Figure 3).
other option but to declare that he lacked jurisdiction. This game on the part of the government endured for a few years after Isabelle’s case.

The Paris court of first instance finally put an end to it by issuing a very unusual ruling. On November 22, 1991, the court allowed a Haitian asylum-seeker to sue the Ministry of the Interior for “arbitrary sequestration” and monetary compensation even if he had been admitted to France in the meantime. The plaintiff had landed in CDG on November 6, 1991. He had been refused entry and confined for two days in the international zone and six days at the Arcade Hotel, which was construed as an extension of the international zone. He had been informed that he was to be put in the next available plane to Port-au-Prince. The court hearing took place on February 26, 1992 and also dealt with the similar cases of four other asylum-seekers (three Haitians and one Zairian) who had landed in Roissy on November 19, 1991 (Bernard, January 21, 1992). Their lawyers had also been authorized by the same court of first instance on November 26, 1991 to pursue the cases on their merits. At the hearing, the Ministry of the Interior acknowledged the following: their deprivation of liberty was not based on any legal document, a legal framework existed but was not applied and lastly, the order was expressly given to civil servants not to detain foreign nationals at the border under the existing legal framework. (Paris Court of first instance, hearing, February 26, 1992). The court ruled on March 25, 1992.

The hearing revealed that the plaintiffs’ right to seek asylum (guaranteed by the French Constitution as well by international instruments) had been severely violated. Hathaway (2005) clearly explains that states cannot escape from their international obligations under the Refugee Convention by resorting to a “legal ruse.” He points out that the non-refoulement provision of the Refugee Convention (article 33) can be breached when states avoid acknowledging formally the arrival of a
refugee by changing their domestic law. International zones, excised territory, and territorial sea are all part of the state’s territory. This is a fact that cannot be changed by domestic law. Therefore, under international law there is no difference between refusing to examine the asylum claim of individuals located in international zones or excised territory and refusing to examine the asylum claim of individuals who are considered by the state to be on its territory (Hathaway, 2005). Yet France did not uphold its non-refoulement obligation, as decisions were made to return the asylum-seekers in question to Kinshasa and Port-au-Prince. Their return was stopped in extremis when the court heard their case. The asylum-seekers also faced obstacles when filing their claim: only two plaintiffs could have their claim registered while the other two were treated as regular migrants failing to fulfill entry conditions.

The court ruled on March 25, 1992. It rejected the government’s extra-territoriality thesis. Asylum-seekers’ lawyers (Stéphane Maugendre, Simon Foreman and Christian Bourguet) argued that the “international zone” was a “police fiction” (fiction policière) designed to dispense with judicial oversight after 24 hours of detention. The court concurred with the plaintiffs’ counsels’ analysis: it explicitly stated that the international zone constituted a “legal fiction” and could not be exempt from fundamental principles of individual liberty. It found that there was no domestic or international document giving extra-territorial status to all or part of the Arcade hotel where asylum-seekers had been held. It rejected the Ministry of the Interior’s arguments and found that holding at the Arcade hotel constituted a deprivation of

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13 These are the precise words of the court: “Attendu que le défendeur n’est pas fondé à soutenir pour écarter le grief d’atteinte à la liberté individuelle, que l'étranger serait seulement empêché d’entrer en France, en étant retenu dans un lieu devant être considéré comme une "extension" de la zone internationale de l’aéroport; qu’en effet, il n’est pas justifié de l’existence d’un texte, national ou international, conférant une quelconque extra-territorialité à tout ou partie des locaux de l’hôtel ARCADE, situé au demeurant hors de l’enceinte de l’aéroport et de la zone "sous douane" de celui-ci. Attendu qu’en l’état cette zone, qui constitue une fiction juridique, ne saurait être soustraite aux principes fondamentaux de la liberté individuelle.”
liberty. It is interesting to note that the centerpiece of the lawyers’ argumentation—the legal fiction thesis—originally began as an arbitrary, informal response fabricated by civil servants. It proved to be a powerful tool as it was endorsed by the Paris court of first instance and used to justify its ruling. But how did the French government develop the extra-territorial thesis in the first place? I would now like to offer some possible explanations.

VI. Factors that contributed to the establishment of the international zone as an abject space

International zones suddenly became the center of attention in the 1980s, when the number of people seeking international protection in Europe soared. The Parliamentary Assembly of the Council of Europe (recommendation 1088, 1988) expressed concerns regarding the restrictive measures adopted by member states to limit the arrivals. Lord Mackie of Benshie (September 12, 1991, 5) pointed out that some asylum claimants may be “only admitted at the airport in so-called international zones, where their legal status is unclear”. France managed to keep undesirable migrants (and asylum-seekers in their midst) at bay by declaring that the international zone was not France. At the time, the status of the international zone, also called “transit zone”, was not well defined. Legal scholars had not given much thought to the status of this space and domestic courts had issued contradictory rulings. The French government seized this opportunity to pursue political aims. It took advantage of the discrepancy between legal and cartographic borders at airports.

When events unfolded, international law did not directly address the status of the transit zone. International law did not explicitly state whether or not transit zones were part of a state’s territory or what laws applied to passengers located in these
spaces. It is interesting to note that, originally, Annex 9 to the Chicago Convention’s definition of a “direct transit area” (1st edition, 1950) did not include passengers. At first it was “a special area established in connection with an international airport, approved by the public authorities concerned and under their direct supervision for accommodation of traffic which is pausing briefly in its passage through the Contracting State”. In 2004 the Facilitation Division of the International Civil Aviation Organization proposed to broaden this definition to mention that “passengers can stay during transit or transfer without being submitted to border control” in the direct transit area (FAL/12-WP/6, 12/11/03). This international legal instrument did not, and still does not, specify the perimeter of the direct transit area. There are no indications as to what is encompassed by the direct transit area. It became apparent in 1993, at a conference gathering lawyers and activists from Europe and North America, that countries delineated airport transit zones’ perimeter differently (Anafé, 1993). This lack of consensus allowed the French government to claim that the international zone included hotels. Even today, the reader of an international law textbook looking for the “transit zone” page in the table of contents will be disappointed: there is no such thing. International law textbooks do not have a “transit zone” entry.

Nevertheless, it does not mean that airports’ transit zones were not covered by international law in the 1980s. As previously mentioned, Annex 9 to the Chicago Convention established that the transit zone was directly supervised or controlled by the public authorities of the state concerned. This meant that the state in question exercised its territorial sovereignty over the transit zone. As Labayle (1993, 48) explains, a state exercising its sovereignty over a territory is competent both to create and implement rules. As soon as international legal scholars, international human
rights courts and treaty monitoring bodies turned to the matter of the international or transit zone, they clearly stated that this space was integrally part of the state’s territory. Under international law, airports’ transit zones are not extra-territorial spaces.

French domestic courts’ lack of consensus regarding the status of the international zone may have also created a climate conducive to the development of the extra-territoriality thesis. The highest judicial and administrative courts of the country came to some contradictory conclusions during the 1980s. The former (Cour de Cassation) found that the international zone was part of French territory while the latter (Conseil d’Etat) found precisely the opposite. These domestic debates left the door open for the government to use the international zone as a device to deflect from its international obligations. The two diagrams below provide some background on the French legal system and help understand the significance of these rulings (Source: Harrap’s Unabridged Dictionary, 2007, 67-68).
Figure 3. French civil and criminal courts

French Legal System

- Les tribunaux ordinaires : droit civil
  Ordinary Courts: Civil
  - Cours de cassation
    Final court of appeal
    Can overturn decisions from the lower courts
  - Cours d'appel
    Courts of appeal
    Examine appeals of civil cases
  - Tribunaux de grande instance
    Courts of first instance
    Have general jurisdiction for civil cases and minor offences
  - Tribunaux d'instance
    Small claims courts
    Tribunaux de commerce
    Courts hearing disputes over business contracts and commercial matters
    Conseils de prud'hommes
    Industrial arbitration courts dealing with disputes over employment contracts
    Tribunaux des affaires de sécurité sociale
    Courts hearing cases relating to social security matters
    Tribunaux paritaires des baux ruraux
    Courts hearing disputes over agricultural holdings

- Les tribunaux ordinaires : droit pénal
  Ordinary Courts: Criminal
  - Haute Cour de Justice
    High Court of Justice
    Juge le Président de la République et les ministres du gouvernement pour crimes et haute trahison
    Trys the President and government ministers for serious crimes and high treason
  - Cours de cassation
    Final court of appeal
    Can overturn decisions from the lower courts
  - Cours d'appel
    Appeal courts
    Examine appeals of criminal cases
  - Cours d'assises
    Assises courts
    Judge serious crimes
    Triez les crimes
    Deal with serious crimes
  - Tribunaux correctionnels
    Criminal courts
    Judge lesser crimes
    Triez les délits
    Deal with lesser offences
  - Tribunaux de police
    Courts dealing with minor criminal matters
    S'occupent des contraventions
    Deal with petty offences
Figure 4. French administrative courts

- **Les tribunaux administratifs**
  Administrative Courts
  
  **Conseil d’État**
  Council of State
  - Jurisdiction suprême en matière administrative
  - Examine les appels concernant les élections et le gouvernement; peut annuler les décisions rendues par les juridictions inférieures; conseille le gouvernement en matière législative
  - Supreme administrative court
  - Hears appeals on elections and government authority; can override decisions from the lower courts on points of law; gives legal or legislative advice to the government
  
  **Cour des comptes**
  Audit court
  
  **Cours administratives d'appel**
  Administrative appeal courts
  
  **Cour de discipline budgétaire et financière**
  Budget and finance disciplinary court
  
  **Chambre régionale des comptes**
  Regional audit courts
  
  **Tribunaux administratifs**
  Administrative courts
  - S’occupent des plaintes portées contre l'administration
  - Deal with complaints about government agencies
  
  **Conseil constitutionnel**
  Constitutional Council
  - Compétent en matière de litiges concernant les élections législatives ou la constitutionnalité de nouvelles lois
  - Deals with disputes over parliamentary elections or the constitutionality of new laws
  
  **Tribunal des conflits**
  - Décide de l'attribution des affaires à la juridiction civile ou administrative; tranche les litiges opposant des tribunaux ordinaires
  - Assign cases to either the civil or the administrative court system; resolves disputes between ordinary courts
In the case *Youssef*, the Final court of appeal (*Cour de Cassation*) held that the international zone was part of national territory on October 28, 1987. The court explicitly stated that the entirety of Roissy airport was part of French territory, therefore agreeing with the ruling made earlier (June 12, 1984) by the court of appeal. The court of appeal had found that “[…] the entirety of Roissy-Charles de Gaulle airport, upon which French sovereignty applies, is part of French territory, the legal status of zones called ‘international’ or ‘under customs’ has no consequence on the French character of this part of national territory […]” (quoted in Final court of appeal, criminal chamber, public hearing of October 28, 1987—translation is mine).

In this case, a criminal court had sentenced a Jordanian citizen, Youssef Youssef, on January 5, 1984 to leave France (precisely to be “taken back to the border”-*reconduit à la frontière*) for residing irregularly in the country. Invoking political reasons, Youssef refused to board the plane for Amman on January 7, 1984. As a result, further legal action was taken against him. The defendant argued that, having crossed the police and customs border checks, he had left the territory (he was in the international zone) and that therefore he could not be considered as being illegally in France. But the court rejected his argument and sentenced him again to leave the country since, as of January 7, 1984, he was guilty of being voluntarily present in France without valid documents authorizing his stay. His lawyer, Christian Bourguet, appealed the decision immediately. Youssef was finally forced to board the plane for Jordan on January 20, 1984. He returned to France a few months later and the court of appeal of Paris heard his case. The court upheld the previous ruling and found on June 12, 1984 that Youssef had indeed breached the law regulating foreign nationals’ residency in the country but did not hand down any sentence. The case went all the way up to the Final Court of Appeal (*Cour de Cassation*), which also
rejected Youssef’s arguments: it stated that even if the defendant had been taken beyond police and customs checks, he had still breached the law as the entirety of the airport was indeed part of French territory (Lochak, 1992, 682).

Interestingly, in this case it was Youssef’s lawyer, Bourguet, who developed the extra-territoriality thesis (i.e. the idea that the international zone was not part of French territory). He explains why and how he developed this argument (Bourguet, 1992): his client, a Palestinian born in the West Bank, had told him that he was likely to be jailed in Jordan upon his arrival in the country (his fear materialized as he was imprisoned for four months when he was finally forcibly returned to his country of citizenship, Jordan). Therefore Bourguet thought of a way to stall the return: since his client had been sentenced to be “taken back to the border”, he questioned the location of the border. He argued that the border was where police and customs checks took place at the airport, not where the plane exited French air space. The implications of this argument were important: it meant that his client could be taken beyond police and customs checkpoints but not forced to board a plane for a specific country. If the border was indeed materialized by police checkpoints, his client could not be sentenced for staying irregularly in France as he would not be on French territory: French courts would not have jurisdiction. It is worth noting that the extra-territoriality thesis was used at the beginning of the 1980s by an activist lawyer in the hope of protecting his client whose asylum claim had been rejected by France.

Shortly after the first level court held that the international zone was part of France in the Youssef case, the Council of State (Conseil d’Etat), the highest administrative court in France, came to a completely opposite conclusion: the international zone was not part of France. The Eksir case (January 27, 1984) was about whether the implementation of the decision to refuse entry to a foreign national
could be deferred. The question boiled down to whether presence in the international zone equaled presence on French territory. The Council of State found the claimants to be in a situation of extra-territoriality, outside of France in the eyes of the law (Lochak, 1992, 680).

Bourguet was also the counsel in the *Eksir* case. A few months after the *Youssef* case started, he advised three young Iranians who had fled their country to claim asylum in France. They arrived at Charles de Gaulle in November 1983 flying from Karachi via London. They were first returned to London after being turned away by the Ministry of the Interior at Charles de Gaulle on November 24, 1983. In London they refused to make the connecting flight to Karachi and were sent back to France. At Charles de Gaulle, they were put on a plane to Karachi on November 28. They finally landed again at Charles de Gaulle on December 2, after authorities at Karachi refused to readmit them (Robert, 1984). Bourguet (1992) appealed against the first decision refusing them entry to France. He asked the Paris administrative court to defer the implementation of the decision. In French administrative law, a decision’s implementation can only be deferred under certain conditions. It has to be proven that if the decision were to be maintained, it would modify (de facto or de jure) the situation the claimants were experiencing when the decision was made (Lachaume, 1985). The Paris administrative court refused to defer the decision (on December 7): it found that its implementation would not make a difference to the situation of the claimants either in law or in fact. The Council of State confirmed this interpretation on January 27, 1984, therefore implicitly concluding that the international zone was located outside of France. The highest administrative court must have considered that the claimants were not yet in France as they had not exited the international zone when the border police first refused them entry. Hence the decision’s implementation
(which maintained them outside of France) could not modify their situation. It is also interesting to note that the three Iranians had been deferred to a criminal court in Bobigny for breaching the law regulating the entry and residency of foreign nationals. The Bobigny court had authorized them to reside in France temporarily (Robert, 1984).

These two contradictory rulings worked to the State’s advantage: the international zone was both France and not France at the same time, according to the direction of the border crossing. When it came to returning someone to a country of origin or a third country the international zone was France, and foreign nationals refusing to embark could be subject to criminal prosecution for illegally staying in the country while in the international zone. However, for foreign nationals arriving from another country and landing in Charles de Gaulle, the international zone was not France yet. This interpretation allowed the French government to argue that non-citizens were not to be subjected to the regular legal provisions (Gisti, January 1989). Article 35 bis of the 1945 Ordinance could not apply to them since the international zone was located outside of France and French laws only applied to French territory (Lochak, 1992, 681-682). Such an absurd situation led Bourguet (1992) to refer to the detention spaces at the airport and at the Arcade hotel as the “nowhere country”.

Conclusion

The history of French airports’ international zones illustrates how governments create extra-territorial legal fictions and the danger they pose to individuals who find themselves in these spaces. It corroborates Del Valle Galvez’s (2005) observations: extra-territorial legal fictions establish an internal no man’s land and raise issues of legal insecurity and the absence of legality. They result in the non-
application, or at least incomplete application, of the domestic and international norms regarding immigration and asylum that bind states.

French border authorities’ practices in the 1980s and early 1990s bear resemblance to practices that occurred in other countries at different points in time. Just like France, Australia engaged in excision: in both countries governments “erased” certain parts of the territory for immigration regulation purposes (Shachar 2007). As Shachar (2007, 1) observes, excision enables immigration authorities to redefine the country’s border “[…] in response to perceived threats by unauthorized migrants and high-risk travelers”. Australia’s Excision from Migration Zone Act of 2001 allowed authorities to treat asylum-seekers landing in excised areas as if they had never entered Australian territory, enabling removal and preventing judicial review (Shachar 2007). Australia and France both resorted to the legal maneuver of excision to remove some parts of their territory from domestic and international guarantees applicable to non-citizens. While in the Australian case exclusion was organized through the law, in the French case exclusion, just as in the case of Guantánamo Bay, was rather the result of a “carefully constructed legal absence” (Reid-Henry 2007, 630). In both cases, a piece of land was declared (by law or in practice) outside of sovereign territory for immigration control purposes.

French airport international zones were deliberately placed outside of the reach of the law. Similarly, the US government established Guantánamo as a space devoid of laws. Reid-Henry explains: (2007, 629):

Having thereby historically reconstructed GBC as a physically unique space, Philbin and Yoo then further continued to excise the American Camp located there (GITMO) from previous legal agreements, such as those extending workers rights to all American overseas bases; those regarding the application of tariffs to US overseas territories and those confirming the rights of former detainees of the very cell blocks that were soon to be re-furnished and augmented for the present purpose.
Foreign nationals detained at French borders were rendered without rights by French authorities. As Arendt (1968) has demonstrated, human beings who are stripped of their status of legal subjects no longer belong to a political community and lose their dignity along with their very place in the world (Caloz-Tschopp, 1993). In the 1980s non-citizens stranded at French borders were detained in a legal limbo. To use Paik’s terminology (2016), the French government “manufactured rightlessness”. Although referring to a different geographic area (camps located on US soil and at Guantanamo), Paik’s analysis illuminates the situation of foreign nationals detained at French airports in the 1980s. Paik points out that Guantanamo is not a lawless space: laws actually apply to this territory. However, there are different kinds of overlapping legal regimes. The US government has exploited these legal ambiguities or complexities to claim that Guantanamo is a legal void, where neither Cuban nor US law applies, and therefore nor international law. Similarly, the French government used to detain individuals at airports in a legal void, in spite of applicable laws. In the next chapter, I will trace how the Law on the Waiting Zone, a parallel and less protective legal framework premised on extra-territoriality, was established through regular democratic processes.
Chapter 2. The birth of waiting zones or the manufacturing of an illiberal law through regular democratic mechanisms

Introduction

Non-citizens in the international zone ceased to be detained in a legal void as of July 6, 1992, when the Law on the Waiting Zone was finally passed. The government presented this new legislation as significant progress: France was setting a fine example in terms of rights protection. Yet, the Law on the Waiting Zone offered a less advantageous legal framework to non-citizen populations compared to the one previously in place (i.e. article 35 bis of the 1945 Ordinance). Under this new law, detainees were to be presented to a judge after four days in the waiting zone (compared to one day previously) and could not spend more than 20 days in the waiting zone (confinement was limited to seven days previously). Furthermore, the Law on the Waiting Zone established a parallel and less protective system of rights based on the distinction between physical and legal entry. Before the Law on the Waiting Zone came into existence, the same legislative provisions applied to all foreign nationals detained for immigration control purposes: the law did not establish any distinction between those at French borders and those already deemed to be on French territory. Non-citizens all benefited from the same rights. This equality before the law ended in 1992, with the Law on the Waiting Zone. Since this time, foreign nationals arriving at the border have been subjected to a watered-down legal framework compared to the one applicable to their counterparts already deemed to be on French soil (who are either applying for asylum or are to be removed after being caught for staying illegally in the country). This less advantageous legal regime was precisely premised on the idea that international zones, renamed “transit zones” and
then “waiting zones”, were somehow extra-territorial spaces. The Law on the Waiting Zone did not dispel the ambiguity surrounding the status of this space in stakeholders’ minds.

But how could a parallel system of rights be established in a liberal democracy bound by international human rights and refugee conventions? In this chapter, I will pay heed to the observation made by some scholars that liberal government and authoritarian practices are not mutually exclusive, but rather two sides of the same coin (Hindess, 2001, 94). As Dean (2002, 38) writes,

(…) governing liberally does not necessarily entail governing through freedom or even governing in a manner that respects individual liberty. It might mean, in ways quite compatible with a liberal rationality of government, overriding the exercise of specific freedoms in order to enforce obligations on members of the population.

These observations have translated into concrete lines of enquiry: European scholars have recently identified illiberal practices in EU member states and offered recommendations to end them (Bigo et al, September 2009). I will trace how the framework of the waiting zone was made possible through regular democratic mechanisms (Basaran, 2011). Both parliament chambers approved the government bill, in spite of some parliamentarians and civil society actors vigorously protesting against both procedure and content of the legislative provision. The Constitutional Council, a domestic moral authority, approved the government’s extra-territoriality thesis indirectly. This court found that non-citizens confined at the border did not experience the same degree of constraint as those confined on the territory. The former were therefore deemed less worthy of protection than the latter. Ironically, this less protective framework based on the concept of extra-territorial presence in the waiting zone was the direct product of activism that sought to oppose detention in a legal void. The history of the birth of the waiting zone illustrates the dangers (or
ambiguities at best) of activism using “the tools and grammar of law” (Makaremi, 2009 a, 428) and proves Belcher and Martin’s (2013) point: law is not always liberal. In fact, as Basaran (2011) demonstrates, law is a technique of government that can be used to take away fundamental rights from certain populations. She explains:

The government of populations called migrants develops its effectiveness, precisely by embedding the limitation of liberties within the legal framework. Migrants are not outside the law, but embedded and produced through it, similar to previous segregation and exclusion policies that provided a specific legal framework for particular populations (2011, 105).

This chapter will highlight the political nature of the law. I will first describe the context and content of the Marchand amendment. As I will argue, it is important to study the history of this legislative provision, even though it was partly censored by the Constitutional Council. Indeed the Marchand amendment is truly the ancestor of the 1992 Law on the Waiting Zone: the latter derives its main features and philosophy precisely from the former. Both are premised on the idea that non-citizens arriving at the border do not need the same rights as their counterparts who are already deemed to be on French territory. I will then proceed to demonstrate that the ambiguous status of the transit zone persisted with the Marchand amendment and the subsequent Law on the Waiting Zone. I will also analyze the government’s justifications for the amendment. It will be my contention that the Constitutional Council played a significant role in the manufacturing of this illiberal law. Finally, I will highlight how litigation crises resulted in the broadening of the definition of the waiting zone.

I. Context of the Marchand amendment

As explained in chapter 1, activist lawyers started to sue the Ministry of the Interior from 1988 for arbitrary detention of foreign nationals in the international zone. The judge who heard the cases had a limited mandate: putting a stop to an
illegal administrative practice resulting in a severe violation of fundamental rights. The judge could therefore only order the government to put an end to confinement in the international zone. Until November 1991, these trials did not affect the government, who always instructed border authorities to return or admit to the territory the foreign national in question before the hearing took place. The situation finally changed when the Paris court of first instance issued a very unusual ruling. On November 22, 1991, the court allowed a Haitian asylum-seeker to sue the Ministry of the Interior for “arbitrary sequestration” and monetary compensation even if he had been admitted to France in the meantime. Faced with challenging upcoming litigation, Philippe Marchand, the Socialist Minister of the Interior at the time, decided to draft a legal provision ("the Marchand amendment") addressing the situation of non-admitted foreigners in the international zone, which he renamed “transit zone” (cf section IV). While laws cannot apply retroactively, he hoped that this legislation would shield the Ministry from further legal troubles. As I will demonstrate throughout this dissertation, the French government has always passed laws regulating the status of persons held in the international (and then waiting) zone as a result of legal action. The Marchand amendment was an ad hoc response to a legal crisis.

As the parliamentary session drew to a close, Marchand hastily introduced this new legal provision as an additional article (7 bis) to a bill under discussion at the National Assembly. MPs were debating a government bill whose purpose was to modify domestic law in order to align it with the requirements of the Schengen Convention (signed by France on June 1990 and ratified on July 1991) pertaining to the entry and deportation of unauthorized foreign nationals and to the carriers’ responsibility framework. Indeed, the Schengen Convention had significantly redefined borders of contracting parties. States had pledged to abolish borders internal
to the territory to which the Schengen Convention applied, and to tighten external
ones: they had committed to shift border control from internal to external borders to
create an internal area of free movement (article 2 and 4). With the Schengen
Convention, each state party had become responsible for guarding other parties’
borders (article 4). Importantly, the Schengen Convention had also established the
carrier responsibility framework (cf chapter 7 for extended discussion). Under article
26, states had agreed to inflict financial penalties on carriers bringing inadequately
documented individuals to their gates. Carriers had also been obliged to return non-
admitted passengers. As the numbering “bis” indicates, the Marchand amendment
was grafted onto an already existing provision (article 7). This provision’s purpose
was to incorporate some elements of the carrier responsibility framework into national
law\textsuperscript{14}.

The bill under discussion also aimed to introduce non-Schengen related
provisions to curb immigration. The goal was to increase the effectiveness of the
measures in place to remove those staying irregularly on French territory. The
government had declared the fight against illegal immigration an important objective
during a Ministers’ meeting in July 1991. The bill proposed to penalize foreign
nationals staying on French territory after their tourist visas had expired and to deport
those who overstayed their residence permit for more than a month (French National
Assembly debates, December 19, 1991). The history of the Marchand amendment,
and of the subsequent Law on the Waiting Zone, is intertwined with the construction
of the Schengen area’s external borders and restrictive domestic migration laws.

\textsuperscript{14} Article 3 of the bill under discussion sought to incorporate financial sanctions against carriers into
domestic law while article 7 aimed at obligating companies to transport back the non-admitted
passengers and to pay for their living expenses before return.
The Minister of the Interior introduced the legislative provision on the transit zone at the end of the parliamentary session, after a declaration of emergency. This way of proceeding allowed the government to minimize preliminary checks. The domestic human rights commission, which was scheduled to examine the provision the following day, had not had the time to issue recommendations (French National Assembly debates, December 19, 1991, 8268). MPs were therefore forced to ponder the amendment in the absence of the commission’s report. Furthermore, introducing the bill as an amendment allowed Marchand to dispense with debates at the Council of Minister and with consultation at the Council of State. MPs from the right-wing opposition disapproved of the way the government introduced the transit zone provision (French National Assembly debates, December 19, 1991, 8266 and 8268).

More significantly, Socialist senators, i.e. from the same political party as the government, also protested. They lamented that the human rights commission could not express its opinion on the matter (French Senate debates, January 16, 1992, 206). Senator Guy Allouche observed that the government bill should have been submitted to the Council of State. According to Allouche, careful consideration should have prevailed as the bill touched upon the fate of thousands of human beings hoping to enter France or Schengen area countries (French Senate debates, January 16, 1992, 207). Michel Dreyfus-Schmidt, another Socialist senator, regretted such hastiness, which prevented careful consideration of the bill (French Senate debates, January 16, 1992, 233).

As for NGOs and counsel representing foreign nationals, they considered the amendment procedure a ploy to shield the government’s legal proposal from ordinary scrutiny. While they acknowledged that the amendment was related to the bill under discussion (in the sense that both aimed to modify the 1945 Ordinance) they argued
that the modifications and additions brought by article 7 bis exceeded by far the limits inherent to the government’s right of amendment, as defined by the Constitutional Council jurisprudence. Resorting to the amendment procedure allowed the government to skip the Council of Ministers’ debate as well as the Council of State’s consultation (Anafé et al, letter to the President of the Constitutional Council, January 28, 1992, 1-215). The plaintiffs’ lawyers, who were suing the Ministry of the Interior for arbitrary sequestration, vigorously denounced the government’s arguments. They wrote a letter to Parliamentarians on January 21, 1992 in which they remarked that the hearing date of the case (i.e. January 26, 1992) had been known since November 1991. The government could have, therefore, included the transit zone provision into its bill from the beginning. The provision would have then been examined under normal conditions and it would have been possible to have a serious democratic debate. But instead the Ministry of the Interior waited for December 18, 1991, the day before the National Assembly was due to debate the proposed bill, to introduce the provision via an amendment.

Yet, in spite of this discontent, the bill went through the law-making machinery unusually quickly. The amendment was submitted to the National Assembly for debate and adoption on December 19, 1991. The National Assembly law committee (Commission des lois de l’Assemblée Nationale) had revised it the day before. The National Assembly adopted the text after the first reading. It then made its way to the Senate on January 16, 1992; the high chamber also adopted it after the first reading. Then both chambers worked together on improving the text. They both agreed on the updated version (which was adopted by the National Assembly on January 21st and by the Senate on January 22nd). The Constitutional Council declared

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15 The following organizations wrote to the President of the Constitutional Council: Anafé, Cimade, France Terre d’Asile, GISTI and the Ligue des Droits de l’Homme.
the Marchand amendment partly incompatible with the Constitution on February 25, 1992. The government bill, expunged of the Marchand amendment, became the law of February 26, 1992. As for the provision on the transit zone, it finally came to being through the Law on the Waiting Zone of July 6, 1992. Table 1 below helps situate these developments chronologically.

Table 1. The Law on the Waiting Zone in context

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>First oil shock</td>
</tr>
<tr>
<td>5 July 1974</td>
<td>The French government decides to stop recruiting foreign workers.</td>
</tr>
<tr>
<td>1980s</td>
<td>Significant increase in the number of individuals seeking international protection in Council of Europe member states. Confinement of non-citizens denied entry into French territory and of asylum seekers for extended periods of time in the international zone of Paris airports in a legal vacuum.</td>
</tr>
<tr>
<td>1983</td>
<td>The National Front appears on the French political scene: makes inroads in local elections.</td>
</tr>
<tr>
<td>1984</td>
<td>The Council of State rules that the international zone is not French territory. Case of Eksir.</td>
</tr>
<tr>
<td>1987</td>
<td>The Final Court of Appeal rules that the international zone is a part of French territory. Case of Youssef</td>
</tr>
<tr>
<td>1988</td>
<td>The Parliamentary Assembly of the Council of Europe expresses concerns regarding the measures adopted by member states to limit the arrivals of asylum-seekers</td>
</tr>
<tr>
<td>1989</td>
<td>Activist lawyers start suing the Ministry of the Interior (MI) for arbitrary detention of foreign nationals in the international zone. The judge has a limited mandate and can only order the government to put an end to confinement in the international zone. These trials do not affect the MI, who always instructs border authorities to return or admit to the territory the non-citizen in question by the date of the trial. The point of contention therefore always disappears by the hearing date.</td>
</tr>
<tr>
<td>June 1990</td>
<td>France signs the Schengen Convention</td>
</tr>
<tr>
<td>July 1991</td>
<td>France ratifies the Schengen Convention</td>
</tr>
<tr>
<td>22 November</td>
<td>The Paris court of first instance allows a Haitian asylum-seeker to sue the MI for arbitrary sequestration and monetary compensation, even if he has been admitted to France in the meantime.</td>
</tr>
<tr>
<td>19 November</td>
<td>The Marchand amendment is submitted to the National Assembly for debate and adoption.</td>
</tr>
<tr>
<td>19 December</td>
<td>The Marchand amendment is submitted to the National Assembly for debate and adoption.</td>
</tr>
<tr>
<td>25 February</td>
<td>The Constitutional Council declares the Marchand amendment partly incompatible with the Constitution</td>
</tr>
<tr>
<td>26 February</td>
<td>The Paris court hears the arbitrary sequestration case</td>
</tr>
</tbody>
</table>
I will now discuss the content of the Marchand amendment.

II. The Marchand amendment: a less protective provision premised on extraterritoriality

Article 7 bis intended to legally regulate (yet again) the detention of foreign nationals and asylum seekers in the international zone, which was renamed “transit zone”. The proposed legal provision applied to non-citizens, who were turned away at a French air or sea border (9044 individuals in 1990) as well as to individuals claiming asylum at these borders (690 asylum-seekers had gone through the international zone of airports in 1990 during the review of their claim\textsuperscript{16}). It also applied to passengers who found themselves stranded in transit zones after having been sent back to France by their country of destination or who were refused boarding to another destination by the carrier. The transit zone was broadly defined as encompassing the space between boarding or landing and border control. It could also encompass one or several accommodations located on the airport or seaport compounds. The task of precisely delineating the transit zone was left to an administrative authority, (the prefect -préfet) which was granted tremendous leeway as no specific distance or radius was specified for the accommodation. The non-citizen detained in the waiting zone could ask for the assistance of an interpreter or a

\textsuperscript{16} These numbers were given by the Minister of the Interior to MPs (French National Assembly debates, December 19, 1991, 8255-8256).
doctor and communicate with any person of his choosing. The public prosecutor (immediately informed of the decision to detain) could check the detention conditions at any time.

Compared to article 35 bis in force at the time (cf chapter 1), the Marchand amendment provided significantly fewer guarantees to foreign nationals confined in the transit zone. This was particularly striking on two points. The amendment did not set any time limits to detention in the transit zone (compared to a seven day maximum under article 35 bis). A non-admitted foreign national and asylum-seeker could be detained “for the time strictly necessary for his departure or for the examination of his asylum claim” (French National Assembly debates, December 19, 1991, 8279). Under article 35 bis, detainees had to be presented to a liberty and custody judge after one day of confinement. By contrast, the Marchand amendment did not provide for any judicial oversight.

The National Assembly Law Committee suggested several significant modifications. Michel Pezet, rapporteur of the law committee, observed that under the Marchand provision asylum-seekers could spend months in the transit zone while the refugee agency determined their status. Indeed, under the amendment, asylum-seekers “claimed asylum at the border”. On behalf of the law committee, he suggested that asylum-seekers should instead seek permission from the Ministry of the Interior to enter France in order to file an asylum claim on French territory. This would shorten their wait in the transit zone to a few days. The law committee also suggested that the duration of detention be capped at 20 days. Importantly, only an administrative judge could then decide to prolong the detention for ten more days. This brought the maximum time in the transit zone to 30 days. The law committee also suggested that the hearing before the administrative judge took place in the transit zone where the
non-citizen was held. The government agreed to these modifications and the updated bill arrived before MPs on December 19, 1991.

According to activist and law professor Lochak (1992, 682), the Marchand amendment (i.e. the ancestor of the law on the waiting zone) reflected a significant shift in the government’s approach to the international zone: this space was finally considered part of French territory. Before the amendment, the government clung to the argument according to which article 35 bis could not apply to the international zone due to the extra-territorial status of this space (Lochak, 681). In other words, French laws could only apply to French territory and the international zone was not French territory. Foreign nationals stranded in the international zone encountered themselves in an indeterminate space, literally outside of the law, excluded from its protective reach. Makaremi (2009 a) concurs with this analysis. In fact, most actors working today in and on the waiting zone consider the extra-territoriality issue to have been solved a long time ago, precisely when the Law on the Waiting Zone came to force (cf chapter 3). The Marchand amendment can be read as the French government’s acknowledgment of its sovereignty over the transit zone. By bringing back the individuals held in the international zone under the purview of the law, the government implicitly recognized that the transit zone was in France.

Yet, it is my argument that the initial construction of the international zone (renamed “transit zone”) as an extra-territorial space persisted with the Marchand amendment and the subsequent Law on the Waiting Zone, albeit in a different form. Prior to the Marchand amendment, the law provided foreign nationals detained for immigration control purposes with the same guarantees, be they located on French territory or at its borders. The Marchand amendment put a stop to this, differentiating between non-citizens already on French territory and those arriving to France,
providing the latter with significantly fewer guarantees. This less protective legal framework was precisely built on the premise that non-citizens and asylum-seekers who were rejected at the border found themselves at the threshold of, but not having yet entered, French sovereign territory. Marchand’s entire argumentation in defense of his legal provision was based on the idea that individuals in transit zones had not yet arrived in France. Before the National Assembly he argued that foreign nationals in the waiting zone were not detained since they were not on French territory (French National Assembly debates, December 19, 1991, 8256). Contrary to those detained on French territory, non-citizens in transit zones were free to move and therefore did not need the same guarantees as foreign nationals confined on French territory. He said that, although public opinion saw the transit zone as French territory, it was actually an airport zone (zone aéroportuaire).

Marchand refused to use the same vocabulary to describe confinement on the territory under article 35 bis and in the transit zone. While article 35 bis talked about rétention (a term that can roughly be translated by “detention” in English), Marchand insisted that the term maintien (holding) should be used regarding the transit zone. This different vocabulary was meant to convey the idea that foreign nationals in transit zones experienced a greater degree of freedom than their counterparts detained on French territory under article 35 bis of the 1945 Ordinance. Marchand claimed that non-citizens only faced one closed door in transit zones: that leading to French territory (French Senate debates, January 16 1992, 235). As the argument went, foreign nationals were free to leave the transit zone at all times for any other destination of their choosing. Lochak (1992, 687) debunked the government’s argumentation: as she pointed out, under the rétention regime the foreign national was also free to leave at any time for any other destination. Furthermore, she remarked
that for this freedom to be exercised, the non-citizen had to find a willing host country as well as a means of transport, which made it quite hypothetical. To convey the idea that the distinction between confinement under article 35 bis and confinement in the transit zone is artificial and unjustified, I use the English term “detention” to refer to both situations. This differentiation was created by the government and legitimized by the Constitutional Council to grant fewer rights to non-citizens at the border than to those already considered on French territory.

Arguing that the transit zone configuration was fundamentally different made sense for the government for numerous reasons. It justified the assertion that there was indeed a legal vacuum; foreign nationals could not be detained under article 35 bis of the 1945 Ordinance since their situation was completely different. A new law, especially tailored to them, was therefore necessary. The bill also proposed to abrogate article 35 bis. Along the lines of this logic, since foreign nationals in transit zones experienced deprivation of liberty to a much lesser extent, there was no reason why they would benefit from the same guarantees as those in rétention. Marchand misled parliamentarians, insisting that the transit zone was an accommodation zone without any prison-like character. One MP from the right-wing Opposition, Francis Delattre (French National Assembly debates, December 19, 1991, 8259), disagreed with this assessment and did not hesitate to call transit zones “internment camps” (camps d’internement). The response he received from Pezet, the National Assembly law committee rapporteur (i.e. himself an MP), revealed that parliamentarians had received erroneous and biased information from the government. Based on information provided by the Ministry of the Interior, the rapporteur replied that hotels could be found in transit zones. He explained that the domestic refugee agency, healthcare providers, consulates and embassies all had offices in these hotels. In
addition, interpreters and lawyers could be consulted on site (French National Assembly debates, December 19, 1991, 8259). This idyllic vision did not match reality as the aforementioned trial before the Paris court of first instance revealed. Likewise, the government’s contention that non-citizens could freely circulate in the transit zone was debunked at the trial where it became clear that asylum-seekers were locked up in hotel rooms and subject to constant police surveillance (Paris Court of first instance, hearing, February 26, 1992). Allouche, a Socialist senator was amazed to discover that non-citizens were detained in transit zones when watching a TV documentary (French Senate debates, January 22, 1992, 392).

Some parliamentarians agreed with the government’s argumentation while others refused its logic. Paul Masson, rapporteur at the Senate (French Senate debates, January 16, 1992, 212) claimed that, unlike in rétention, the non-citizen was not locked up in transit zones, as he “freely circulated in a large perimeter defined by the administrative authority”. Gérard Gouzes (French National Assembly debates, January 21, 1992, 63) a Socialist MP, also argued that there was a fundamental difference between detention in the transit zone and under article 35 bis: in the transit zone the “migrant” (his term) was free to go to his country of origin at any time. The two situations could not be compared. Charles Lederman (a Communist senator) protested against the proposed duration of detention in the transit zone (French Senate debates, January 16, 1992, 232). He referred to the opinion expressed by the Constitutional Council on September 3, 1986: the Council had found that systematically detaining foreign nationals under the rétention regime, who were to be removed for three more days (i.e. on top of the seven days already provided for by the law), ran against the Constitution. The Council had concluded that when it was difficult to deport the foreign national, extending the detention for three extra days,
even under judicial oversight, infringed upon individual liberty guaranteed by the
Constitution. Exceptions could only be tolerated in cases of absolute emergency or in
the presence of a particularly significant threat against public order (Lochak, 1992,
686). Masson dismissed Lederman’s point by arguing that the Council’s opinion was
not applicable to the matter at hand: once again, being in the transit zone was different
from being in rétention (French Senate debates, January 16, 1992, 232). Stakeholders’
different understandings of the status of the transit zone proved that the Marchand
amendment did not clarify the status of this space.

III. Persisting ambiguity regarding the status of the transit zone

The status of the international zone was anything but clear in the 1980s, when
the highest courts of the country ruled that this space was both inside and outside of
France (cf chapter 1). Minutes from the parliamentary debates reveal that the
Marchand amendment did not put an end to the transit zone’s ambiguous status. MPs
and senators grappled with this notion and had diametrically opposed understandings.
For example, Pezet (French National Assembly debates, December 19, 1991, 8259),
the French National Assembly law committee rapporteur, wondered in which part of
the territory individuals found themselves after disembarking from the plane and
before crossing border checks. He highlighted that they were not in France under
financial provisions; the entire body of French law was not meant to apply to
individuals just because they landed on French territory. However, French criminal
laws did apply. He concluded by noting the complexity of the transit zone. In contrast
to Pezet, Socialist senator Allouche observed that the government wanted to
transform a rightless zone into a zone where national law applied, “even though we do
not really know if it is French territory!” (French Senate debates, January 22, 1992, 391).

In contrast to both these positions, François Colcombet, an MP, comprehended the transit zone as a part of French territory. He said:

The new article 35 quater of the 1945 Ordinance gives a legal framework to the situation of foreign nationals who, arriving by air or sea, are not admitted to enter French territory, or, more precisely, are not allowed to leave the transit zone, because they are indeed on French territory and not in an intermediary zone, like characters from Orphée’s testament who dwell between life and death. If a woman were to give birth in the transit zone, the child would be registered in France. Likewise, if an offence were committed, French police and judiciary would be competent17 (French National Assembly debates, January 21, 1992, 67).

NGOs noted that the amendment did not solve the extra-territoriality question. Several organizations promoting human and non-citizens’ rights wrote to Robert Badinter, then president of the Constitutional Council18. They denounced the amendment’s inconsistencies by observing that there were only two possible scenarios; either the transit zone was geographically part of French territory as ruled by the Final Court of Appeal in 1987 (Youssef) or it was not, as ruled by the Council of State in the Eksir decision in 1984. If law-makers decided to abide by the Youssef ruling and therefore to exercise their competence over this space then what was the rationale for subjecting foreign nationals in the transit zone to a different law than that applicable to those on the rest of French territory? Why would they be governed by a law which would be less protective of their liberties? The implications of the second scenario were also far-reaching: acknowledging that the transit zone was not part of French territory meant that article 7 bis was contrary to the constitution as law-makers

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17 The Marchand amendment intended to modify domestic legislation by inserting an article 35 quater in the 1945 Ordinance.

18 The following organizations signed the letter: Anafé, Cimade, France Terre d'Asile, GISTI, and the Ligue des droits de l'homme.
were not competent to adopt it. Indeed neither lawmakers nor administrative authorities had the competence to pass a law that applies beyond national territory or take individual decisions implementing such law (NGO letter to the President of the Constitutional Council, January 28, 1992, 5).

IV. The government’s justification for the amendment: emphasis on progress, security and the upcoming litigation’s danger

The government presented the amendment as necessary for striking a balance between individual liberties and border control and security (French Senate debates, January 16, 1992, 229). Marchand portrayed France as an exemplary, progressive country in Europe in this regard: France would be the first country to provide a legal status and safeguards to individuals held in transit zones, promising that they would not spend more than 30 days in these spaces (French National Assembly debates, January 21, 1992, 71 and December 19, 1991, 8256). Gouzes, president of the National Assembly Law committee, described the situation of non-admitted travelers in other countries’ transit zones. According to him, non-admitted passengers could be detained in prison in Ireland, Denmark and the United Kingdom, while in Germany and the Netherlands they could be detained in police premises at the airport (French National Assembly debates, December 19, 1991, 8271). Marchand insisted that his legal provision would place France far ahead of its neighbors in terms of legal protection in the transit zone. He explained that the government had decided to give a legal basis to what was currently an administrative practice (French National Assembly debates, December 19, 1991, 8256). The Paris court of first instance that heard the arbitrary sequestration case expressed outrage precisely at the government’s efforts to give a legal base to an illegal administrative practice harmful to individual
liberties (Paris court of first instance, February 26, 1992). Appalled by the procedure, the court declared the Ministry of the Interior’s attempt to turn an illegal administrative practice into an acceptable one through law making as incompatible with the rule of law.

Security loomed large in the Minister of the Interior’s discourse: he was adamant that freedom of movement neither could nor should run against the State’s security. Freedom of movement should not mean the loosening of migration controls. He emphasized that some non-admitted foreigners were undesirable (i.e. individuals whose presence would be a threat to public order, or who had been banned from the territory or against whom a deportation order had been taken). The Minister of the Interior used the upcoming legal proceedings to his advantage, referring to them to create a sense of urgency. He warned senators that state practices could be found illegal. He argued that, should this possibility materialize, discarding the transit zone’s legal provision would be tantamount to suppressing border control. Indeed, if article 7 bis was not adopted and the plaintiffs won the case, no foreign national could be detained in the transit zone. As a consequence, all non-admitted passengers and asylum-seekers would have to be granted entry even if they did not fulfill the criteria. Marchand raised the specter of invasion: a familiar trope associated with calls to increase border control. He claimed that the disappearance of French borders would translate into several thousands of individuals coming to France each year. These people would swell the ranks of illegal workers residing in the country without authorization. This uncalled-for situation would be against the State’s interest (French Senate debates, January 16, 1992, 229-230).

Prime Minister Edith Cresson reiterated that the transit zone provision resulted from a legal crisis. When the president of the human rights commission wrote her a
letter expressing his dissatisfaction about the commission not being able to offer its opinion to parliamentarians, Cresson replied that the government could not wait for the commission’s report due to the looming trial date (letter of the Prime Minister to the president of the domestic human rights commission, January 16, 1992). She clearly stated that the government’s decision to legislate on the transit zone was triggered by the court of first instance’s November ruling allowing the plaintiffs to sue the Ministry of the Interior on the merits of their case. As she candidly admitted, at first the government had no intention to pass a law on the transit zone: the situation had not been challenged before national courts or the European Court of Human Rights. She argued that it was a government leader’s responsibility to make sure civil servants did not have to act illegally for extended periods of time. Therefore, the government could not wait for the spring parliamentary session. This unsettling admission on the part of the French government—*that it did not care about respecting the rights of foreign nationals as long as there were no legal proceedings involved*—will be found over and over again in the history of the Law on the Waiting Zone.

I will now examine the role that the Constitutional Council played in the birth of the Law on the Waiting Zone.

V. The role of the Constitutional Council in the manufacturing of an illiberal law

Interestingly, while Socialist Party MPs adopted the government’s bill at the first reading in December 1992, Socialist senators refused to support the text when it came to the Senate for the first and second readings on January 16 and January 22, 1992. Other political groups cast a positive vote and the bill was approved in spite of the Socialist Party senators’ Opposition. Yet, the minutes from the parliamentary debates reveal that Socialist senators supported the gist of the transit zone provision:
they agreed it was necessary to control borders. As such, they opposed the Communist group’s request to delete article 7 bis, as they agreed with the spirit of the bill (French Senate debates, January 22, 1992, 230). The Socialist senators were uncomfortable with the maximum length of time spent in the transit zone (thought to be excessive) and favored the intervention of a liberty and custody judge rather than an administrative judge to extend the duration of detention. During the first reading, Allouche, speaking on behalf of the Socialist group, explained that the Socialist senators would back the amendment only if the government promised to refer it to the Constitutional Council (French Senate debates, January 16, 1992, 207). Allouche requested a clear answer from Marchand, but was not given one. He reiterated his request at the second reading, making it very clear that the Socialist group’s vote depended on the government’s favorable response.

According to French law, two different actors are entitled to refer a legislative text to the Constitutional Council: the Prime Minister and a group of 60 Parliamentarians -either MPs or senators- (Constitutional Council website, accessed January 2015\(^\text{19}\)). The Socialist group at the Senate counted enough members to fulfill the requirements: Why did the senators not refer the bill to the Constitutional Council? Allouche explained that he preferred the former option, arguing that it was in the government’s interest: by referring the bill to the Constitutional Council itself, the government would shield itself from any criticism (French Senate debates, January 22, 1991, 392). The bill was passed without the Socialist senator’s blessing and became a law. However, confronted with significant opposition both inside and

\(^{19}\) [http://www.conseil-constitutionnel.fr](http://www.conseil-constitutionnel.fr)
outside of parliament, the government decided to refer the Marchand provision to the Constitutional Council.

The French Constitutional Council (Conseil Constitutionnel), established in 1958, “is a court vested with various powers, including in particular the review of the constitutionality of legislation” (French Constitutional Court website, accessed January 19, 2015). The circumstances under which the Constitutional Council was tasked to review the constitutionality of the proposed legislation on the transit zone were unheard of. Until now, opponents to legislation had introduced referrals (Genevois, 1992). In stark contrast, Edith Cresson, Socialist Prime Minister, who therefore belonged to the same government that introduced the Marchand amendment, referred the amendment to the Constitutional Council on February 25, 1992. The Council’s decision was released on the same day.

The Constitutional Council examined the Marchand amendment under two aspects: the right to liberty and the right to seek asylum (both protected under the French Constitution). Importantly, the Council endorsed the government’s contention that detention in the transit zone and in rétention were of a different nature: it found that foreign nationals detained (the word used by the Constitutional Council is not detention but holding -maintien) in the transit zone under the proposed article 35 quater were not subject to the same degree of constraint as those placed in administrative detention under article 35 bis of the 1945 Ordinance. Nevertheless, the Council found that the amendment infringed upon the right to liberty because the responsibility to extend the duration of detention rested on the administrative judge, not the liberty and custody judge. Indeed the French Constitution of 1958 (article 66, still in force today) tasked the latter with upholding individual liberties, not the former. As for the right to asylum, the Council found that the Marchand amendment
was compatible with this constitutional right, provided that the asylum-seeker’s detention in the transit zone only occurred for the time necessary for the claimant to be returned, if the claim appeared to be manifestly unfounded. The Council censored part of the Marchand amendment but legitimized its very rationale. The court thus contributed to creating an exceptional legal framework for individuals detained in the transit zone. The Council gave legitimacy to the government’s bill, thereby soothing the conscience of parliamentarians who were unsettled by the Marchand provision. It played a significant part in the birth of the subsequent Law on the Waiting Zone.

VI. The Law on the Waiting Zone from 1992 to 2016: successive extensions of the definition of the waiting zone following litigation crises

In March 1992, the Paris court strongly condemned the government’s efforts to turn an illegal administrative practice, harmful to individual liberties, into a law. Yet this is precisely what happened. Partly censored by the Constitutional Council, the Marchand amendment was modified and became the Law on the Waiting Zone of July 6, 1992. Such a law gave a legal framework to the administrative practices of detention outside of article 35 bis of the 1945 Ordinance and abolished the provisions of article 35 bis pertaining to the detention of foreign nationals turned away at borders. Although the final version of the waiting zone provision was more protective than the initial Marchand amendment, it still granted significantly less protection to individuals than article 35 bis. The Law on the Waiting Zone gave fewer rights to non-citizens arriving at the border than to those already considered on French soil.

Today, the Law on the Waiting Zone establishes a particular legal regime for non-citizens (French: ‘étranger’) denied entry into French or Schengen territory or claiming asylum at a French border arriving by train, boat or airplane (CESEDA,
2016 articles L221-1 to L224-4). Individuals located in the waiting zone are still not governed by ordinary laws, but instead subjected to its particular legal regime. The regular refugee determination procedures do not apply to asylum-seekers at the border. Unaccompanied minors are denied due process rights that children in France enjoy (Human Rights Watch, April 8, 2014). This parallel – and less protective – legal framework builds on the premise that rejected non-citizens and asylum-seekers at the border find themselves at the threshold of, but not having yet entered French sovereign territory. They find themselves, instead, in territorial border zones where the state establishes the distinction between physical and legal entry: physical presence proves insufficient and only lawful admission amounts to entry into the territory (Basaran, 2011). Individuals falling under the purview of the waiting zone framework are detained during the time necessary for them to be returned or, if they are claiming asylum, to determine whether or not their claim is inadmissible or ‘manifestly unfounded’. As a general rule, only asylum-seekers passing this initial screening will be entitled to enter French territory where claims will be examined on their merits. The Law of July 29, 2015 was adopted to incorporate two European directives of June 2013 pertaining to asylum: the Asylum Procedures Directive (2013/32/EU) and the Reception Conditions Directive (2013/33/EU). Since this law, asylum-seekers may also be admitted to the territory when deemed particularly vulnerable by the refugee agency. When not considered as such, unaccompanied minors seeking asylum still have to pass the “manifestly unfounded test”, save in a very few cases (cf chapter 4).

Since July 1992, the scope of the Law on the Waiting zone has been extended significantly, following litigation “crises”. Initially (in the early 1990s), those denied entry were geographically circumscribed by an administrative authority (le préfet) to
waiting zones, which ran between points of boarding or disembarkation and border checkpoints. These zones could include accommodation located on or nearby the airport, port, or train station. In 2003, the definition of the waiting zone was extended to include accommodation “nearby the place of disembarkation” (article 50 of the Law of November 26, 2003). The definition was also expanded to include any place where an entering non-citizen goes for administrative or medical reasons (Law of November 26, 2003). As a result, the waiting zone status now accompanies the individual, even kilometers from the point of arrival. For example, individuals turned away at the border at Charles de Gaulle (CDG) airport are deemed outside of France under immigration law when presented to a judge at the Bobigny court – located 17 kilometers from the airport – after four days of detention. Trapped by the waiting zone framework, aliens “are not expelled by the border, they are forced to be the border” (Khosravi, 2010, p. 99). Thus the term ‘waiting zone’ refers both to a geographical and legal space.

Interestingly, the 2003 extension of the definition of the waiting zone was prompted by the arrival of 910 refugees (mostly Kurds of Syrian citizenship, who first said they were from Iraq) on the beach of Boulouris on the French Riviera during the night of February 17-18, 2001. The secretary of the relevant administrative authority created an ad hoc waiting zone, that run from the point of disembarkation on the beach to the Fréjus military compound where the refugees were detained. At the time, the law did not sanction the creation of a waiting zone outside of a port, airport or international train station. Law professor Serge Slama explains that the government,

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led by Lionel Jospin, decided to admit all refugees into the territory before the liberty and custody judges handed down their ruling. This decision appears to have been motivated by a conversation with Dominique Simonnot, journalist at *Libération*:

They create a waiting zone of several dozens of kilometers to transport people to the camp. Then all the activist lawyers arrive: Jean-Eric Malabre, Stéphane Maugendre, Dominique Monget-Sarrail, it was the same crowd; (...) they were often somehow related to Anafé, but mostly to Gisti. They go down there, they try to release everybody by appealing to principles. And the case was solved, -I do not know if this story is really well-known: Dominique Simonnot, who was journalist at *Libération*, starts to write articles on this (*Libération* is a respected newspaper in France). She speaks on the phone with someone from the Ministry and lets him know that she is going to publish in *Libération* (an article saying) that lawyers will manage to release all refugees. They get scared and I think it is Matignon (official home to the Prime Minister, this term refers to the Primer Minister in common language), so Jospin, who decides to release them. Anafé had contested the act creating the waiting zone and four years afterwards, years afterwards, the administrative court cancelled it (Interview with Serge Slama, July 2014).

All refugees were released from the waiting zone, except for a dozen, who were believed to be Palestinians (Simonnot and Hassoux, February 21, 2001). Anafé and six other NGOs defending non-citizens’ rights sued the government before the administrative court of Nice for the creation of an illegal waiting zone. The court condemned the government in 2005 and cancelled this ad hoc waiting zone (Administrative court of Nice, December 9, 2005). Meanwhile, the government, anticipating a legal defeat, had managed to expand the definition of the waiting zone with the Law of November 26, 2003. Initiated by Nicolas Sarkozy, then Minister of the Interior, this law aimed at cracking down on illegal immigration.

On paper, there are 67 waiting zones in France, all located in ports, airports and train stations open to international passengers (Anafé, November 2015, 13). Most

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21 Lionel Jospin was Prime Minister from June 1997 to May 2002 when Jacques Chirac was President (from 1995 to 2007). Jospin and Chirac were from different political parties (the former was left-wing while the latter was right-wing). Jospin therefore led the government during times of cohabitation (cf chapter 1).
are not significant crossings and therefore used infrequently. Since 2011 (Law of June 16, 2011), ad hoc waiting zones can also be created when a group of 10 non-citizens arrives in France outside of a border crossing (for example on a beach). In this case the waiting zone will run between places where authorities have found the non-citizens and the closest border checkpoint. Once again, this change in legislation was triggered by a (perceived) immigration crisis: a boat dropped off 123 refugees - mostly Kurds from Syria - in Corsica in January 2010 (Jamet, January 22, 2010). After being placed in detention centers all over the country (in rétention), these non-citizens were released by judges. The latter found that the government had not respected legal procedures. Eric Besson, then Minister of Immigration\textsuperscript{22}, spearheaded the Law of June 16, 2011, whose goal was to enhance both control over immigration and integration of migrants. Referring to the Corsican case, Besson argued that it was necessary for administrative authorities to be able to create temporary waiting zones so that irregular migrants would not abscond and wander around the Schengen area freely (Law commission of the French National Assembly, September 8, 2010). Table 2 below presents the successive extensions of the definition of the waiting zone.

\textsuperscript{22} There was a Ministry of Immigration from May 2007 to November 2010. Aside from this time period, the Ministry of the Interior has been handling matters pertaining to immigration.
Table 2. The Law on the Waiting Zone from 1992 to 2011

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 July 1992</td>
<td>Creation of waiting zones: the Law on the Waiting Zone is passed. Waiting zones run between points of boarding or disembarkation and border checkpoints. They can include accommodation located on or nearby the airport or port. The task of demarcating waiting zones is left to an administrative authority.</td>
</tr>
<tr>
<td>Night between the 17 and 18 of February 2001</td>
<td>The boat <em>East Sea</em> carrying 910 refugees (mostly Kurds of Syrian citizenship) runs aground near the beach of Boulouris, on the French Riviera. The secretary of the competent administrative authority creates a waiting zone that runs between the point of disembarkation on the beach to a military compound, where the refugees are detained. The government decides to release them all before the liberty and custody judges hand down their decision.</td>
</tr>
<tr>
<td>26 November 2003</td>
<td>Extension of the definition of the waiting zone to include accommodation “nearby the place of disembarkation” as well as any place where an entering non-citizen goes for administrative or medical reasons.</td>
</tr>
<tr>
<td>22 January 2010</td>
<td>A boat drops off 123 refugees (mostly Kurds from Syria) in Corsica. After being placed in detention centers all over the country, they are all released by custody and liberty judges, for the government had not respected legal procedures.</td>
</tr>
<tr>
<td>16 June 2011</td>
<td>Extension of the definition of the waiting zone: ad hoc waiting zones can also be created when a group of 10 non-citizens arrives in France outside of a border crossing (for example on a beach).</td>
</tr>
</tbody>
</table>

**Conclusion**

In this chapter, I have traced how a parallel and less protective legal framework, one premised on extra-territoriality, was established through regular democratic processes. The history of the birth of the waiting zone and of its subsequent extensions highlight the difficulties of legal activism. Paradoxically, defending non-citizens through litigation has resulted in significant extensions of the scope of the waiting zone. Each time, the government managed to turn the illegal administrative practice in question into a law. While liberal discourse and the discourse of exception (Agamben, 1998, 2005; Butler 2004) associate deprivation of rights with exception, extra-legality or emphasis on executive powers, these findings illustrate Basaran’s (2011, 109) observation: “The challenge of liberties is inherent to liberal rule and the rule of law, which always contain within themselves the
possibility for limiting liberties, for creating new legal exclusions”. As she and other scholars note, the infringement of liberties is not an anomaly in liberal democracies or a discontinuity with liberal rule. In the following chapters, I will further explore the extra-territoriality notion and argue that the initial construction of the international zone as an extra-territorial space has endured in both mindsets and practices.
Chapter 3. Non-citizens in airports’ waiting zones today: the endurance of exclusion through extra-territoriality

Introduction

Since the birth of the Law on the Waiting Zone in 1992, international treaty monitoring bodies, legal scholars and the European Court of Human Rights (*Amuur vs France*, 1996) have explicitly stated that international zones, or transit zones, are integrally part of the territory of the state on which they are located. Under international law, airports’ transit zones are not extra-territorial spaces. Many people working on or in Charles De Gaulle’s waiting zone think that the legal issues attached to “extra-territorial legal fictions” (Del Valle Galvez, 2005) in the 1980s and early 1990s disappeared when the Law on the Waiting Zone came into being in 1992. To them, the Law on the Waiting Zone represents a striking shift from the previous era, when asylum-claimants and rejected travelers were excluded from legal guarantees based on their presence in geographical spaces construed as extra-territorial. Rémi Rouquette, a lawyer and former lecturer in public law, rejects the use of the term “extra-territoriality” to describe today’s situation (i.e. at the time of data collection in 2013-2014), pointing out that waiting zones are not-extra-territorial zones but places where a different set of rights apply (Interview, February 25, 2014). Christian is a lawyer specializing in the defense of non-citizens in administrative detention (at the border and on the territory). He affirms that courts are no longer wondering whether those in waiting zones are *de facto* on French territory. All ambiguity on this matter has been dispelled (Interview, December 10, 2013). As for Jeanne, who works at the Ministry of the Interior in the department tasked with reviewing asylum-seekers’ applications to enter French territory, she argued that the French government
adequately responded to the critiques mounted against its practices at the borders by creating the Law on the Waiting Zone (Interview, November 2013). To my question “How does the Ministry of the Interior interpret the European Court of Human Rights ruling Amuur versus France?” Jeanne replied:

We do not pay attention to it. It is a ruling from 1996, but events took place in 1992. The waiting zone was created in 1992. We saw that there was a small issue at the time. As usual, the court took its time, but it does not mean that the State did not react. The waiting zones were created in 1992. This is the reason why the law came into existence (Interview, November 2013).

I agree that the establishment of extra-territorial international zones as devices to deflect from domestic and international obligations has been formally rejected in July 1992. When MPs passed the Law on the Waiting Zone, they implicitly acknowledged French sovereignty over the international zone, renamed “transit zone” and then “waiting zone”. From the moment the Law on the Waiting Zone came to force (and was applied) non-citizens stopped being deprived of “the right to have rights” (Arendt, 1968). Furthermore, the excision of airports’ international zones was clearly condemned by the Court of Human Rights in 1996. But was the Law on the Waiting Zone really a cause for celebration and a resolution to a problem? Is the term “extra-territoriality” in fact inappropriate to describe the current situation?

In answering these questions, I will make the following arguments. Firstly, the initial phase of extra-territoriality has endured in mindsets and practices. Amongst individuals working in or on the waiting zone can be found the deeply ingrained idea that the waiting zone is not French territory (at least) for non-citizen populations. This argument, just like in the 1980s and early 1990s, has been used to exclude non-citizens from rights. In other words, some individuals have been denied the protection of international law based on their presence in excised, non-French territory. Secondly, the Law on the Waiting Zone has reinvented exclusion through another
form of extra-territoriality, premised on the non-citizen’s legal status at the border. Although physically in France, rejected non-citizens and asylum-seekers at the border are not present from a legal standpoint, for they have not crossed yet “law’s admission gate” (Shachar 2007). The first argument will be developed in this chapter but the second one will be saved for chapter 4.

In this chapter, I will first review how international law explicitly addressed the status of the international or transit zone at airports. I will then highlight how the international zone may still be a lawless space for those denied access to the waiting zone status. I will also provide evidence to demonstrate that the excision issues attached to the international zone have been transferred to the waiting zone. A possible explanation regarding the causes of this transfer will finally be offered.

I. The case of Amuur vs France (1996): airports’ international zones are not extra-territorial spaces

When the French government established the airports’ international zones as non-French spaces, international law had not directly addressed the status of the international zone yet. Legal scholars had not given much thought to the status of this space (cf chapter 1). This changed when the European Court of Human Rights specifically ruled on June 25, 1996 in the Amuur case that the international zone at Orly airport did not have extra-territorial status. The court found that the Somali asylum-claimants had been illegally deprived of liberty: no appropriate law had authorized their detention.

The Amuur case started at the domestic level when Dominique Monget-Sarrail and her associates Laurence Roques and Pascale Taelman first brought the case to the Créteil court of first instance on March 26, 1992. The day before, the Paris court of
first instance had rejected the government’s extra-territoriality thesis, according to which the government argued that the Arcade hotel at CDG airport was part of the international zone and as such had extra-territorial status (cf chapter 1, the plaintiffs were four Haitian and one Zairian asylum-seekers). It was also about a month after the Constitutional Council had upheld the French government’s contention that confinement in the international zone and on French territory differed on the grounds that the former was less detrimental to individual liberty than the latter (cf chapter 2).

The Law on the Waiting Zone came to force a few months after the Amuur case began. The Amuur case has to be understood as part of a series of trials that activist lawyers launched against the French government from the late 1980s (cf chapter 1 and 2).

When these events unfolded, the European Commission of Human Rights was tasked with filtering the requests to determine their admissibility. The facts of the Amuur case are therefore described in both the Commission’s decision Barir and Amuur against France of October 18, 1993 and in the Court’s ruling Amuur versus France of June 25, 1996. The information given by Monget-Sarail, one of the plaintiffs’ lawyers, complements that provided in these legal accounts. The Amuur case highlights the plight of asylum-seekers detained in international zones, caught in the extra-territorial legal fiction designed by the French government. It reveals that those seeking international protection were particularly at risk of refoulement when arriving at Parisian airport borders.

Four Somali siblings arrived on March 9, 1992 at Paris Orly airport from Syria where they had spent two months after fleeing from Somalia via Kenya. They alleged their lives were at risk in Somalia after the fall of President Siyad Barre. The border police refused them entry on the basis that their passports were forged. They were
placed at the Arcade hotel, which was construed as an extension of the international zone (cf chapter 1). On March 12 the Ministry of the Interior examined their request to enter France to claim asylum. By March 14, 18 other Somali nationals (among which 11 children) had arrived at Orly from Syria and Egypt. Of these 18 Somali citizens, five were cousins of the Amuur brothers and sister. They were all members of the Darob Marhan tribe, which was in power during the regime of President Mohamed Siyad Barre. They explained that several members of their family had been murdered. On March 24 they obtained legal aid after the NGO Cimade (i.e. one of the founding members of Anafè) put them in touch with a lawyer. On March 25, they wrote a letter to the refugee agency (OFPRA) requesting refugee status according to the Geneva Convention of 1951. On March 26, their case was referred to the court of first instance at Créteil on the grounds that their deprivation of liberty was arbitrary.

Lawyers Monget-Sarrail, Roques and Taelman referred the case of the 22 plaintiffs to the European Commission of Human Rights on March 27, 1992. In spite of the President of the European Commission indicating to the French government on March 27 “that it was desirable, in the interest of the parties and the proper conduct of the proceedings, to refrain from sending the applicants back to Somalia before 4 April 1992” (European Court of Human Rights, 1996, 18), the four Amuur siblings were forcibly returned on March 29. The Minister of the Interior had refused them entry. The government bypassed the Commission’s request by returning the applicants to their country of transit, Syria -which was not a party to the 1951 Refugee Convention- instead of Somalia. At the time of their return (March 29), the Somali claimants not yet received the answer from the refugee agency. Their case before the court at Créteil was still pending. The government insisted that the French ambassador in Syria had
obtained diplomatic assurances from Syrian authorities that the country would take the Somali nationals.

On March 29 Monget-Sarrail and her associate Taelman were at a conference on asylum. They received a phone call letting them know that the four young Somali (the Amuur siblings were young adults of 22, 21, 19 and 17) were no longer at Orly airport. Monget-Sarrail recounts:

On Friday the European Commission had invited France not to return them to Somalia, but on Saturday morning they were put on the plane anyway. So we came back from the conference, Pascale (Taelman) went to Orly to see the families that were still there. They were terribly upset as they had been forced on the plane, they did not want to go, they were put in the plane on a hoist. So she went to the airport and I came back to find someone to stop the return. So we called Mrs. Mitterrand who, at the time, was head of “France Libertés” when (François) Mitterrand was president of the Republic. We explained to her the situation: there were only women and children left. She made him promise not to try to return the others before the (court of first instance at Créteil’s) decision on Monday. We also told the European Court that France had not respected its invitation to postpone (return). (France) bypassed this requirement quite cleverly, since the European Court was saying that they should not be returned to Somalia, and they were sent back to Syria where they had transited (Interview with Monget-Sarrail, August 2014).

Yet, in spite of Monget-Sarrail securing a non-return commitment from the President’s wife, the 18 remaining asylum-seekers were presented to a plane for Cairo on March 30. They refused to board it. They were then referred to a criminal court for refusing to abide by the decision denying them entry. On the following day, March 31, the refugee agency declared itself incompetent, as the claimants had not yet been admitted to French territory. This same day, the judge of the court of first instance at Créteil declared that the detention of the remaining claimants was illegal and ordered the Ministry of the Interior to immediately release them. The 18 Somali nationals

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23 “France Libertés” is an NGO that was created in 1986 to defend human rights and ethnic minorities. The organization’s website explains that the NGO has been active in defending the right of peoples and individuals to self-determination. Cf: [http://www.france-libertes.org/Notre-histoire,2217.html](http://www.france-libertes.org/Notre-histoire,2217.html)
were granted refugee status by the refugee agency on June 25, 1992 and withdrew their request before the European Commission of Human Rights.

Monget-Sarrail and her associates were ready to drop the case as the plaintiffs had all left the international zone. But a lawyer from the European Court called them: he was adamant that they press on with the request nonetheless. Monget-Sarrail recalls:

It was the first time we referred a case to the European Court; we did not know how to proceed, so we explained how unfair it was. When they were set free, the four others had disappeared so we thought: “It is over”. And a lawyer from the Court, a Greek, called us. Luckily he spoke French flawlessly and told us: “Yes, you have to press on, even if they disappeared, because we are looking for a case to rule on these zones where incoming people are placed. There are many countries in Europe where there are no laws and they are waiting for the court’s decision. Press on with your request, we are going to help you, we will explain how it works.” So this is how we could file our request. The (European) Commission examined it and then we were referred to the Grand Chamber and invited to come plead. (Interview, August 2014)

Most of the proceedings before the European Commission and the European Court took place in the absence of the plaintiffs. Monget-Sarrail explains that for a long period of time, she and her associates completely lost the trace of the Amuur siblings after their return to Syria. The European Court ruling (1996, 2) reads: “The lawyer who had represented the applicants before the Commission stated that she was unable to contact them but that the terms of the authority to act that had been produced before the Commission also covered the proceedings before the Court”, confirming her story. According to Monget-Sarrail, the UNHCR had received assurances from the Syrian government that the Somali nationals would not be placed in refugee camps but would instead receive a residency permit. On this basis, the international refugee organization had tried to convince the four Amuur to return to Syria, their country of transit. Yet, as Monget-Sarrail and her associates later learned, the Amuur had landed in Syrian refugee camps where they had “stagnated” (végéter) for months
before leaving. They then heard that the siblings were in Moscow (Interview, August 2014). The European Commission’s opinion corroborates her story: “The applicants claimed they were arrested upon arrival in Damascus and two of them were forced to leave Syria for Russia” (European Commission, 1993).

The Commission finally referred the case of the four Amuur siblings to the European Court on March 1, 1995. The plaintiffs had argued that several articles of the European Convention of Human Rights had been violated (articles 3, 4, 5, 6, 13 and 25) but the Commission rejected all of the alleged violations save the one based on article 5 (right to liberty and security)24.

Not surprisingly, the arguments of the government in the Amuur case (at the domestic and European level) were the same as those fed to parliamentarians to justify the Marchand amendment and used at the trial before the Paris court of March 25, 1992. In its observations to the European Commission (transmitted on July 7, 1992), the French government claimed that the plaintiffs’ “holding” (maintien) in the international zone did not amount to deprivation of liberty: they were not arrested or detained. They were instead “staying” (séjourner) in the international zone. They were free to leave for any other destination than France (European Commission, 1993). The Créteil court of first instance came to the same conclusions as its Paris counterpart the day before: the plaintiffs’ detention was not provided by any legislation and “detention may not be ordered by the administrative authorities in cases other than those provided for in Article 35 bis of the 1945 Ordinance, which in any event makes such detention subject to supervision by the courts” (Créteil court’s ruling quoted in the European Court of Human Rights’ judgment). The court found

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therefore that the applicants’ detention was unlawful and directed that they be released. The European Court concurred with the domestic court’s judgment. It ruled that individuals in the international zone were subjected to French law, even though French authorities claimed the opposite. As France exercised sovereignty over this zone, the protections offered by the Refugee Convention had to be granted. This case law highlights that jurisdiction cannot be withdrawn at will. Under international law these situations of extra-territoriality do not exist, despite states’ effort to create “legal fictions” through national policies or legislation (Gammeltoft-Hansen, 2011).

Hathaway and Gammeltoft-Hansen (2015, 245) explain that the excised zone, “in which some or all of the legal obligations of the territorial state are declared not to apply” constituted a traditional non-entrée mechanism (cf chapter 1). The concept of “non-entrée”, first coined by Hathaway in 1992, is defined as the efforts deployed by wealthy states to ensure refugees never reach their jurisdiction. They argue that traditional non-entrée mechanisms, such as international zones, have been successfully challenged both in law and in practice. They write: “The notion that a state can delimit the geographical scope of its territory for purposes of avoiding legal liability—for example, by excision or the declaration of an international zone in an airport-has simply been rejected” (Hathaway and Gammeltoft-Hansen 2015, 246-247). They argue that, in order to keep refugees at bay, powerful states have now turned to a new generation of non-entrée mechanisms based on international cooperation, since they can no longer rely on former tools such as excision. The European Court of Human Rights also implied that, had the Law on the Waiting Zone been in force at the time the complaint was lodged, the applicants would have had no grounds for complaint.
I take issue with these positions. As I will now demonstrate, non-citizens have
continued to be excluded from rights based on their presence in excised, non-French
territory many years after the Law on the Waiting Zone came into force and the
Amuur ruling was handed down.

II. When history repeats itself: evidence of the endurance of the initial phase of
extra-territoriality

The legacy of the excision of international zones weighs heavily on
contemporary mindsets and practices. As chapter 1 demonstrated, in the 1980s the
French government claimed international zones in Paris airports were outside of
France, leaving migrants and asylum-seekers outside of the protective reach of
domestic and international guarantees.

In the 1980s, judges from the highest courts issued contradictory rulings,
which gave greater regulatory power to the State. The rulings reveal that the
international zone was understood to mean different things according to the political
usage of the law. The international zone was both France and not France at the same
time, according to the direction of the border crossing (cf chapter 1). When it came to
returning someone to a country of origin or a third country, the international zone was
France, and non-citizens refusing to embark could be subject to criminal prosecutions
for illegally staying in the country while in the international zone (Final court of
appeal, Youssef, 1987). However, for foreigners landing in Charles de Gaulle arriving
from another country, the international zone was not yet France (Council of State,
Eksir, 1984).

When the Ministry of the Interior presented the bill that later became the Law
on the Waiting Zone, parliamentarians grappled with the status of transit zones (in
December 1991 and January 1992). They exhibited confusion regarding the status of this geographic space. Some of them endorsed the government’s assertion according to which it was not France (cf chapter 2). The status of Paris airports’ international zones was anything but clear.

Years after the Amuur against France judgment, French domestic courts still issued contradictory rulings regarding the status of the waiting zone, coming again to the conclusion that waiting zones were both located outside of and part and parcel of French territory. Some courts espoused the government’s 1980s argumentation according to which waiting (previously international) zones were not French territory for certain populations. This argumentation was used in order to circumvent granting rights guaranteed by French and international law. This resulted in an uneven enforcement of rights. It is fascinating to observe that the same court could make diametrically opposed rulings on exactly the same topic. This seemingly permanent, persistent indecision reveals that the status of waiting zones remains unclear in stakeholders’ minds.

In France, the children’s judge (juge des enfants) has jurisdiction whenever there is a threat to a child’s health, security or morality or if the child’s education or his or her physical, emotional, intellectual and social well-being are severely at risk (Anafé, January 2013, 32-33). On December 7, 2004, the Paris appeals court ruled that legal provisions pertaining to the protection of minors were applicable to all minors present on French territory, regardless of their nationality. The court therefore found that the children judge’s protection extended to minors held under the waiting zone law who, although turned away at the border, were de facto on French territory. Yet the very same Paris appeals court ruled exactly the opposite in 2008 (February 21): as the minor placed in the waiting zone was not on French territory, he could not
benefit from protection measures that could be implemented only on French territory (cf Final court of appeal, March 25, 2009). The court found that the Convention on the Rights of the Child did not apply to children in the waiting zone.

Finally, the Final court of appeal (i.e. the highest court in the domestic judicial order, Cour de Cassation) rejected the appeals court’s February 2008’s reasoning, stating that “the waiting zone was under national administrative and jurisdictional supervision”. The Final court of appeal found that a minor (here an Iraqi asylum-seeker) placed in Charles de Gaulle airport’s waiting zone was de facto on French territory. French law pertaining to the protection of childhood was applicable to all minors located on French territory, regardless of their nationality or legal status in France. The Final court of appeal found that the inferior court had violated article 20 of the Convention on the Rights of the Child, which states that “a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State” (Final court of appeal, March 25, 2009).

It is beyond the scope of this dissertation to study all of the rulings issued by liberty and custody judges and by the appeals court. This would constitute not only a tedious but also an impossible task due to their sheer number. Indeed, a liberty and custody judge from the Bobigny court of first instance –i.e. the judge who assesses whether detention in Charles de Gaulle waiting zone’s facility should be extended after four and 12 days- can work from 11:00 am until 2:00 am, deciding on the cases of dozens of individuals. I have myself observed days of hearings finishing after midnight. Hearings do not stop during weekends or holidays and the rulings are not available in electronic format. However, more instances of exclusion from rights on
the grounds that waiting zones are not French territory could perhaps be found in other rulings.

In practice, the Final court of appeal’s 2009 ruling pertaining to the status of the waiting zone has not really been followed. Yet, in the French legal order, the judgments of the Final court are a reference. Children’s judges have the power to order placement in a group home or with family members, therefore ending detention in the waiting zone. Gérard, an experienced ad hoc administrator, explains that in practice children’s judges very rarely dare to take a decision that would contradict the administrative decision placing the minor under the waiting zone regime (Interview, December 2013)\(^25\). He argues that the children’s judges’ jurisdiction over children confined in the waiting zone should be reaffirmed and explicitly written into the law. It was actually Gérard’s organization that brought the issue to the Final court of appeal in order to obtain a ruling confirming that the children judge had the power to intervene on behalf of children placed under the waiting zone regime. Gérard deplores that the children’s judge’s jurisdiction over the waiting zone is neither in the culture nor in most people’s psyche –including that of the children’s judges’-. Children’s judges are reluctant to intervene in such cases. Gérard recounts:

As soon as we had the opportunity we went before the Final court of appeals, thinking that it could establish the principle. At the end the Final court of appeals confirmed the principle that had been chosen, in another case, by the Appeals court. But today in practice, the fact that judges are entitled to make these decisions is not in the culture, in people’s unconscious, including judges’. So, in spite of jurisprudence from the Final court of appeals it remains complicated (Interview, December 2013).

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\(^{25}\) Minors are subject to the exact same legal regime as adults, except for their appointment of a legal guardian called “ad hoc administrator” (administrateur ad hoc). Under French law minors lack the capacity to represent themselves in legal proceedings. Therefore, the ad hoc administrator’s mission consists in assisting the child during his or her detention in the waiting zone and in ensuring the child’s legal representation in all administrative and judicial procedures pertaining to his or her detention (law n°2002-305, 2002, article 17). Cf chapter 6 and 4 for an extended discussion of the role of ad hoc administrators.
Organizations advocating on behalf of unaccompanied minors in waiting zones have to constantly reiterate that the children’s judge had indeed jurisdiction.

III. The waiting zone: the heir of the international zone

Beyond court judgments, it appears that stakeholders are still unsure as to whether CDG airport’s waiting zone is (fully) part of French territory. Actors working in and on CDG’s waiting zone have confessed their ignorance regarding the status of waiting zones. Some of them carry the deeply ingrained idea that individuals detained at the legal border find themselves somehow physically outside of the country, in an excised space, justifying a less favorable treatment. Generally, the waiting zones’ status remains a vexed issue that triggers negative emotional responses on the part of most interview participants who belong to different professions. After a few interviews, I quickly realized that the question “Is the waiting zone French territory?” was emotionally charged, and found it was better to ask it when nearing completion of the interview, after rapport had been established and in order not to jeopardize the rest of the interview.

For example, I asked Jacques, an inspector of places of deprivation of liberty, the following question: “Are you on French territory when you visit CDG’s waiting zone”? Jacques first answered: “This is a good question. When I visit I am not on French territory, but you need to ask the question to a lawyer”. When I insisted that I valued his perspective, Jacques became wary: “I may say something stupid, I do not know and I do not care. Why do you ask me this question?” After I quoted the Amuur vs France ruling, Jacques was openly annoyed: “I am not able to answer you because I do not know and I can say that I am not interested. It does not matter to me whether or not I am in the international zone when I visit, I do not know and I do not care: not only does the law authorize me, it instructs me to go there. What is the status of this
zone? I do not know and I do not care” (Interview with Jacques, August 2013). Jacques’ answer is interesting on two accounts: to him there is no doubt that the international zone is not France, as he equals being located in the international zone with being outside of France. Secondly, it illustrates that one can write detailed reports on the enjoyment of human rights in the waiting zone without having a clear idea of its status.

Why is the status of waiting zones so unclear? Why do some consider waiting zones excised space? I would like to offer two hypotheses. First, years after the Amuur v. France ruling, those working in and on CDG’s waiting zone still held the view that the geographical area of the international zone (i.e. the zone between the runaway and first border checks) was somehow located outside of France. Second, the different stakeholders confuse the international zone and the waiting zone, and therefore envision the waiting zone as excised space. This confusion probably originates in the definition of the waiting zone itself. Initially, when the Law on the Waiting Zone was first passed in July 1992, it read that the waiting zone “runs between the points of embarkation and disembarkation to the border checkpoints”, therefore covering the area of the “international zone”. The law also specified that the waiting zone could include nearby hotel-like accommodations. The geographical space of the waiting zone therefore mapped onto that of the international zone and onto what the government construed as its extension, i.e. hotels close by. Why, then, would not the waiting zone inherit from the issues attached to international zones? As previously explained, the perimeter of the waiting zone is now larger than that of the international zone, as it also encompasses any place where the person goes for administrative or medical reasons. One can also be located in the international zone without being assigned the waiting zone regime (cf chapter 5). Interviews with
relevant actors indicate that the issues associated with Paris’ airports’ international zones in the 1980s and early 1990s have been passed onto waiting zones.

In response to the question: “Is the waiting zone French territory?” Jeanne, a civil servant in the Ministry of the Interior’s department tasked with reviewing asylum-seekers’ requests to enter France, forcefully replied: “I think you know the answer? It is an international zone”. I explained I was interested in her opinion as rulings from the Court of Appeals and the Final Courts of Appeals reiterated that the waiting zone was *de facto* French territory. Jeanne disagreed: “Not at all, it is not (*de facto* French territory). For us (at the Ministry of the Interior) it is not; if we start to say it is, it would mean that they have entered France. It is really an international zone, a bubble” (Interview, November 19, 2013). Dominique, a high-ranking border police manager at CDG, explains that individuals turned away at terminals are brought to the detention center through the runways so that they do not enter the country (Interview, September 2013). This way, Dominique argues, when the person is brought to the detention center, he or she remains in the international zone. Dominique therefore believes that airport compounds are not French territory, and that using the regular roads connecting terminals to detention center would be tantamount to entering the country.

Interestingly, some stakeholders have declared that the waiting zone was non-French territory for both non-citizens and those working there. Conversations with two former Red Cross employees who had accumulated significant experience in CDG’s waiting zone proved illuminating. The Red Cross has been offering humanitarian support to detainees in CDG’s waiting zone since 2003, after signing a first convention with the Ministry of the Interior on October 6, 2003. Red Cross employees, called “mediators” spend an important amount of time in ZAPI 3, in direct
contact with both authorities and detainees (cf chapter 6). Laura, a former mediator, explains that the waiting zone is located in the international zone. According to her, neither non-citizens nor Red Cross employees are on French territory when situated in ZAPI 3 (Interview, 2013). Paul, also a former mediator in CDG’s waiting zone, tells a revealing anecdote transpiring around the time when the smoke-free policy was first implemented in public spaces (i.e. February 2007\textsuperscript{26}). Before the policy was enforced, it was possible to smoke in one of the detention center’s TV rooms. From February 2007 Red Cross employees were instructed to inform smokers that cigarette consumption was no longer permitted within the perimeter of the waiting zone. However, some border policemen resisted, claiming the policy could not apply in, what they argued, was not French territory: “We are not in France, so why enforce the law?” (Interview, August 2013).

The terms “international zone” and “waiting zone” are even used interchangeably by legal practitioners. For example, Clémence and Frédéric, who both represent non-citizens in court proceedings, use the word “international zone” to mean “waiting zone” (interviews, respectively December 2013 and October 2013). While observing court hearings at Bobigny, I also noted that a liberty and custody judge used the term “international zone” to refer to the waiting zone (field notes, November 2013). The choice of this term is not innocent. As Bauder (2013, 2) contends, “language matters in public discourse and everyday exchange: terminology can imply causality, generate emotional responses and transmit symbolic meanings”. He concurs with Barnett and Duvall (2005) who, in their analysis of productive power, note that discourse produces subjects with associated rights and

\textsuperscript{26} Cf Decree n°2006-1386 of November 15, 2006. Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000818309&categorieLien=id
responsibilities. Such classification has material consequences for people on the ground. For example, assignment to the categories of “civilian” or “combatant” translates into differential protection under international humanitarian law (Barnett and Duvall, 2005). The adjective “international” both reflects the various stakeholders’ perspective on the waiting zone and plays a role in the constitution of extra-territorial subjects: it triggers the idea that non-citizens do not share the same space as citizens. This logic legitimates granting them differentiated and watered-down rights compared to the rights granted to those who are similarly categorized (as illegal migrants, asylum-seekers and unaccompanied minors) but who, like citizens, are located on French territory.

Conclusion

In summary, the initial extra-territorial fiction still very much informs stakeholders’ understanding of the waiting zone. The government’s initial attempt to establish the international zone as an excised geographical space for some populations had far-reaching consequences that are still felt today. The geographical dimension of exclusion has endured as the issues attached to international zones were passed onto waiting zones. In the following chapter, I will demonstrate that the Law on the Waiting Zone established another layer of exclusion by creating a “legal space” of lesser rights through the “legal entry doctrine” (Basaran, 2011, 49 and 65).
Chapter 4. The Law on the Waiting Zone: The reinvention of exclusion through extra-territoriality

Introduction

As demonstrated in the previous chapter, in the collective imagination of waiting zone practitioners, this space is not French territory (at least) for non-citizen populations. Non-citizens have been excluded from rights on this basis. I will now argue that the Law on the Waiting Zone has reinvented exclusion through another form of extra-territoriality, premised on the non-citizen’s legal status at the border. Although physically in France, rejected non-citizens and asylum seekers at the border are not present from a legal standpoint, for they have not yet been legally admitted to the country. My findings concur with the Commissioner for Human Rights of the Council of Europe’s observations. During his visit to France in 2005 he remarked that border police at CDG airport still considered waiting zones as not belonging to French territory, and that a separate set of laws applied to people in waiting zones:

The first thing that struck me when I visited the Arenc and Roissy waiting zones was their status, as the authorities seemed to take the view that they were not part of French territory. Yet, in so far as I could make out, these zones are physically located in France and not floating somewhere in outer space. Furthermore, there are a number of laws which relate specifically to such zones and establish separate rules for them and so French law should apply to them. Yet, according to the officials I talked to, this was not so – a circumstance which gives these zones an uncertain legal status which should be remedied as soon as possible so as to dispel the legal ambiguity with which they are surrounded. (Gil-Robles, 2006, §187.)

The French government brushed aside the Commissioner’s remarks, highlighting the creation of a new “accommodation center” at CDG in 2001 and the resulting improvement in material conditions. Before the opening of a detention center specifically designed to house them, non-admitted citizens and asylum-seekers
arriving at Charles de Gaulle were detained in nearby hotels in rooms specifically earmarked for this purpose, with sealed windows and cleanliness issues\(^{27}\). The government also pointed out that French law applied to the waiting zone, which was a “clear legal concept”. It did not acknowledge that the Law on the Waiting Zone had established a discriminatory and less protective framework (French government response, appendix, §187-203). Finally, the government also insisted on the rights granted to those placed in waiting zones which included: the right to be assisted by an interpreter and by a doctor; the right to communicate with a legal counsel or any person of one’s choosing; the right to be notified of one’s rights in a language that one understands, and a maximum length of detention of 20 days following judicial review after four days of confinement.

In this chapter, I will show that the Law on the Waiting Zone excludes particularly vulnerable groups from the protection they are entitled to under international law. I will also situate the Law on the Waiting Zone within the global landscape of legal maneuvers deployed to control migrants and asylum-seekers’ arrivals. Finally, I will unveil stakeholders’ perspective on the waiting zone framework, demonstrating that to most actors working in or on CDG’s waiting zone, border control takes precedence over rights.

I. The Law on the Waiting Zone: an exclusionary framework forced upon the most vulnerable.

\(^{27}\) For a description of the conditions of detention in hotel rooms located nearby CDG airport (and construed as an extension of the international zone), see Olivier Clochard’s thesis, entitled “Le jeu des frontières dans l’accès au statut de réfugié, une géographie des politiques européennes d’asile et d’immigration” [Border games in the access to refugee status, a geography of European policies of asylum and immigration], 2007, p. 202.
When the Law on the Waiting Zone came into force in July 1992, the overt mechanisms of exclusion shifted in the sense that the law itself (and not the absence thereof) created a less protective regime than that applicable to the same groups already deemed on French territory. Exclusion, in other words, was reinvented: instead of individuals being placed outside of the law, the law itself organized exclusion. The waiting zone’s exclusionary legal framework builds on the premise that groups at the border find themselves from a legal standpoint at the threshold of, but not yet having entered French sovereign territory. Volpp (2012, 1-2), writing about the law of immigration, remarks: “Whether formal legal doctrine recognizes a human body as inside or outside a nation’s territory is deeply consequential.” She notes that physical entry can have various meanings:

Immigration doctrine does not treat everyone inside (or outside) the same way. “Being here” can mean many different things, depending upon the initial conditions of a person’s presence inside. The same empirical fact – the physical presence of a human body – can be alternatively understood as an entitlement, if the person is a citizen; as a matter of hospitality, if the person is a legal permanent resident, a lawful temporary visitor, or a refugee; as a trespass, if the person is an undocumented immigrant; or as a nullity, if the person is a “parolee,” meaning that the person is physically here but is not recognized as having effected an entry. Thus, we can say that physical presence inside the territory is polysemic, in that it does not have the same meaning for everyone (Volpp, 2012, 1-2).

Her observations shed light on the specific “legal space” (Basaran 2011, 50) applicable to those confined under the waiting zone regime. Although individuals placed under the waiting zone framework are physically present within the state, they are not present from a legal standpoint, for they have not yet crossed the state’s legal borders. Non-citizens at the legal gate receive less favorable treatment as compared to the same groups (i.e. illegal migrants, asylum-seekers and unaccompanied minors—these categories not being mutually exclusive) who are deemed to have entered French territory. The concept of legal space makes it possible for individuals sharing
the same geographical space to have entirely different sets of rights stemming from their different legal statuses. It contradicts Bosniak’s (2007) notion of “ethical territoriality”, according to which individuals should be granted the same rights by virtue of being located on the same geographical territory of a national state.

In the 1980s, exclusion started from the moment the non-citizen set foot in the geographical location of airports’ international zones. Exclusion was triggered by geography and legal absence. Today, under the Law on the Waiting Zone, exclusion is triggered by a combination of geography and law: an individual is placed under the waiting zone framework when arriving in the border’s physical location and when he or she is either refused entry or registered as an asylum-seeker. As will be explained in the next chapter (5), some non-citizens in the international zone never reach the waiting zone framework. Presence in territorial border zones alone is insufficient to trigger the waiting zone regime.

As Basaran (2011, 55) points out, “the law on the waiting zone equips detainees with some fundamental rights, but these rights are limited when compared to the ordinary French legal regime”. Two groups particularly suffer from the eroded rights attached to the waiting zone status: asylum-seekers and minors (especially when unaccompanied). The waiting zone regime has dramatic consequences for these groups that are granted specific rights under international human rights and refugee law on account of their particular vulnerability.

A. Asylum-seekers

Asylum-claimants in waiting zones cannot yet apply for refugee status: they first have to be legally admitted to the country. In waiting zones, their requests are not examined on their merits. Instead, they are evaluated against the “manifestly
unfounded” yardstick over an interview carried out by refugee agency’s employees\textsuperscript{28}. Since the law of July 29, 2015, asylum-seekers may also be admitted to the territory when deemed particularly vulnerable by the refugee agency. CESEDA’s legal provision L.221-1 reads:

When OFPRA … considers that the asylum-seeker, due to his or her minority or to having been the victim of torture, rape or another serious form of sexual, psychological or physical violence, needs particular procedural guarantees that are not compatible with holding in the waiting zone, this holding is put to an end.

When they do not fall within the purview of article L.221-1, unaccompanied minors seeking asylum still have to pass the “manifestly unfounded test”, save but for a very few cases (cf section C). It would be interesting to know how many claimants have been admitted to territory under this article since the new law came into force. This legal provision did not apply at the time of research.

As Basaran (2011) notes, the refugee agency (OFPRA) only has an advisory function, the final decision being left to the Ministry of the Interior’s department of asylum at the border. In practice, the Ministry of the Interior follows OFPRA’s advisory opinion almost 100 percent of the time. Jeanne, from the Ministry of the Interior’s department of asylum at the border, has been reviewing OFPRA’s opinions since 2008. Since she entered the department, the Ministry of the Interior rejected OFPRA’s recommendations only twice (Interview, November 2013). However, from a symbolic standpoint this organization is not neutral: it signals that the Ministry of the Interior (whose agenda regarding border control necessarily differs from that of the refugee agency) ultimately decides who can enter France to claim asylum, not the refugee agency. As the Ministry of the Interior decides whether an asylum-claimant should be admitted to France, the issue of asylum is subjected to border control.

\textsuperscript{28} For a discussion of the origins of the term “manifestly unfounded” cf chapter 1.
Jeanne insists that I should not use the expression “asylum procedure at the border”. She explains: “These are not asylum claims at the border, but entry procedures to the territory on asylum grounds. It is very important to have this definition, as those allowed to enter the territory will not have obtained any status. They will still have to apply. It is really a request to enter the territory, a police procedure” (Interview, November 2013).

The waiting zone therefore functions as a buffer zone where asylum-seekers are filtered, in order to keep those deemed undesirable at bay. Only a fraction of asylum-seekers gain access to the actual refugee determination procedures. Those who successfully pass the waiting zone barrier are granted leave to enter France on asylum grounds and have eight days to file a claim. Once they enter the regular refugee determination system the Ministry of the Interior has no more say regarding their claim: the decision to grant protection lies entirely with OFPRA in the first instance and with the National Court of Asylum if necessary (CNDA—an administrative court adjudicating appeals against OFPRA’s decisions). In 2011 OFPRA reviewed the cases of 1857 claimants (for all waiting zones) and recommended that 188 be admitted to the territory: about 10 percent of claimants got access to regular refugee determination procedures (OFPRA, April 11, 2012). In 2012, this number was 13.1 percent and 18.5 percent for unaccompanied minors specifically (OFPRA, April 24, 2013). In this regard, waiting zones should be understood as part of many areas flourishing at the margins of the European territory that treat human beings like waste to be sorted, stored and thrown away (Caloz-Tschopp, 2004). Actors working in and on the waiting zone use the disposal vocabulary; for example, a lawyer representing the border police at the Bobigny court
of first instance did not hesitate to claim: “France is not the garbage can of Europe” (field notes, October 2013).

At the time of research, the law did not define what constituted a “manifestly unfounded” asylum claim. In 2000, the administrative court of Paris had noted that a claim was manifestly unfounded when “it is manifestly unlikely to fit the criteria set out by the Geneva Convention of July 28 1951 or other criteria justifying the granting of asylum” (Anafé, January 2013, 53). In theory, OFPRA agents were not supposed to go into details: they just needed to rule out individuals seeking to enter France for work, study or tourism. However, scholars and activists had documented just the opposite (Clochard et al, 2003; Anafé, December 2012). Basaran writes: “In reality, however, it has become a predetermination procedure for refugee status, including an analysis of refugee narratives, their truth content and their provenance from safe countries” (2011, 56-57). OFPRA agents at Charles de Gaulle admitted that they considered asylum claims to be manifestly unfounded in the following situations: when they had nothing to do with asylum but also when they relied upon deliberate fraud (for example a Lebanese national claiming to be Syrian), when the discourse was not “personalized” (i.e. when the claimant fails to demonstrate that he or she is the specific target of persecution-escaping war is not enough) or when the discourse was incoherent or too vague (Interview, November 2013) 29.

Since July 29, 2015, the law defines what constitutes a “manifestly unfounded claim”. Provision L. 213-8-1 reads: “A claim that is manifestly unfounded is a claim that, considering declarations made by the foreign national and documents produced when applicable, is manifestly devoid of relevance regarding conditions under which

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29 OFPRA agents reviewing asylum claims at the border are based at Charles de Gaulle’s detention center. They review the cases of asylum-seekers placed under the waiting zone regime at Charles de Gaulle but also anywhere in the country (in which case the interview takes place over the phone) Cf chapter 6.
asylum is granted or manifestly devoid of credibility regarding risk of persecutions or severe violations.” The law now explicitly states that asylum-seekers’ stories are assessed on their content at the border. It means that a claimant is expected to provide a detailed and coherent account of the persecutions that he or she experienced. Yet, someone who just travelled a great distance after surviving difficult events is not in the best conditions to narrate his or her story. While claimants on the right side of the legal border can rely on several NGOs to help prepare their application, those in waiting zones do not have access to the same services, due to the scarce NGO presence and urgency that prevails in these spaces (cf chapter 6). The Law on the Waiting Zone established a dual set of rights: one for the border and one for what is considered to be the territory. One has to exit the waiting zone regime to access the normal rights regime (Basaran, 2011). I will now compare the legal regime and policies applicable to minors (accompanied and unaccompanied) in waiting zones with those applicable in the rest of the territory.

B. Accompanied children in the waiting zones

Numerous bodies monitoring human rights treaties have stressed that states’ obligations apply to all individuals subject to their jurisdiction. For example, the Committee on the Rights of the Child issued the following comment (Report, A/61/41, 2006, 19-20):

State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State’s territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory.
Yet, children and their families awaiting deportation from France for lack of residence permit receive more favorable treatment than those awaiting return in waiting zones. The former are not routinely detained pending their deportation, contrary to the latter. The government’s willingness to respect its international and regional obligations under international law does not extend to individuals placed under the waiting zone regime. An internal policy brief from the Ministry of the Interior dated July 2, 2012 ("Circulaire Valls") instructs local administrative authorities to ensure that families with minors to be deported from France be circumscribed at home (or in a hotel if they do not have a “stable and decent home”) rather than be placed in administrative detention facilities. Families under compulsory residence orders have to abide by certain rules, such as checking in from time to time at the closest police station or handing in their identity and travel documents. Overall this represents a significant shift in deportation policies. The brief specifically refers to the Convention on the Rights of the Child, and to its core “best interest of the child” principle as the rationale for such a change. Under the brief, the detention of families with children under eighteen years of age is still possible but constitutes the exception rather than the rule. Detention will happen if the family fails to comply with the deportation order, i.e. in case of the escape of one or several family members, in case of refusal to board the plane or in case of failure to comply with the rules pertaining to compulsory residence.

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30 The French legal term “éloignement” is translated as “deportation”. It refers to the removal of individuals residing illegally on French territory. It is used by opposition to the French word “retour” or “récélement” (“return” in English), which refers to the removal of individuals who, although physically present on French territory, have not crossed yet French legal borders.

31 The French term “circulaire” is translated as “internal policy brief”.

32 The French term “assignation à résidence” is translated as “compulsory residence order” (which is the term used in the European Court of Human Rights’ Popov v. France judgment).
The brief also speaks of the necessity to comply with the European Court of Human Rights *Popov v. France* judgment (January 19, 2012). In *Popov*, the Court had ruled that France had breached article 3 prohibiting inhuman or degrading treatment by detaining children (aged five months and three years) with their parents in an administrative detention center in unsuitable conditions. The applicants, a Kazakh family, had been arrested at their house in August 2007 after the rejection of both their asylum claim and application for residence permits. They then had been taken to CDG airport to be deported to Kazakhstan. However, with their flight having been cancelled, they had been transferred to a detention center in Rouen-Oissel. The Court found that the detention conditions of the children at the facility had amounted to a violation of article 3: although the center was authorized to accommodate families it did not offer play areas or activities for children. The beds with sharp metal corners and automatic bedroom doors were dangerous for children.

The Court referred to the Council of Europe Commissioner for Human Rights’ findings (Gil-Robles, 2006): detaining children in administrative facilities with their parents was contrary to the Convention on the Rights of the Child. During his visit to France from September 5 to September 21, the Commissioner had noted: “Very few centres are equipped to receive them. In any event, no children should be detained on the grounds that their parents do not have the necessary papers to remain in France, in places marked by overcrowding, dilapidation, promiscuity and very strong tensions” (Gil-Robles, 2006, § 257). The Commissioner had remarked that, although French law provided an alternative to detention in the form of compulsory residence orders, those were rarely used. The Court observed: “[...] it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant” (§91, emphasis added). It
found that the Rouen-Oissel facility was not adapted to the children’s age. Moreover, although the length of detention (15 days) was not excessive per se, the children could have perceived it as never-ending. In Popov the Court did not go as far as condemning the detention of children in and of itself. Only the length of their detention and conditions of confinement were found illegal. As for the parents, the Court found that their detention conditions did not amount to a violation of article 3 since they had not been separated from their children.

Whether the brief from the Ministry of the Interior has been really implemented is another issue, but on principle this constitutes a significant shift in deportation policies. It originates in a promise François Hollande, then Socialist candidate running for president, had made to NGOs to abolish the detention of families with children under eighteen in administrative facilities (Le Monde, March 14, 2012) pending their deportation from French territory.

The commitment to end the detention of children for immigration regulation purposes does not extend to minors placed under the waiting zone regime. Anafé employees, Lise and Anne raised the issue with the Ministry of the Interior, denouncing blatant discrimination between the waiting zone and the rest of the territory. To justify this difference of treatment, the Ministry of the Interior argued the waiting zone was not French territory, but the external border (Interview, December 2013). Again, the argument that waiting zones are excised territory was deployed.

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33 Children are still detained pending their deportation from France (Cf. Journal du droit des jeunes, 2015).

C. Unaccompanied children in the waiting zones

Not only are children traveling with their families locked up in waiting zones, but so too are all unaccompanied minors who are not asylum-claimants. Who falls under the status of “unaccompanied minor”? According to Anafé (January 2013), the border police consider a person under the age of eighteen to be unaccompanied when he or she arrives alone at the border. Interviews with different actors (judges, not-for-profit employees and volunteers, lawyers, border police agents), visits at CDG and observations of court hearings revealed that minors placed under the waiting zone legal regime have many different motivations for travelling alone to France, where they may or may not have family. It is hard to categorize unaccompanied minors according to their travel motives, as individuals do not fit into clear-cut categories and may be unwilling to disclose their reasons for travelling.\(^{35}\) Categorization also masks individuality and personal stories.

Keeping this *caveat* in mind, I will quickly explore their rationales for travelling. Some travel with the intent of doing some sightseeing but others encounter themselves in far more precarious situations: some flee war, persecution, abuse or poverty in their country of origin, some are brought in by parents who reside legally in France but could not secure the authorization to bring their child via legal routes. Some do not enlist the assistance of other parties to travel while others are smuggled. Finally, some are trafficked for various exploitative purposes (such as prostitution or forced labor). Asylum claimants at the border do not represent the majority of unaccompanied minors. For example, in 2011, only 8.53 percent of unaccompanied minors at French borders claimed asylum (i.e. in all waiting zones). This number was

\(^{35}\) Cf French Red Cross, January 2013, “Bilan d’activité, mineurs isolés étrangers, 2011”, p. 10
19.74 percent for 2012, 12.96 percent for 2013 and 17.34 percent for 2014\textsuperscript{36}. As only those seeking asylum may be admitted into the territory (under very limited circumstances), in practice the law provides for the detention of most unaccompanied minors. As for asylum claimants, the law allows for their detention in many cases.

The Law of July 29, 2015 is written in such a way so as to suggest that the detention of unaccompanied minors seeking asylum in the waiting zone is the exception, not the rule (CESEDA, 2016, L. 221-1). While the law implies that most unaccompanied minors will be admitted into the territory when they are in search of international protection, it makes it possible for them to remain in the waiting zone under many circumstances. Unaccompanied children may still have to pass the “manifestly unfounded” test if they come from countries that are deemed safe by the refugee agency or if they presented false identity or travel documents\textsuperscript{37}. Their claims may also be assessed against the “manifestly unfounded” yardstick if they provided false information or hid information or documents regarding their identity, citizenship or conditions of entry to the country or introduced several asylum claims under different identities (CESEDA, 2016, articles L.723-2). As Anafê pointed out, these grounds for detention are very broad and not well defined, giving significant margin of maneuver to OFPRA (Anafê, October 21, 2014). Gérard, ad hoc administrator at the Red Cross, explains that many unaccompanied children, in an attempt to protect themselves, do not tell their true stories to ad hoc administrators, let alone to refugee agency employees: “It is true that a certain number of minors who are brought in by

\textsuperscript{36}I obtained these statistics by computing numbers provided by OFPRA and by Anafê. In 2011, 516 unaccompanied minors were detained in all waiting zones. Of this number, 44 applied for leave to enter French territory on asylum grounds (Anafê 2015, 28 and OFPRA 2012, 34). In 2012, they were 416 unaccompanied minors and 81 claimants (Anafê 2015, 28 and OFPRA 2013, 67). In 2013 and 2014, the numbers were respectively 49 claimants out of 378 minors (Anafê 2015, 28 and OFPRA 2014, 69) and 45 claimants out of 259 minors (Anafê 2015, 28 and OFPRA 2015, 65).

\textsuperscript{37}As of October 2015, the refugee agency had decided that 16 countries were safe (OFPRA, October 17, 2015).
networks come with stereotyped stories, not only with respect to asylum, but about the entirety of their lives, and so they have a sort of armour that even we do not manage to break” (Interview, December 2013) 38. Do OFPRA agents let minors enter the territory to claim asylum when they sense that they are hiding behind fabricated stories? Again it will be interesting to study how the Law of July 29, 2015 has been translated into practice. The OFPRA report for the year 2015 did not state how many unaccompanied minors (or asylum claimants in general) had been released from the waiting zone on the basis of the new law (OFPRA, May 13, 2016).

At the time of research, 500 unaccompanied children were detained in French waiting zones each year, contrary to unaccompanied minors who were already deemed present on French territory (Human Rights Watch, April 8, 2014). Systematic detention at the border is per se contrary to international law: it runs against the “best interest principle” (article 3) and article 37 of the Convention on the Rights of the Child (CRC) which clearly states that detention should only take place as a last resort and for the shortest amount of time possible. Section D of the Statement of Good Practice established by the Separated Children in Europe Programme39 also specifically reads: “They [separated children] must never be detained for reasons of immigration policy and practice” (2009). The Council of Europe Commissioner for Human Rights also specifies: “Members states should avoid holding unaccompanied

38 It is interesting to note that most actors (i.e. judges, border police officers, Red Cross employees, lawyers, inspectors of places of deprivation of liberty, etc) do not make the distinction between immigrant smuggling and trafficking rings. Instead they use the word réseau, which can literally be translated in English as “network”. In the debate surrounding the detention of unaccompanied minors in waiting zones, the term “network” mostly refers to trafficking enterprises.

39 The Separated Children in Europe Programme is a consortium of international intergovernmental and nongovernmental organizations. The 2009 Statement of Good Practice reads: “The Separated Children in Europe Programme (SCEP) started as a joint initiative of some members of the International Save the Children Alliance and the United Nations High Commissioner for Refugees (UNHCR). It has grown and evolved and is now comprised of many non-governmental partners throughout Europe who continue to work closely with UNHCR”.
minors, pregnant women, mothers with young children, the elderly and people with disabilities in waiting areas” (Gil-Robles, 2001, point 6).

At CDG, a separated detention area specifically dedicated to unaccompanied minors opened in July 2011 (hereafter the “minor area”). Yet, conditions of detention sometimes run against international standards as the said area has limited capacity: it can only host six children at a time (it has three bedrooms, each containing two beds). Whenever the number of unaccompanied minors exceeds this capacity, those who are above 13 will be held in the regular part of the center, with unknown adults, in violation of article 37 (c) of the CRC Convention. Children above 13 will also be detained with adults should the number of unaccompanied male and female be uneven (as boys and girls do not share bedrooms).

At CDG, unaccompanied children placed under the waiting zone regime have always been confined in different places according to their age. Before the dedicated space of detention opened, those under 13 were placed in nearby hotels under the supervision of Air France hostesses. Those older than 13 were detained at CDG’s detention center (ZAPI 3) with adults. Laura, a former Red Cross mediator, narrates that when the minor area first opened, the border police considered that only those under 13 could be hosted there. The Red Cross obtained that, space allowing, children older than 13 also benefit from the structure (Interview, August 2013).

Authorities seem to believe that separating minors from adults does not constitute a legal requirement but a favor. Dominique, a high-ranking border police agent, insists that having a specific area for minors is not an obligation. Furthermore, he does not seem to pay much attention to the fact that, under French law and the Children Rights Convention, every person under 18 is a child. Dominique minimizes the issue of detention with adults: “If the person is 17 – almost an adult - it is less of a
problem to detain him or her with adults, especially considering that in some countries they attained majority a long time ago.” The law can be dispensed with. According to him, the minor area “in principle preferably hosts minors who are under 13” (Interview, October 2013).

Beyond the issues of illegal deprivation of liberty and detention conditions, confinement in the waiting zone can have dramatic consequences for minors who arrive at the border on their own. Contrary to minors already deemed in France, those in waiting zones may potentially be returned at any time (save during the assessment of their application to enter France to seek asylum). They are indeed subject to the exact same legal regime as adults, except for the appointment of a legal guardian called “ad hoc administrator”(administrateur ad hoc). Under French law minors lack the capacity to represent themselves in legal proceedings. Therefore, the ad hoc administrator’s mission consists in assisting the child during his or her detention in the waiting zone and in ensuring the child’s legal representation in all administrative and judiciary proceedings pertaining to his or her detention (law n°2002-305, 2002, article 17)\(^{40}\). Ad hoc administrators are based in two organizations: the Red Cross and Famille Assistance (which can roughly be translated as “Family Aid”), a not-for-profit organization. Gérard has been serving as ad hoc administrator since the mission was created in 2005. According to Gérard, the return of minors held at Charles de Gaulle’s waiting zone constitutes one of the three challenges that his organization has to tackle (Interview, December 2013). Gérard recalls that when he first started, almost three quarters of unaccompanied minors were sent back. Over the years this number has diminished dramatically, but return still takes place occasionally. In January 2014,

\(^{40}\) In French, article 17 reads: “L’administrateur ad hoc assiste le mineur durant son maintien en zone d’attente et assure sa représentation dans toutes les procédures administratives et juridictionnelles relatives à ce maintien”.

Sylvie, mediator in the minor zone, told us that four or five forced returns had taken place over the last two months\textsuperscript{41}. Gérard explains:

When returns do take place it is always in bad conditions. The bad conditions are that the return goes against what we identified to be the best interest of the child. It takes place in situations where the youth declares not having parents, no family, or to be running from a mistreating family in countries that lack proper childcare structure, in situations where the minor is particularly fragile (…) (Interview, December 2013).

Unaccompanied minors seeking asylum face all of the hurdles and diminished guarantees that come with the waiting zone framework. They, just like adults, must prove that their claims are not “manifestly unfounded”, only to be granted the subsequent right to apply for asylum once on the right side of the legal border. An interview with refugee agency agents at CDG confirmed that the asylum screening process at the border is absolutely the same for unaccompanied children (interview, November 2013). Gérard explains that those applying for leave to enter France to seek asylum very rarely obtain such permission (Interview, December 2013). In 2012, OFPRA considered that 18,5 percent of unaccompanied minors’ requests were not manifestly unfounded (OFPRA, April 24, 2013).

Martini (2004, 31) summarizes well the situation of unaccompanied minors placed under the waiting zone regime:

Deprived of liberty, sometimes the victim of violence, returned forcefully to countries where his or her security is not guaranteed, the minor held in the waiting zone is an undesirable being to be jettisoned. Once past the imaginary line that separates the waiting zone from the rest of French territory, he or she theoretically, is worthy of all attentions (translation from French is mine).

As soon as they cross the legal border, laws and policies prohibit both their detention and return and allow them to access ordinary asylum procedures.

The Law on the Waiting Zone establishes a legal space of lesser rights. This exclusionary framework is premised on individuals being outside of the country from

\textsuperscript{41} “Us” refers to Human Rights Watch researchers and me.
a legal standpoint. The notion of extra-territoriality has been reinvented to curtail rights and diminish international obligations. Extra-territoriality is both the origin and the purpose of the waiting zone regime: individuals are assigned the waiting zone status for not yet being in France and precisely to control their access to and keep them outside of France. In the eyes of the state detainees in waiting zones are first and foremost individuals whose mobility needs to be controlled, not rights-holders. Revealingly, the function of ad hoc administrator was created to safeguard the state’s interests, not to protect unaccompanied children. As Martini (2004) explains, the number of unaccompanied minors started to soar in 1998. Liberty and custody judges therefore had to adjudicate numerous unaccompanied minors’ cases (according to the law detainees have to be presented to a judge after four days spent in waiting zones-the judge can either prolong the detention or set the detainee free). Many judges decided to release the children from waiting zones on the basis that they lacked legal capacity to represent themselves and were not assigned a legal representative. Once liberated, children disappeared, becoming illegal migrants. In order to fight this jurisprudence, the government first attempted to grant legal capacity to minors above 16. This would have infringed upon established principles of minor protection, and the government was confronted by hostile reactions. It finally decided that all unaccompanied minors in waiting zones should be assigned a legal representative. The function of ad hoc administrator in waiting zones was therefore invented to prevent judges from releasing children arriving alone at the border (Martini, 2004).
II. Actors’ perspective on the waiting zone framework: when border control takes precedence over rights

Following Agamben’s conceptualization of a “vanishing point” as “a hidden point of intersection between the juridical-political institutional and the bio-political models of power” (Gregory, 206), Gregory analyses the war prison (through a study of US Naval Station at Guantanamo Bay and Abu Ghraib prison in Iraq) as a “dispersed series of sites where sovereign power and bio-power coincide” (206).

Drawing on Agamben (1998, 1999 and 2005) and Gregory’s work (2007), Mountz argues that nation states create “vanishing points” through geography to prevent and diminish asylum-seekers and migrants’ enjoyment of the rights attached to presence on sovereign territory. Vanishing points are “sites where national security is prioritised over human security and where the protection of human rights and human life disappear” (Mountz, 2013). Although the geographical moves described by Mountz take place offshore, she notes that the same mechanisms are at work on sovereign territory.

Charles de Gaulle’s waiting zone and the waiting zone legal framework in general are an example of such vanishing points on mainland territory. The previous section has demonstrated how, in the eyes of the state, the categorization of individuals in waiting zones as illegal migrants trumps their status of rights-holders. This translates into dramatic consequences for those entitled to specific protection under international human rights and refugee law on account of their particular vulnerability. Asylum-seekers and unaccompanied minors (sometimes also asylum-claimants) are perceived and treated as economic migrants (and therefore as bogus applicants), undeserving of the guarantees applicable to their counterparts who have crossed the legal border.
Strikingly, even those entrusted with safeguarding the rights of individuals in Charles de Gaulle’s waiting zone can embrace the state’s perspective according to which border control should take precedence over rights. The general inspector of places of deprivation of liberty (Contrôleur général des lieux de privation de liberté) is an independent public body whose mission consists in controlling the conditions of management and transfer of people who are deprived of liberty in order to ensure their fundamental rights are upheld (Law of October 30, 2007)\textsuperscript{42}. This public body came into being following France’s ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. 21 inspectors assist the head of this monitoring body (called the “general inspector”). An interview with one of these inspectors (Jacques, August 2013) reveals that even those who are tasked with safeguarding the rights of detainees can endorse the state’s perspective.

When asked whether there were vulnerable groups in the waiting zone, Jacques explained that during his visit to the CDG waiting zone (on January 27 and 28, 2009) he met with Yin, a seventeen-year-old Chinese girl at the detention center. She told him (via an interpreter) that she had been smuggled to France after the death of her parents. The smuggler had taken the land she had inherited as payment for her passage.\textsuperscript{43} Jacques acknowledged that this situation was absolutely terrible in the sense that it was very difficult to determine the best course of action. Should Yin be

\textsuperscript{42} Law n° 2007-1545 of October 30, 2007. Article 1 reads: “Le Contrôleur général des lieux de privation de liberté, autorité indépendante, est chargé, sans préjudice des prérogatives que la loi attribue aux autorités judiciaires ou juridictionnelles, de contrôler les conditions de prise en charge et de transférement des personnes privées de liberté, afin de s'assurer du respect de leurs droits fondamentaux. Il exerce, aux mêmes fins, le contrôle de l'exécution par l'administration des mesures d'éloignement prononcées à l'encontre d'étrangers jusqu'à leur remise aux autorités de l'Etat de destination. Dans la limite de ses attributions, il ne reçoit instruction d'aucune autorité.”.

\textsuperscript{43} The case of this young Chinese is briefly described in the 2009 report of the general inspector of places of deprivation of liberty (p. 58)
taken to a group home? In this case the smuggler would be happy, as she would have managed to cross the border: he would take it as a signal that more people should be sent and get rich as a result. Or should she be returned to China? But she had nothing left at home. Jacques’ dilemma was not framed in terms of determining the best course of action for the young Chinese but rather in terms of what was best for the control of borders. Yet, the Convention on the Rights of the Child, to which France is a Party, explicitly states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” (article 3). Furthermore, Article 20 of the same convention specifies that “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Instead of envisaging people in the waiting zone as right-holders, Jacques embraces the state’s perspective by being overly concerned with border control.

Even George, an experienced ad hoc administrator who explicitly presents himself as an activist (“I am an activist”), observes that it is impossible to end the detention of unaccompanied minors at the borders as this would clearly constitute a “suction effect” (appel d’air): it would incite more people to come (Interview, October 2013) 44.

Stakeholders whose task it is to assist and comfort detainees in the waiting zone in a spiritual or medical way appeared overly concerned with security and lacked empathy with detainees. Several places of worship and prayer for Christians, Jews and Muslims can be found on Charles de Gaulle airport’s compounds. Catholic

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44 When I say “at the borders”, I mean at the legal borders, not the cartographic borders.
priests, pastors, rabbis and imams are allowed to visit those placed in waiting zones should detainees expressly call for them. Such visits rarely take place, as detainees are often unaware of this possibility: the information is nowhere to be found in spaces of confinement. During data collection two Catholic priests were listed on the airport’s website. One of them, Cédric, simply refused to talk to me: he was very angry and told me that “he knew people like me, who just want to sell their products and are not even thankful afterwards”. But the other one, Raphaël, agreed to a short phone interview.

Raphaël explained that he had been to Charles de Gaulle’s detention center twice. He was first called by an Orthodox priest and then by a Catholic priest. Both were lacking one document to enter the country. He had the opportunity to talk with Red Cross agents and doctors working onsite and could visit the entire center. He was very suspicious of those in CDG’s waiting zone, denouncing individuals who “abuse the system”. For example, some detainees pretend to be sick. He noted that some priests might be frauds: sometimes there are “false priests” and “false nuns”. The border police must be careful, as nothing proves their identity: “In detention centers there are people of all kinds. There are people who may be terrorists or wanted by Interpol”. Raphaël remarked that CDG airport was a very sensitive zone: “Should the slightest problem arise, an entire plane crashes with many passengers onboard”. Raphaël did not find the detention of children problematic, explaining that ZAPI 3 was well equipped to receive families: conditions are satisfactory (Interview, June 2014).

45 I also contacted a pastor who was willing to talk but could not provide me with information as he had not been called yet and therefore did not know waiting zone issues. Due to time constraints, I did not contact rabbis or imams.
During one visit to the detention center, I met Pierre, one of the doctors working onsite. He described the medical unit comprised of three doctors and three nurses, working in shifts. I asked Pierre: “What is the impact of detention on children?” Pierre did not answer my questions directly but observed that parents were to be blamed for putting their children through this: “They take their children all around the globe for 15 days, giving them anything to eat, not to mention the presence of fleas”. The parents made the decision to carry their children to the other end of the world. As far as unaccompanied minors are concerned, he wondered whether it was better for them to be hosted in hotels with nannies (i.e. before the minor area opened) or at ZAPI 3, in an area with toys. Clearly Pierre did not find the confinement of minors problematic. Pierre admitted: “As a clinician, I really do not care about the age (of detainees)”. I remarked that a different legal framework applied to children. Pierre insisted: “I do not care about the legal regime”. Once again, the law is something that can be dispensed with. As a doctor, Pierre sees minors under 13 every day and those older than 13 once during their stay at ZAPI 3. Even though he “agrees to check on the little ones”, he thinks that this policy has been established so as to please NGOs and the Ministry of the Interior. Generally, Pierre minimized detention, explaining that ZAPI 3 was “a hotel from which one cannot leave”. Like Raphaël, Pierre thinks many detainees are frauds. He explained: “Every time there is a conflict somewhere, people take advantage of it”. For example some claim they are Syrians but they are not. Pierre espouses the state’s perspective; in waiting zones people are first and foremost illegal migrants who seek to take advantage of the country. He added: “The majority of people come for economic reasons or to get cured here”. The legal technique of the waiting zone is not isolated. On the contrary, it is one of many maneuvers deployed globally to control migrants and asylum-seekers’ arrivals.
III. The Law on the Waiting Zone within the global landscape and perspectives on the concept of legal space

The Law on the Waiting Zone resembles immigration practices and laws in other countries. Once the waiting zone regime is assigned to non-citizens, they carry it with them wherever they go, even when they leave the geographical space of the border. The waiting zone framework creates a particular legal space of lesser rights that always follows the individual, no matter his or her location. Practitioners explain that non-citizens carry the waiting zone status like a “backpack” or are in a waiting zone “bubble”. Christian, the lawyer aforementioned uses both terms (Interview, December 2013). This brings to mind the notion of the “personalized border” as defined by Weber (2006) in the context of her analysis of United Kingdom (UK) frontiers. As she observes, the new immigration rules that came into force in the UK in April 2000 changed the moment at which entry to UK territory is officially granted. Under the new rules, entry is officially granted when a consular official issues a visa overseas. This means that “British borders can be conceptualized as fragmented and fully portable, their location defined, not by sites of enforcement action by states officials but in terms of the current whereabouts of certain intending visitors” (Weber 2006, 36). In both the UK and the French cases, the conception of borders has shifted from physical location to personal immigration status. Shachar’s findings, while describing United States’ immigration policies, illuminate the waiting zone legislation: “The border itself has become a moving barrier, a legal construct that is not tightly fixed to territorial benchmarks” (2007, 2).

The Law on the Waiting Zone allows immigration authorities to tailor the border to their needs: as explained in chapter 2, ad hoc waiting zones can be created when a group of 10 non-citizens or more arrives in France outside of a border
crossing (for example on a beach). The non-citizens can all be found in one place or in different locations separated from one another by 10 km maximum. In this case the waiting zone will run between places where authorities have found the non-citizens and the closest border crossing: the perimeter of this area may be quite large.

How do legal practitioners view ad hoc waiting zones? A former lawyer, Louise, who was serving as Senator at the time of the interview, described these waiting zones as “an aberration”. However, she did not find the practical consequences of such waiting zones to be dire: lawyers defending non-citizens know how to plead. She trusted them to draw the liberty and custody judge’s attention to any weakness or breach to the law (Interview, January 2014). As for Ségolène, a liberty and custody judge at Bobigny, she trusted judges to release individuals should there be any legal irregularity. She explained that she never had to deal with ad hoc waiting zones. She did not find the concept particularly shocking, as those placed under the waiting zone regime will always be presented to a judge after four days: they will be able to enforce their rights. She said: “It is true that it is a little disturbing that an administrative authority has the powers to extend the waiting zone to any place where individuals are found but the procedure still has to be respected” (Interview, November 2013). When I observed that it would be challenging for detainees to exercise their rights due to lack of access to legal aid, she agreed but, once again, highlighted immigration authorities’ responsibilities: they would have to respect detainees’ rights. Should these rights be violated, the judge would release individuals from the waiting zone (Interview, November 2013). I asked Léa, also a liberty and custody judge at Bobigny, whether the creation of ad hoc waiting zones should be controlled by the judiciary. She sighed: “What type of control would we have? What would we be good for? There is a tendency to put the judiciary at the
heart of everything. For me it is an immigration policy issue, an administrative problem, not a judiciary one…Immigration is a policy” (Interview, November 2013).

France is not the only country where immigration authorities tailor the border to their needs. As Shachar observes, the US and other countries of immigration have managed to create “malleable borders”, i.e. borders that can be flexibly redrawn to keep at bay “unwanted untruders”. She writes (2007, 2):

This redesign [of the border] has been accomplished by enforcing the sovereign prerogative to deny or permit access in a whole new way: by redrawing (indeed, redefining) the once fixed and static territorial border, transforming it into something more malleable and movable, which can be placed and replaced - by the words of law - in whatever location that best suits the goal of restricting access.

With the Law on the Waiting Zone, French authorities can create legal spaces of lesser rights pretty much anywhere they see fit. This legal maneuver involves shifting “the border of immigration regulation” (Shachar, 2007) to circumvent granting some rights has been used by other states and may or may not be enshrined in the law. For example, Mountz (2010) documents how the Canadian government used the “long tunnel thesis” to claim that Chinese people (intercepted on four boats off the coast of British Columbia in 1999 and transported to Vancouver Island) had not reached Canadian soil yet, in spite of them being physically located on Canadian sovereign territory. The Canadian government used this trick to shape the migrants’ access to legal rights: their access to refugee lawyers was delayed on the basis that they were still walking through the tunnels of an international airport, not yet landed on Canadian territory.

In the United States, the 1996 modification of the US Immigration and Nationality Act (INA) established the distinction between physical entry into the country and lawful admission at a recognized port of entry. The implications are far-reaching for those whose presence is deemed unlawful: “In this way, entry into the
territory - the material act of crossing the geographical border and physically being present within the jurisdiction of the United States, does not equate with gaining immigration-related procedural protections that would apply to those who have been admitted” (Shachar, 2007, 4). Similarly, individuals are placed under the waiting zone regime because they have not been legally admitted.

How do individuals subjected to the waiting zone framework comprehend their situation? Evidence suggests that the notion of legal space can be difficult to grasp for those detained in Charles de Gaulle’s waiting zone. While visiting places of confinement in CDG terminal 2D in February, I met a family with two small children (aged one year and one month and three years) that had fled Syria. Hassan46, the father, explained that they had undertaken a long journey travelling from Syria to Lebanon, Turkey and then Cyprus before finally arriving at CDG two days before my visit. The family’s final destination was Sweden, where his wife’s family was living. They had not asked for asylum at French borders and the police had attempted to return them to Cyprus that very morning. The father enquired: Was this France? My explanation: Yes, this was France but they were detained in this small room for they had been refused entry as they lacked valid travel documents, was met with a puzzled look. The detainees’ confusion surrounding their physical location may be compounded by the official posters located in some police stations at terminals, which remind border policemen of the rules by which they must abide. I saw one such poster in terminal 1. Such posters remind policemen to be courteous, say “hello” and “welcome to France”. Not without irony, they are located in rooms where people are

46 Hassan explained that he was a descendant of Palestine refugees, born in Kuwait. He confided that he wanted to go back to Israel but the country did not want him. Hassan and his family had refugee cards. Hassan wanted to know whether they could seek refugee status again in a European country.
taken to be further interrogated about their travel motives, i.e. after the agent at the checkpoint determined they could not be admitted, at least not before more thorough checks. It is in these rooms that travelers, when applicable, are informed of their placement under the status of the waiting zone.

Conclusion

To conclude, the Law on the Waiting Zone does not represent a striking shift from the previous era, when asylum-claimants and rejected travelers were excluded from legal guarantees based on their presence in international zones construed as extra-territorial. The international zone is still a non-rights place for those denied access to the waiting zone status. Furthermore, the excision issues attached to the international zone have been transferred to the waiting zone: the argument according to which waiting zones are excised territory has been used to exclude non-citizens from rights. Finally, the Law on the Waiting Zone itself forces an exclusionary legal framework on the most vulnerable, premised on their location outside “law’s admission gate” (Shachar, 2007) at the border. The term “extra-territoriality” appropriately captures the situation today. CDG waiting zone functions like an extra-territorial, offshore vanishing point described by Mountz (2013): it is a physical and a legal space where border control takes precedence over access to rights.
Chapter 5. Airport terminals: the border police’s realms. The less visible part of CDG’s waiting zone

Introduction

In previous chapters, I explored the ways in which exclusion of non-citizens through extra-territoriality endured and was reinvented. I showed how CDG’s waiting zone was a physical and legal space where border control takes precedence over rights. Now that this conceptual framework has been established, I would like to change the level of analysis to concretely describe daily practices in and discourses of the waiting zone. Is CDG’s waiting zone a homogenous space? What happens to non-citizens confined there? Are their rights being respected? What organizations or actors are working in CDG’s waiting zone and how do they relate to non-citizens and each other? In this and the following chapter, I will share ethnographic findings, unveiling practices and mental landscapes in spaces inaccessible to the general public and journalists. This chapter will focus on airport terminals while the next one will turn to the detention center, “ZAPI 3”. I will demonstrate that airport terminals are truly the border police’s realms. Here, asymmetrical power relations prevail and both detainees and researchers experience arbitrariness. Airport terminals constitute the less visible part of CDG’s waiting zone. I begin with a description of the geographical and legal path followed by passengers prior to and upon conferment of the waiting zone status. Some passengers may have difficulties reaching the waiting zone status, deprived of the “right to have rights” (Arendt, 1968) in the international zone.

I. Path followed by passengers prior to and upon placement under the waiting zone regime
Passengers arriving at the airport may meet the border police as soon as they get off the plane at gangway checks (also called “on-board inspections”) or at built-in border checkpoints. I will describe how, in both cases, passengers may be returned immediately, without conferment of the waiting zone status. For these non-citizens, Paris airports’ international zones remain a legal black hole, or, as Basaran calls it, a “zone of non-rights” (2011, 63). It is the only space where some individuals can still exist in a legal vacuum. Indeed those who have not been registered yet as non-admitted travelers or as asylum claimants at a border checkpoint do not benefit from the rights attached to the waiting zone framework (among them the right not to be returned before 24 hours or the right to communicate with any person of their choosing). Because they are not registered as having been denied entry, they are not accounted for under the law. As their existence is not acknowledged in the border police’s records, it is possible for border agents to intercept them as soon as they get off the plane and to return them immediately.

Christian, a lawyer representing foreign nationals in the waiting zone and in rétention, flew from Kinshasa to Belgium a few years ago. He explains that authorities boarded the plane where they identified travellers who did not meet the criteria to enter Belgian territory. These passengers were forbidden from exiting the plane, which was returning to Kinshasa (Interview, December 2013). Christian wondered how people could claim asylum in such circumstances. At CDG, on-board inspections have been common practice since 2005 (Iserte, 2008). According to Iserte (2008, 16), 40 onboard inspections are carried out daily at CDG. The practices witnessed by Christian in Belgium also take place at CDG. Several European reports denounced these illegal practices in respect to CDG airport. In 2007, the European Parliament report recommended that France “prohibit the almost immediate removal
of illegal immigrants during ‘on-board inspections’, which is contrary to asylum law” (European Parliament, 2007). The Commissioner for Human Rights also noted in 2004:

A final matter to address is that of foreigners who are not allowed to enter the waiting zone. Representatives of specialist NGOs passed on several reports to me which show that gangway checks are on the increase and lead on occasion to immediate expulsion or removal to international areas of the airport terminal, preventing the persons concerned from being registered or reaching the waiting zone (Gil-Robles, 2006, §193).

Therefore, asylum-seekers and migrants are sometimes returned without even leaving the runway, as in the 1980s and early 1990s. Jean, an Air France employee at CDG in the 1980s, describes the practices at the time: “When the border police caught someone this person would not even cross the gangway, the person was left on the plane, the airline company had to deal with the person” (Interview, February 6, 2014). Issues pertaining to the absence of legality in the international zone have endured well after the birth of the Law on the Waiting Zone in July 1992.

Luc is a lawyer who occasionally represents non-citizens placed in the waiting zones of Paris’ airports. Luc had a client who never reached the legal guarantees attached to the status of the waiting zone (Interview, October 2013). He explains that the family of a pregnant Moroccan woman contacted him in 2008 or 2009. Living in France with her husband, Leïla had requested administrative permission to reside lawfully in the country. She was given a receipt acknowledging that her request was under examination. Mistaking the receipt for proof she had been entitled to stay in France, Leïla travelled to Morocco. When she returned and presented herself at Orly airport’s border, the police denied her entry and kept her at the terminal, in their offices. When Luc arrived at Orly, two hours after his client had landed, he found no trace of her. The border police had not issued the usual administrative paperwork: there were no documents certifying she had been denied entry or placed in the waiting
zone. Leïla was completely unknown, her name absent from police electronic records. It was as if she had never come. Luc understood how events had unfolded later, when Leïla contacted her family from Casablanca, Morocco. She explained that the police had attempted to beat her to put her back on the plane. Already six or seven months pregnant, she had not resisted her return. There are frequent flights to major Moroccan cities, perhaps making it easier for authorities to return travellers without registering them. When denied registration under the waiting zone regime, those turned away at the borders at French airports are rendered nonexistent, as in the 1980s and early 1990s. While the rights conferred to those placed under the waiting zone regime are no panacea, they are nonetheless better than being denied legal existence. In particular, the waiting zone framework grants the right not to be returned before 24 hours.

It is important to note that the international zone remains an “abject space” (Isin and Rygiel 2007) only for those left outside of the waiting zone regime. To illustrate this point, imagine two individuals detained in the same holding room in one of CDG airport’s terminals. One of them possesses paperwork indicating he has been turned away, while the other will never receive such documents. Both are geographically located in the international zone. However, from a legal standpoint they do not share the same space: the former is detained in the waiting zone, while the latter is located in the international zone. The illegal practice of non-registration under the waiting zone status may have dramatic consequences on people’s lives. As in the era preceding the birth of the Law on the Waiting Zone, asylum-seekers may experience *refoulement* in Paris airports’ international zones.

Travelers may also spend lengthy amounts of time in the international zone, in a legal vacuum, before reaching the waiting zone status. The Roissy Charles de
Gaullé airport is not a homogeneous place: terminals were built at different points in time and do not have the same shape or length.

**Figure 5. Map of terminals at Roissy-Charles de Gaulle airport. Source: airport website August 2016**

In some terminals, passengers have no choice but to reach the border checkpoint immediately. However, in other terminals, passengers have to walk for a while and/or to take a shuttle to reach the border checkpoint: the international zone covers a vast amount of space. Extended stays in the international zone may be voluntary or involuntary. Some travelers avoid reaching the checkpoints immediately so that it becomes impossible to track their point of departure and therefore to return them (Interview with Clotilde from the Ministry of the Interior, December 2013). But others are confronted with the police’s refusal to register their asylum claims (Anafé, February 2016).
I will now explain the path followed by those who are granted the waiting zone status. When authorities suspect the traveler of lacking the appropriate documents to cross the border, the individual is put aside and taken to meet another authority called an *officier de quart*. This border officer proceeds to conduct further checks, interrogating the individual. The *officier de quart* ultimately decides whether or not the individual should be admitted to the country. When the individual is placed under the waiting zone regime, this authority issues the following administrative documents: a form certifying that entry was denied (or requested on asylum grounds), a form certifying the placement under the waiting zone regime, the transcription of the hearing and documents detailing the types of control that were carried out by the *officier de quart*.

According to the Law on the Waiting Zone, authorities must inform the rejected traveler or asylum seeker of the non-entry decision and the rights attached to it “in a language that he or she understands” (art. L213-2). The rights in question are the following: right to communicate with the person that was meant to host the non-citizen, with the consulate or counsel of the non-citizen’s choosing and the right to refuse to be returned before 24 hours (this 24-hour period is called the *jour franc*, art L.213-2). The non-citizen must also be informed that he or she can require the assistance of an interpreter and a doctor (art. L.221-4). Authorities have to let the non-citizen know that he or she can ask to leave the waiting zone to go anywhere but France at any time (art. L.221-4). These rights are written in French on the first two administrative documents aforementioned and must be communicated orally to the person placed in the waiting zone (art. L 213-2), through an interpreter if need be. Ethnographic findings and interviews revealed that, in practice, these rights are really difficult to access. I distinguish between what I call “sine qua non rights” and other
rights. *Sine qua non* rights are rights without which the enjoyment of all other rights proves impossible. In other words, these *sine qua non* rights determine the ability to enjoy the rights one has in principle. *Sine qua non* rights include the right to be informed of one’s rights, the right to an interpreter (this right is connected to the former) and the right to stall return for 24 hours. I will start by describing barriers to the enjoyment of *sine qua non* rights, detailing the number of ways in which they are curtailed.

II.  **Barriers to the enjoyment of sine qua non rights**

For individuals to be able to exercise the rights set out in the law, they must first be able to understand their very existence. However, evidence suggests that interpretation issues prevent non-Francophone travelers from being aware of their rights. Upon placing an allophone individual under the waiting zone status, border officers may call professional interpreters but also anybody present on the airport compounds, such as an agent from an airline or a cleaning company. Border officers themselves may also act as interpreters (Anafé, 2015). There are many obstacles to comprehension: the police may stop interpreters from doing their job, interpreting may occur in a language that the person does not master, or interpreters may lack ethical considerations.

Michaël discussed the first of these obstacles. He runs an interpreting company that used to provide interpreters in person at CDG. Companies compete to win tenders to provide interpreting services to the police at CDG. Languages are divided into different bundles and companies compete over one or more bundles. Companies can provide interpreters that are physically present or available by telephone (Interview with Michaël, July 2014). Interpreters speaking English, Arabic,
Chinese, Spanish and Russian (i.e. UN official languages) are based at CDG (Anafé, 2013) from 6:00 am to 9:00 pm, in order to provide interpretation in person as soon as the need arises. For any other languages or during the night time, interpreters may be physically dispatched or available by telephone (Interview with Michaël, July 2014).

After much hesitation, Michaël confided that he was forced to terminate the contract of Joël, one of his employees, after the police complained about Joël’s work. Joël wanted to translate the entire content of administrative documents, including the part mentioning rights. Michaël explains:

I have to tell you this: the officers’ behavior with respect to individuals is seriously questionable. I have an interpreter who was fired because he did not fit in the system, which means that he was doing his job but it was not like the police wanted. The police wanted to put these people back into planes; it is that simple. So they gave them… There are written rights so there are forms, I do not know if I have some here, forms to notify “you have the right to a lawyer, to this and that”. But the police are interested in the duties: “You have to do this, you have to do that.” But when it comes to recourses etc, we do not dwell on it (Interview, July 2014).

Michaël’s statement matches what numerous detainees (Francophone and allophone) told me: their rights were never explained to them. In some cases, the police specifically stood in the way of people understanding their rights. For example, in February 2014, in terminal one I met Arthur, a Congolese national born in Kinshasa, who explained that he had been living in France with his son and wife since 2010. Arthur said he was coming from Istanbul, Turkey where he had spent a few days for vacation. He had a valid document allowing him to stay in France until October of the following year, but was suspected of carrying a fake passport. Arthur contended that a female officer told him “no, you mustn’t read everything”. He did not have time to read his administrative paperwork. When I saw Arthur, he was in the
terminal’s holding cell to be returned to Turkey in spite of having his family in France. It was particularly important that he understood his rights.

Michaël explains that the case of Joël is not isolated but is part of a pattern. Many interpreters would like to translate the entirety of administrative paperwork but are prevented from doing so:

Maybe, after working for some time (there) interpreters are disillusioned, but I had several interpreters including this one, who wanted, it was part of his job to do this but he was prevented. He was found “too kind to claimants”. A colleague of his who was not fired, but who raised serious objections regarding this system, was wondering whether he would stay. Moreover it was in the same language, in Portuguese. So there is a real problem here. (…) I received a registered letter from the police for my interpreter to be excluded, where it is clearly written that this person should work for the Red Cross instead of the police (Interview, July 2014).

Michaël admits that he found himself in a complicated situation: he does not like to fire people after recruiting them, and Joël threatened to sue him in court. At the same time, Michaël’s interpreting company was working for the police: officers at CDG were his clients, and he needed to keep them satisfied. He finally terminated Joël’s employment.

Not only may interpreters be prevented from doing their work, but they may also speak a language in which the detainee is not fluent. During a February visit, I met Ajitabh from Sri Lanka. Communication in English was extremely uneasy and I could only get a basic understanding of his situation after reading his administrative documents. Yet, his form specified that an interpreter physically present had notified him of his rights in English. A native Tamil speaker, Ajitabh lacked proficiency in English and therefore likely had a very limited understanding of his rights.

The fact that anyone can provide interpretation services also raises ethical questions. Lydia had recently joined Anafè as a volunteer when I met her at the Bobigny court of first instance. A detainee explained to Lydia that an airline company
employee acted as an interpreter for him. In lieu of translating the documents notifying him of his rights, the carrier’s staff told the detainee: “Here they do not give asylum, go back home” (observations). It is also interesting to note that in theory anybody can become a professional interpreter as the profession is not regulated: there is no exam to be taken or training specifically required (Interview with Michaël, July 2014). Nobody controls the quality of interpretation and Michaël laments that cost-management takes precedence over quality in selecting interpreting companies for the CDG market (Interview, July 2014). It would have been valuable to gather the perspective of interpreters working for the border police at CDG at the time of research. Unfortunately the two companies providing such interpretation services -in person or by telephone- either refused to talk to me or never replied, leaning me to rely instead on interviews with those who had been doing this work previously and my own ethnographic observations.

Just like the right to be notified of one’s rights in a language that one understands, the right not to be returned before 24 hours is a sine qua non right, a right without which all others cannot be enjoyed. Delaying return by 24 hours allows the individual placed under the waiting zone regime to contact whomever he or she wants and therefore to try and gather missing documents in order to be able to enter France or any other Schengen area country or to prepare for return. This period of time is particularly important for asylum-seekers who otherwise face refoulement. However, actors in charge of monitoring or defending non-citizens’ rights routinely notice many barriers to the enjoyment of the jour franc. Non-citizens must specifically ask to be granted this 24-hour delay (article L.213-2), but often fail to grasp this right or its significance. Furthermore, in many cases the police seem to
make the decision for the person. Jacques, an inspector of places of deprivation of liberty (cf chapter 3), recalls his visit to a terminal in January 2009:

We say it in the report, there was something that was really less satisfying in this terminal, we saw a high-ranking officer tell one of his colleagues: “you give it to this one”, you know the 24-hour period, it has a name.
Researcher: The jour franc?
Jacques: “You give him the jour franc”, meaning “you do not give it to this one”. Normally everybody has the right: anybody has the right to ask for the jour franc, and it was not satisfying because it was not offered to them in an intelligible manner. They were not asked whether they wanted to take the first plane back to Sao Paulo or benefit from the jour franc. It was not satisfactory at all (Interview, August 2013).

The non-citizen is supposed to indicate whether he or she wishes to benefit from the jour franc on the administrative form certifying that entry was denied or requested on asylum grounds. The following tick boxes can be found under the rights section:

1. “I do not want to go back before the expiry of a 24-hour time period, to be spent in waiting zone, from midnight today”.
2. “I want to go back as soon as possible”.

But in practice, I observed that the police may tick box number two on the computer before handing the document over to the non-citizen to gather his or her signature. Anafé has been denouncing this practice for a long time (Anafé, January 2013, 37).
Christian, a lawyer defending non-citizens, observes that it is difficult to prove that the non-citizen did not tick box number two himself or herself. But the behavior of many of his clients is at odds with the box that they supposedly chose. Christian explains: “Sometimes people tell me ‘no I was not told about this’ (jour franc). Sometimes there are contradictions, the person does not ask for the jour franc but refuses to board the very same day. So you say ‘it is weird, there is something wrong’” (Interview, December 2013). This was the case for Arthur: his form mentioned his desire to leave as soon as possible. Yet Arthur had his family in France and had no intention of living in Turkey. The right to remain in the waiting zone for
24 hours is subject to discretion; it is only available to some. Luc, another lawyer defending non-citizens’ rights (cf section I), finds this state of affairs infuriating:

It is them (the border police) who decide whether they can grant the jour franc or not, depending on the case. Very often you will see at Roissy the jour franc is granted to individuals whose flight is not departing immediately. Because they know that within the next two or three days they cannot do anything, they grant the jour franc. Because they know that within 24 hours nothing will happen so they can grant the jour franc. But for individuals who have a possible return flight within the next 24 or 12 hours, they tick the box “I want to go back as soon as possible”. Who is this person, who earns a meager living and paid a flight ticket, who arrives here and is told “you can stay on the territory, you can stay in waiting zone during 24 hours for you to talk to family members or to your consulate”? And this person, who spent his or her money would tell you, “I want to go back as soon as possible”! (Interview, October 2013).

As Luc observes, it is highly unlikely that travelers would agree to be returned as soon as possible after disbursing money on a plane ticket, especially when this represent a significant financial investment in comparison to their income. In practice, the right to stall return after 24 hours has been emptied of its content. Border officers routinely deny this right in order to expedite returns. This is particularly an issue for asylum claimants.

During a January visit with Human Rights Watch researchers, we met André. He had been denied entry to France for carrying a fake Cameroonian passport and a fake French residence permit. André was in terminal 1’s holding cell, awaiting return shortly: his flight was scheduled at 11:00 am and it was just a few minutes past 9:00 am. At first André was really wary of us, wondering whether he could trust us. After one HRW researcher showed him a business card, he confided that his travel documents were indeed forged; he was from the Central African Republic (CAR). André had undertaken a long journey from the CAR, transiting through three different countries before arriving in France. Explaining that his life was at risk in his country on account of being a Muslim, he recounted that he had not been able to apply for
asylum on the previous day at the detention center (ZAPI 3) because he had arrived too late, around 10:00 pm. André clearly did not wish to be sent back, yet the box “I want to go back as soon as possible” was ticked on his form. André explained that the box was already ticked when he was given the form. He refused to sign it. I informed André that he could refuse to board the plane: he would then be taken to the detention center where he would be able to make an asylum claim. When we left, the authority did not seem pleased that I had given André this information. André did manage to reach the detention center: we saw him there that afternoon. But being denied the right to stall return for 24 hours nearly cost him the opportunity to apply to enter France on asylum grounds.

In theory, claims can be made at airport terminals but in practice the police seldom accept or register them (Anafê, November 2015, 23). Christian, legal counsel, laments that inadmissible individuals are not informed of their right to seek asylum. Yet foreign nationals in administrative detention who have passed “law’s admission gate” (Shachar 2007) are notified of this right. Christian explains: “So this is a first difficulty: they are not notified of the right to seek asylum. Contrary to the detention center (on the territory, rétention center), it is not a right that is notified to the person who is not admitted. It is the person who must express this demand.” (Interview, December 2013). Ethnographic findings in fact suggest that authorities go to great length to hide the fact that detainees are entitled to seek asylum (cf section V. below). The law changed since I collected data: article L. 221-4 of the CESEDA (introduced on July 29, 2015) now states that the individual placed in the waiting zone “is informed of the rights that he or she may exercise regarding asylum claim”. It would be interesting to know whether practices have changed since this new legislative provision was introduced. I would now like to describe the multiple barriers that have
been erected between travelers placed under the waiting zone regime and other rights. I will show that material conditions of detention may also stand in the way of rights enjoyment. Geography is used to exert control.

III. Material conditions of detention and barriers to accessing other rights

After - but also sometimes prior to - conferment of the waiting zone status, rejected travelers and asylum-seekers are detained in small cells located in or outside of police stations at airport terminals (in terminals 1 and 2A, 2C, 2D, 2E and 2F)\(^47\). Individuals await their transfer to the detention center (ZAPI 3) in these small cells, which are also the last stop of those who are to be returned before boarding. Men, women and children of all ages (accompanied or unaccompanied) are all detained together, sitting on rough benches that are attached to the walls. Conditions of detention in these transitional places of confinement are anything but homogeneous. These rooms present different degrees of cleanliness and are of varied surface area (from five square meters to 28 square meters). Some walls are covered with sentences such as “Put your trust in God”, “Jesus is Lord”, “No one is a stranger in this world” or “God is great, DRC” (Dieu est grand, RDC). Some of the cells’ doors are opened, being guarded by one or several police officers at the entrance. However others are locked without a door handle on the inside, creating a very claustrophobic atmosphere to the space. Most rooms are windowless except for a small window that cannot be opened - about the size of an A4 paper - on the door itself. None of the rooms I visited had windows allowing natural light into the room. Although my visits took place during the winter, some of the rooms were very hot. They were more or less crowded, depending on the level of activity and the destinations covered by the terminal in question.

\(^47\) At the time of visits, terminal 2B was closed for renovation.
Some terminals receive significantly more passengers than others. According to one authority, 70 percent of the flights land in terminals 2E (including Air France flights) and 2F combined. Many flights from Africa land in these two terminals. The border police consider African citizens as presenting a “high migratory risk”. Not surprisingly, during each of my two morning visits to terminal 2E, the detention room (about 18 square meters) was quite full, with detainees occupying most of the benches’ space. I met Arnaud, a border agent, in terminal 1. Having previously worked in terminal 2E, he explained that, although holding cells in the two terminals were of the same surface area, terminal 2E hosted twice as many individuals. Arnaud remarked: “Terminal 2E’s holding room really looks like a prison. And from the point of view of hygiene it is not great. There is a ventilation system but no air conditioning, while terminal 1 has both” (observations). A picnic is served to detainees during meal hours, but according to an agent in terminal 2F, there are no meals for babies. During a February visit to terminal 2D I met a Syrian family (Hassan’s family, cf chapter 4) with two small children aged three years and 13 months. The toddler was eating the solid food provided: potato crisps and a tuna salad, in spite of the choking hazard.

The possibility of accessing legal aid is highly variable from one terminal to the next. Posters featuring Anafé’s number and/or a list of lawyers accredited by the bar office of the Seine Saint Denis department (i.e. that are capacitated to represent detainees at the Bobigny court hearing) are attached to the cells’ walls in a few terminals only. The NGO Anafé provides free legal advice over the phone upon request when detainees call the organization during legal aid clinics.48 These clinics are held three times a week on average (Anafé November 2015, 116). Yet, while

48 Anafé volunteers also call holding cells’ phones during legal aid clinics.
appropriate numbers are a necessary starting point to access legal aid, they are not enough. Non-citizens must first comprehend whose number is listed and trust their interlocutors enough to explain their stories. In France, only individuals interested in non-citizens’ rights have heard of Anafé. How can a foreign national travelling to France for the first time, understand the organization’s mandate? Also, how can detainees be sure that individuals listed as Anafé volunteers or lawyers are not, in fact, working for the French government? Difficulties are compounded for allophone detainees: while Anafé’s posters are written in different languages, the lawyers’ poster is written solely in French. In any case, detainees must be able to express themselves in a language in which their interlocutor is comfortable. Those seeking the assistance of a legal professional must also have enough financial resources. Furthermore, detainees are confronted with a very practical obstacle: many had their mobile phones taken away upon placement in the waiting zone. It is forbidden to take pictures in airport areas whose access is restricted; therefore phones with cameras are usually confiscated.

It is true that all confinement rooms are equipped with a phone. According to authorities, individuals could make and receive domestic and international calls whenever they wanted, without any time limit. However, the presence of a phone alone does not guarantee effective or satisfactory communication. First of all, detainees need to know how to use the phone and what number to dial. During my first visit to terminal 2E, Philippe, the police officer, informed us that a country code list used to be posted inside the holding room. In an attempt to be reassuring, he added that detainees just had to knock on the door (from the inside of the cell) for a border agent to provide them with the appropriate country phone code. However, observations suggest that once people are locked up, it is very hard for them to
communicate with authorities. In late February, while I was waiting at the entrance of terminal 2F’s police station, a loud and prolonged banging could be heard from a nearby door. The policeman behind the entrance desk did not move, continuing his activities as if there had been no sound. About ten minutes afterwards, a female officer arrived, asking him whether he could hear the noise. He replied that he could hear, but was alone and could not go. The policewoman responded that she was alone too and therefore could not go either, shrugged and walked away.

In practice detainees may also lack the inclination to ask the border police and give up on contacting the person of their choosing. In terminal 2E I met Françoise, a Senegalese woman whose journey from Dakar to Milan, Italy ended at Charles de Gaulle where she was refused entry to the Schengen area. She wanted to contact her sister in Italy, but thought that the phone did not work. In fact, the phone was functioning, but Françoise did not have the right country code, which was then given to her by the HRW research assistant. Individuals may also fail to contact their families for they do not know that the number “zero” has to be dialed first. Indeed, very few cells feature instructions as to how the phone should be used. The absence of written guidelines places detainees in a situation of dependence: they rely on authorities to communicate with the outside world. Is this a deliberate strategy to exercise petty control over individuals in waiting zones or just negligence?

After one frustrating visit to terminal 2E in February (cf section IV) Jérémie, the officer accompanying me, asked if I had any recommendations so that he could convey them to his superiors. He warned: “I am not Santa Claus”, meaning that he could not guarantee their implementation. It was the only time I was invited to offer recommendations after terminal visits. He refused to write down my remark that detainees should be allowed to use the bathroom more frequently, arguing that they
only had to knock: every time a police officer passed by they could go. They were “not deprived” of using the bathroom. But he did note two of my propositions: I suggested that the country code list be posted on the wall next to the phone, as well as Anafé’s number. When I carried out a subsequent visit to terminal 2E a few days afterwards, I was informed that my recommendations had been followed. The Anafé poster was still at the same place, outside of the holding cell, visible from the tiny window on the door, but letters were written with a bigger font size. When I inquired why the document was still not inside the room, the officer replied that the walls were made of concrete, so documents could not stick to them. He also gave another reason: the detainees tended to pull off posters. Yet this did not seem to be an issue in other holding cells, where documents were posted on cells’ walls. As for the country code list, it was nowhere to be seen. Precarious external communications represent a significant issue for detainees who experience a high degree of isolation in airport terminals.

IV. Isolation

The presence of third parties is very rare in airport terminals. These spaces are the realm of the police; most of the time non-citizens are alone with border agents. Detainees are therefore highly isolated there. Many actors equate Charles de Gaulle’s waiting zone with ZAPI3: in common language, the term “waiting zone” refers to the detention center. Usually, when I presented myself at police stations’ entry desks in terminals, border agents were surprised and tried to divert me, claiming that the waiting zone was not located in airport terminals, but at the detention center. This attitude probably denotes that policemen are not used to receiving visitors in terminals. The law entitles legal counsel to visit their clients anytime and anywhere
within the waiting zone. But in practice, lawyers are generally turned down when they present themselves in airport terminals (Anafé, January 2013, 40-41). I met four lawyers who, at the time of interview, represented or used to regularly represent non-citizens detained in CDG’s waiting zone. None of them visited their clients in terminals.

As for ad hoc administrators, they do not visit unaccompanied minors in airport terminals either. Unaccompanied minors are alone when placed under the legal regime of the waiting zone: they sign the administrative paperwork without their ad hoc administrator being present. Ad hoc administrators are normally designated upon placement of the child in the waiting zone (art. L.221-5). However, in violation of the law, some time may elapse before the public prosecutor office is able to designate an ad hoc administrator. Anafé (January 2013, 29-30) explains that border officers may question the person’s age even if he or she carries official documents proving his or her age as a minor. When border officers are unsure as to whether the person is under 18, they contact the public prosecutor’s office. The latter may then order a medical diagnostic: a bone test. When individuals are finally recognized as minors, they usually have already been transferred to ZAPI 3. Even when the ad hoc administrator is swiftly designated, he or she does not meet the child in the terminals’ holding cells (interview with Anafé employees Anne and Lise, January 2014 and conversations with border officers).

Family members and friends are also banned from terminals. As far as NGOs are concerned, some of them do visit - but sporadically. Two organizations secured privileged access to airport terminals: Anafé and the Red Cross. As per a

49 Cf chapter 4 for a discussion of the role played by ad hoc administrators.

50 This way of assessing a person’s minority is controversial; the medical community contests its accuracy, pointing out that such method only offers a rough estimation of a person’s age (Anafé, 2013, 31).
Memorandum of Understanding signed with the Ministry of the Interior on February 25, 2011 (valid for two years and renewable), Anafé is entitled to visit the airport terminals four times per week (Anafé, January 2013, 2). However, the agreement prevents the organization from carrying out unannounced visits: Anafé has to let the border police know one day in advance of their intention to visit (Interview of Lise and Anne, January 2014). In practice, Anafé lacks the necessary resources to frequently visit the terminals. Noémie had volunteered for Anafé for nine months at the time of interview. According to her, the NGO only visits terminals once a month (Interview, September 2013). Other restrictions apply to terminal visits: the agreement forbids Anafé visitors from speaking to non-citizens when they are the “object of an ongoing procedure” (Anafé, 2007, 1). Raoul, an Anafé volunteer, observes: “An ongoing procedure can mean anything and we say it very often. Depending on the agent that we have in front of us, an ongoing procedure can mean that the person has just arrived and has not signed yet his or her administrative forms, that the person will be boarding in two hours or refused to board two hours ago, it can be anything and everything” (Interview, October 2013).

The Red Cross also visits places of confinement in terminals and the international zone from time to time. The organization, which has also signed a bilateral Memorandum of Understanding with the Ministry of the Interior, faces the very same limitation as Anafé. The Red Cross report (2013, 18) reads: “The argument of an ongoing procedure is often used, mediators are invited to come back later”.

51 Anafé first signed a Memorandum of Understanding with the Ministry of the Interior on March 5, 2004. The Convention was subsequently renewed. At first the organization only had the authorization to visit twice a week. This number was then extended to three visits per week in 2005.

52 The Memorandum of Understanding reads: “habilitated individuals (…) can talk to foreigners, except for those who are the object of an ongoing procedure, and access places where these people are waiting” (“les personnes habilitées (…) peuvent avoir des échanges avec les étrangers, à l’exception de ceux pour lesquels une procédure est en cours, et accéder aux locaux où ces personnes sont en attente.”).
Furthermore, agents often assert to mediators that confinement cells are empty in an attempt to thwart them.\textsuperscript{53} In general, officers do not seem to understand the rationale for mediators’ visits:

(...) policemen present in terminals’ police stations do not seem well aware of the precise role of our mediators and of what motivates their visits to terminals. Some civil servants are surprised by their presence, even though this is a contractual task which is an integral part of the mission that has been assigned to us (Red Cross, 2013, 18).

Just like Anafé, the Red Cross had to reduce the number of visits due to its shortage of personnel. While the organization’s report (2013, 9) does not specify any visit number, it suggests that they are infrequent: visits can only take place when there is little activity at ZAPI 3 and when teams are complete.

Other NGOs are authorized to access the waiting zones, including CDG airport terminals. NGO access to the waiting zones has fluctuated tremendously over the years. The Prime Minister first issued a decree (\textit{décret}, i.e. an administrative act) on May 2, 1995, allowing a UNHCR delegate as well as eight NGOs (of which six were Anafé members\textsuperscript{54}) to access the waiting zones. Conditions of access were stringent: each NGO was allocated ten visitor’s cards but could not carry out more than eight visits per year and per waiting zone. Visitors had to request the Ministry of the Interior’s permission prior to visiting. Visits had to take place between 8:00 am and 8:00 pm, and only two visitors were allowed each time. Other NGOs then requested visiting privileges. In reaction to ongoing court proceedings, the Minister of the Interior authorized thirteen NGOs to access the waiting zone on May 30, 2006\textsuperscript{55}.

\textsuperscript{53} Mediators understand that the confinement cells were not empty when they witness non-citizens arrive in ZAPI 3 shortly afterwards from these very same cells (Red Cross, 2013,14).

\textsuperscript{54} The following Anafé members were granted access to waiting zones: The French section of Amnesty International, Anafé, Cimade, Forum réfugiés, France Terre d’asile and MRAP. The other two non-Anafé members to be granted access were the French Red Cross and Doctors Without Borders.

\textsuperscript{55} Cf French Minister of the Interior, May 30, 2006. In addition to the eight NGOs that were granted access in 1995, the following organizations obtained the right to visit waiting zones in 2006:
(of which ten were Anafé members). The government ended the limitations to visits.

Then, in 2009, two additional NGOs secured authorization to visit waiting zones (French Minister of Immigration, May 27, 2009), bringing the number of accredited NGOs to fifteen. This number was finally reduced to fourteen in 2012, when one NGO lost its access (Anafé January 2013, 64-65). In 2015, fifteen organizations, including Human Rights Watch (HRW), had access to waiting zones.

HRW sought accreditation in the Fall 2013 when I offered to work collaboratively to update the 2009 report on unaccompanied minors\(^{56}\). These organizations’ visits to terminals depend on each NGO’s mission and priorities. For example, Human Rights Watch (HRW) dedicates itself to the production of reports documenting human rights violations, reports upon which an advocacy strategy is then devised and implemented. For such an organization, fieldwork takes place to collect enough data in order to write thorough reports. Dedicated to fact-finding, fieldwork is limited in time. I carried out a few visits alongside with HRW researchers (two of CDG’s and one of Orly’s waiting zones) and pressed on by myself after they had collected enough data. Conditions of accreditation to waiting zones are listed in the CESEDA (art R223-8 to R223-14). NGOs willing to apply need to have had legal existence for at least five years and must aim to provide social or medical assistance, defend human rights or assist non-citizens. Accreditation is granted for three years and one NGO can request up to ten visitor’s cards. The law specifies that representatives from different NGOs cannot visit the same waiting zone on the same


\(^{56}\) For the 2009 report (Lost in Transit, Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle) the HRW researcher did not access terminals. The interviews that took place in the waiting zone were conducted at the detention center, in the visitors’ room (accessible to the general public). Cf p. 6 of the report.
day. However, this was never an issue: over the course of my visits to terminals, I never ran into any other NGO visitor from these 14 organizations. NGO presence in terminals is limited in time and irregular: most of the time detainees are alone with the police.

For all of these aforementioned reasons, airport terminals are not places where detainees can exercise their rights satisfactorily. Both Dominique, high-ranking border officer, and Luc, legal counsel who represents non-citizens in waiting zones, agree on this point. Dominique admits:

It is (ZAPI 3) a more appropriate structure to exercise rights than the terminal. At the terminal, where the person’s rights are notified, she has access to a phone and can make international calls. There are no difficulties but it is not a place that is suitable to host the person over a long period of time. It is not suitable at all to ensure confidentiality for interviews with lawyers or others so she is transferred to this structure (ZAPI 3) (Interview, September 2013).

Yet the law considers the waiting zone as a homogenous space; it does not distinguish between airport terminals and the detention center. Lawyers representing the border police in proceedings before the custody and liberty judge often state that “the waiting zone is one and indivisible” in response to the other counsel’s claim that his or her client’s access to rights was impeded by extended stay in terminals (observations).

Several officers that I met during the course of my visits insisted that detainees spent as little time as possible in airport terminals. For example, Philippe asserted: “Detainees are normally kept four to five hours before their transfer” (observations). However, the testimonies of the detainees themselves did not match the policemen’s affirmation. Time spent in confinement can be lengthy. Rosalita, a young Nicaraguan woman whose trip to Madrid was interrupted at CDG, contended that she had spent 12 hours in terminal 2E’s holding cell upon her arrival from Nicaragua. As for Alfredo, a Cuban national who had departed from Bamako with the intent of reaching Sweden, he claimed having spent 12 to 13 hours per day in terminal 2E for the past
week. Inspectors of places of liberty also noted that time spent in confinement in terminals was extremely variable: from five minutes to 14 hours (CGLPL, 2013, 47-48) in terminal 2F. They arrived at this conclusion after studying terminal 2F’s police registries from December 1 to December 10, 2013. About one third of individuals had spent more than four hours at the station. Makaremi (2007) observed that officers at CDG had a strategy to curtail detainees’ willingness to resist return; non-citizens were sleep and food-deprived in order to make them more compliant. The non-citizens I met in terminal cells had not been subjected to such measures. However, confinement in a restricted space with other individuals without easy access to water (distributed only during meal times) or sanitary facilities is in itself trying. Detaining those who are to be returned in the airport’s terminals for lengthy periods of time may be a strategy to discourage them from staying. Luc, a legal counsel, deplores the lack of transparency that surrounds the time of transfer from terminals to ZAPI 3. He points out that exercising rights in terminals is much more challenging:

You are told that the person in question or the non-citizen is in a position to exercise his or her rights from the first minutes. The issue that we run into today and that I lament is there is no transparency regarding the transfer of people from the terminal to the accommodation zone (zone d’hébergement). Why? Because the person who stays in the terminal from 7:00 am to 5:00 pm is not in the same conditions to exercise his or her rights than in the accommodation zone where he or she can have access to family, talk, receive family members and send a fax through the Red Cross which is on site, or ask to meet a doctor anytime if he or she wishes. There is a minimum of infrastructure. But in terminal these individuals are put in a room and access is closed (Interview, October 2013).

Detention at ZAPI 3 is not devoid of challenges when it comes to exercising rights (cf chapter 6). But, at least, detainees can receive the visit of family members, lawyers, consulate employees and friends as well as communicate more easily with Anafé and the Red Cross. In addition to experiencing isolation and barriers to accessing their rights, detainees are also subjected to arbitrariness in airport terminals.
V. Arbitrariness and asymmetrical power relations

As I will demonstrate in this section, generally those confined and their visitors are subjected to arbitrary and diverse rules, varying greatly from one authority to the next. The treatment an individual receives, therefore, varies significantly from one terminal to the next, and even within one terminal under the supervision of the very same authority. Not unlike Melville’s characters of Turkey and Nippers, whose energy levels and behaviors fluctuate according to the time of day (in the short story *Bartleby, the Scrivener*, 1853), the very same official might display distinct attitudes as time unfolds. For example, during the first visit to a terminal at Charles de Gaulle airport I witnessed a border officer’s transformation: within the range of an hour Philippe went from being very welcoming and eager to please to quiet and aggressive, reaching a point where he stopped answering questions. At the end of the visit he explained the reason for his anger: his colleagues had not come to relieve him of his duties. Having started his shift at 5:00 am, by the time of the lunchtime visit Philippe was starving. In a place where people must rely on authorities for everything, every change in mood or well-being affects both detainees and researcher’s access to information.

Belcher and Martin (2013, 408) explain that policies of access to detention centers in the United States “changed randomly and without notice, or were interpreted differently by detention center staff members”. In airport terminals, similarly, there is no guarantee that NGO visitors will be able to effectively communicate with detainees. On a Saturday in February, I experienced first-hand at Charles de Gaulle what Martin had observed in the United States. The police officer

57 In this story, the characters Nippers and Turkey are law-copyists, working for a Wall Street lawyer. Turkey is a great employee in the morning but becomes too energetic in the afternoon, making mistakes at work. As for Nippers, his attitude is inversely proportional to that of Turkey: he is irritable and nervous in the morning and calmer in the afternoon.
accompanying me attempted to silence both detainees and myself by affirming that I could not discuss any “procedures” with the individuals confined in terminal 2E, claiming that my mandate was limited to verifying detention conditions. This precluded any conversation about rights or administrative or judicial procedures pertaining to the detainees’ status. When challenged with the observation that these requirements were nowhere to be found in the law, Jérémie replied that they were specified in an internal policy note, which I could not see as I was not a civil servant. The visit posed a significant ethical dilemma: the officer, standing less than one meter apart from myself and detainees, listened closely to the conversations. I attempted to bypass the police officer’s illegitimate conditions by first engaging with English and Spanish-speaking detainees in their language. When it became apparent that the police understood neither English nor Spanish, I could still gather some valuable information: I heard about an allegation of mistreatment at the hands of the police of a woman named Maria for the second time. This incident probably explained why the authority did not want me to speak openly with detainees.

However, this strategy was limited by the common word origins of French, Spanish, and English. Jérémie put an abrupt end to the conversation after hearing the word “court”, which is the same in French and Spanish (tribunal). It was particularly heart-breaking not to be able to explain asylum procedures to an exhausted and obviously traumatized Syrian asylum-seeker (who kept saying: “please, don’t attack me”). The officer told me it was forbidden to discuss “political asylum”. When it was time to speak to Francophone detainees, I asked the only question I could think of that would not endanger them: Had they eaten? The answer to this question was evident as garbage and picnic leftovers were scattered all over the room. Fearing that detainees
could be the targets of retaliation if they complained, I chose to ask the minimum amount of information possible.

Ironically, this uncomfortable situation repeated itself shortly afterwards. After exiting terminal 2E, I took a small break before heading towards terminal 2A. During the previous visits, I had learned that different police officers were in charge of the different terminal clusters (terminals 2E, 2F and 2G constitute one such cluster: every morning the 300 policemen assigned to this cluster are distributed across the three terminals). According to what I had observed, the police officer in charge of terminal 2E was different from the policeman in charge of terminal 2A. However, when I presented myself at the entrance of terminal 2A, asking to visit the detention cell there, the same policeman greeted me. Apparently, on Saturdays, the same officer covered multiple terminals. Unfortunately, the two individuals held in terminal 2A were both Francophone. I quickly left. Ultimately, it is the researcher’s ethical duty to decide when to stop asking questions and leave, however frustrating the situation.

Officers also referred to detainees’ possible dangerousness to oppose private conversations. Arnaud, border officer in terminal 1, contended that he could not leave me alone with the detainees, as “we do not know who these people are”. This measure, justified by reference to my own safety, prevented me from talking privately to the detainees. As Agier (2008) points out, by isolating migrants, states convey the message that there is something wrong with them: they must be isolated for a reason. Arnaud displayed a friendly attitude and probably meant well, frequently interrupting my conversation with detainees to provide extra information (“I am helping you a little”). Arnaud used the third person to refer to the non-citizens sitting next to us, explaining the procedures applicable to detainees in general. Not only was this situation ethically problematic, it also confused my position in the eyes of detainees
who associated me with the authorities and felt I was not to be trusted. Establishing rapport with both policemen and detainees at the same time constituted an impossible task. Although NGO workers possess more power and freedom than detainees, they too are subjected to the arbitrary power of authorities. Noémie notes the fundamental power gap between officers and NGO affiliates:

I know that we try to be diplomatic with the border police. We know very well that otherwise they can shut all doors; they make the decisions. When we visit terminals, we chat with officers as if we were friends and afterwards we are astonished (by their answers). But we should never forget that it is them who have the power to open the waiting zone for us, it is a constant negotiation and we have to play along (Interview, September 2013).

Power differential, isolation and barriers to accessing rights combine to create an environment conducive to psychological and physical mistreatment.

VI. Psychological and physical violence

Terminals are the waiting zone’s spaces where detainees are more likely to experience the highest levels of psychological and physical violence. Mistreatment is particularly prevalent prior to or upon placement in the waiting zone, when officers try to assess the individual’s travel motives over interviews of varying duration. It is also very likely to happen during attempts to return the individual, especially against his or her will. Different detainees confided having been subject to instances of abuse. Rosalita, a young Nicaraguan national who landed in terminal 2E in February 2014 told me that her final destination was initially Madrid, a city that she wished to visit as a tourist. The border police thought otherwise, and tried to force her to admit that her intent was to work in Madrid. Officers told her that if she did not tell the truth, they would make her clean the airport. She was certain she had understood correctly, as her interpreter had conveyed the officers’ words. Several detainees complained that officers made fun of them and applied pressure. For example, Carmen, another
Central-American national, explained to the police that she was a masseur; but she was ridiculed and called a prostitute.

During the challenging visit aforementioned (February 22) when I was forbidden to discuss any “procedures” with detainees, I heard about an allegation of mistreatment for the second time. Alfredo, a Cuban national, recounted that policemen had beaten Maria, a Central American woman on the morning of the previous day (February 21). Maria had been seated just outside of the holding cell when he himself was brought to detention. Although Alfredo had not personally witnessed the event, when he arrived she was crying and had many bruises on her stomach. His testimony concurred with that of a group of Central American women I had met in the afternoon of the 21st at the detention center. In the morning, they had been held at the terminal in a room close to that of Maria and had heard the incident. They had heard officers telling Maria that she was going to be put “in a dark room alone”.

Because the group of Central American citizens in ZAPI3 had told me that Maria was now confined in terminal 2F, I decided to visit this terminal’s holding room. After waiting for a fairly long time, I was finally invited to observe the end of the interview of a non-admitted Nicaraguan national. Philippe, the officer, insisted that this constituted a favor: usually it was forbidden for visitors to witness interviews, but he was making an exception for me. Was this an attempt to distract me from the case of Maria? It is impossible to know, but when I finally got to see the holding cell, there was no trace of her. Philippe was very tense and inquired when I left: “Could you see everything that you wanted to see?” I shared Maria’s case with Anafé employee Lise, who explained that Anafé had never managed to get the border police convicted for violence on detainees. Usually, such cases are riddled with
issues: eyewitnesses are lacking, and the alleged victim has left the country and cannot testify. The case of Maria was no different: she had been returned and nobody had witnessed directly her abuse. Nothing could be done.

Lise explained that she had attended a meeting with the Ministry of the Interior during which she had mentioned instances of violence. The Ministry refused to take the allegations of mistreatment into account, challenging her instead to present proofs and to state what criminal procedure had been launched (Interview, December 2013). Yet, France is a party to regional and international conventions prohibiting torture and other cruel, inhuman or degrading treatment or punishment. As such, France has an obligation to prevent and repress torture and other acts of ill treatment. But the Ministry of the Interior is not pro-active in terms of safeguarding human rights when it comes to the waiting zone. This case is representative of the government’s approach to the waiting zone in general: the Ministry of the Interior will not take steps to address alleged rights violations unless forced to do so by legal proceedings. To unveil the mechanisms behind abuse, it is important to study how authorities perceive detainees.

VII. Authorities’ perception of detainees

In order to determine who should come in or not, border agents screen passengers and their stories, on the lookout for suspicious elements. Some traveling rationales trigger red flags. Salter (2007, 59) observes:

Border guards build up a common stock of acceptable travel narratives and traveler characteristics…In addition to being from a refugee-prone country or

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58 Amongst other Conventions, France ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986 and the Council of Europe’s European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1994. Furthermore, the prohibition of torture and other forms of ill-treatment is an established jus cogens norm. Cf Weissbrodt and Heilman, 2011.
region, guards are attendant to other risk factors: buying a plane ticket in cash, having another person purchase the ticket, purchasing a ticket close to departure time, traveling a long distance for a short time... Travelers are reduced from citizens, foreigners, and refugees, with complex identities and claims to home into objects of danger or benefit, which perhaps afford entry or exit into the national population.

At CDG, after this screening, those denied entry or seeking asylum are placed in waiting zones\textsuperscript{59}, carrying the category that has been assigned to them at the border. They are either to be returned or to be heard by the refugee agency. In either case, those placed in waiting zones are suspect and not to be trusted. In fact, some agents are so convinced that detainees are liars, resorting to any possible method to deceive them, that they dismiss everything they say as unreliable. During one March visit to terminal 2A, I met Laurent from Senegal, whose journey to Portugal had stopped at CDG. Laurent recounted that he had previously been refused entry into Schengen territory at Lille (a city in the North of France). As I was not aware of Lille having an airport, I asked Laurent to confirm that I had understood him correctly. Laurent explained that he had flown from Senegal to Algeria and then to Lille, where he was turned away. After this visit, Henri, the agent accompanying me, was concerned that I might be too gullible. He asserted: “There is no airport in Lille. I hope you do not believe everything that they tell you!” He went on: “These people do not have money for tourism; it is impossible to come from the other end of the world for just three days.” When I left Henri, he reiterated his point: “Whatever you do, do not go to the airport in Lille!” Yet, Lille does have an airport, serving flights to and from Algeria as well as Portugal\textsuperscript{60}. In the eyes of some authorities, people lose their individuality once in the waiting zone: they join the ranks of faceless “\textit{Inads}” whose word is necessarily

\textsuperscript{59} Unless immediately returned, in which case they will never reach the waiting zone status (cf chapter 3).

\textsuperscript{60} According to the brochure edited by Lille Airport for the Fall and Winter 2013. The brochure was no longer available from the Internet at the time of writing.
untrustworthy. The term “Inad” comes from the International Air Transport Association (IATA) and is used by French border agents. It designates an “inadmissible person”, defined as “a person who is or will be refused admission to a State by its authorities” (IATA, October 15, 2014, 4). As anthropologist Agier (2008) observes, what makes a foreigner (étranger) is not an identity but a place (from a material and symbolic standpoint) and a context. The waiting zone is one of several places creating the foreigner. To some authorities, the waiting zone embodies an outside as well as a supposedly natural inequality and difference (Agier, 2008). Detainees are lumped together based on their administrative status; they have not been admitted to the country.

Henri envisioned his border-enforcement job as necessary to protect his own welfare as well as that of the country. Sociologist Bauman contends that modernity produces “wasted humans”, i.e. “redundant” or “excessive” beings (5). As new ways of making a living emerge, previous ways are degraded and devalued, thereby stripping individuals of their livelihood. Present times are also characterized by the fullness of our planet: there are no territories left to colonize, “no man’s lands” have disappeared. Bauman demonstrates how, in the past, such territories were used as “dumping grounds” for the wasted humans who had been rendered undesirable by the processes of modernization. The conjunction of these two phenomena (i.e. the production of human waste and the fullness of our planet) results in “an acute crisis of the human waste disposal industry” (Bauman, 6). Bauman equips us with conceptual tools to understand the perspective of some border agents towards both their jobs and individuals placed in the waiting zone. Henri insisted that we (French people) should help ourselves first, our family and our neighbors, otherwise we would be committing suicide (“hara kiri” were his precise words). He noted that from a humanistic
perspective, everyone should be able to come in. However it was not possible, due to current (unfavorable) economic conditions. Henri therefore conceived his job as a shield against social redundancy: “excessive beings” had to be kept outside of the country for it to thrive. Bauman writes:

Immigrants, let us note, fit better into such a purpose than any other category of genuine or putative villains. There is a sort of ‘elective affinity’ between immigrants (that human waste of distant parts of the globe unloaded into ‘our own backyard’) and the least bearable of our own, home-grown fears. When all places and positions feel shaky and are deemed no longer reliable, the sight of immigrants rubs salt into the wound. Immigrants, and particularly the fresh arrivals among them, exude the faint odour of the waste disposal tip which in its many disguises haunts the nights of the prospective casualties of rising vulnerability. For their detractors and haters, immigrants embody—visibly, tangibly, in the flesh— the inarticulate yet hurtful and painful presentiment of their own disposability. One is tempted to say that were there no immigrants knocking at the doors, they would have to be invented (56).

Financial matters occupied a central place in my conversation with Henri, who was disgruntled by a recent talk he had had with an inspector of places of deprivation of liberty. According to Henri, the inspector used to work for an NGO “whose role was to annoy the government”. Now retired, the inspector worked in such a position five days a month and allegedly complained to Henri that his salary was low. Henri remarked that “the inspector did not realize that some people did not make as much”, especially since this money was supplementing his retirement pension. As for asylum-seekers, Henri told me they were receiving a lot of state subsidies. I remarked that French law prohibited asylum-seekers to work during the assessment of their claim. To my observation, Henri replied: “I do not say that they live well, but my wife works in the department in charge of allocating subsidies, and they do receive some!” He continued: “People who live in poverty at home will always be better off in France, because here there are NGOs distributing meals and helping out”. Henri also admitted that he was not in favor of people receiving benefits from the state, but preferred when people made their own money through entrepreneurship.
Henri was not the only agent to resent non-citizens. Valentin, whom I met at a terminal’s reception desk, confided that he was about to leave the force, as he was terribly disappointed with the way he and his colleagues were treated by their superiors. He explained that work conditions were disastrous, with superiors refusing to permit breaks to be taken or to take into account doctor’s notes. According to this young policeman, four colleagues had committed suicide over the course of a year and a half and their superiors could not care less. He expressed resentment: he deplored the fact that foreign nationals received more attention and care than themselves. No NGO was interested in checking how policemen were treated.

Importantly, authorities are not a monolith and should not be essentialized: agents do have different stances on both their work and non-citizens placed in the waiting zone. On a different day, Simon, a policeman at one of the terminal’s reception desks looked at my access card. When he saw the name Human Rights Watch, his interest was piqued. He asked: “It [the NGO] is well-known, right”? He said he regretted his career choice and confided the torments that his job entailed. He lamented that some of his colleagues were racists and that detainees were just “Inads” to them. He explained that some colleagues did their job without asking themselves any questions: “They come here, do their job and go home. They are happy with themselves at the end of the day”. Simon recalled: “One of my superiors told me, ‘you are like me, you would prefer borders to be closed’. But it is not my wish at all, I have never asked for anything like that”. He reminded me that, historically speaking, we all came from Africa and confessed that there were things he was pressured into doing. Simon was visibly tense and scared. He told me he had a lot more to say and wanted to meet again but outside of his workplace. He explained that he would call from a public phone and use a pseudonym to set a meeting. Unfortunately, Simon was never
interviewed, as he did not call. I do not claim to have depicted comprehensively the viewpoints of representative of all of the border agents at CDG. Instead I have merely attempted here to present some of the perspectives of some of the agents I met during my terminal visits.

**Conclusion**

While the law treats the waiting zone as a homogenous space, exercising rights in airport terminals is particularly challenging. Individuals may spend lengthy periods of time in holding cells where they experience a high level of isolation. Despite the existence of formal agreements between NGOs and the Ministry of the Interior, access to detainees is subject to the border officers’ goodwill. Conditions of access are highly variable, reminding the researcher and NGO worker of the pronounced power differential at play in this part of the waiting zone. When HRW retrieved visitor’s cards, the civil servant working for the Ministry of the Interior explained that we could visit whenever and as much as we wanted. However, HRW’s office soon received a call (after two visits) from the Ministry of the Interior explaining that it would be appreciated if we could inform authorities of visiting plans in advance. I had planned to carry out more visits of CDG’s terminals but stopped after eight visits\(^6\), as I was starting to feel really unwelcome. Officers ridiculed me with remarks such as “you must really like it here to come back so often” or “she has taken a subscription: 10 entries with one free!” Some were rather threatening, telling me that I was very well known on the airport platform or that I should stop coming. I also realized that I was taking a significant amount of agents’ time, diverting them from their work.

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\(^6\) I carried out one visit in January, five visits in February and two visits in March 2014. Terminal 1, 2A, 2C, 2D and 2E were all visited three times. Terminal 2F was visited twice.
Some authorities’ mindsets towards non-citizens and their border enforcement jobs may be conducive to ill treatment. Those placed in waiting zones are seen as being impoverished and as undifferentiated masses to be kept at bay for the economic sake of the country. Once categorized as “non-admitted” or “asylum-seekers”, individuals disappear. As Bauman (2004, 78) argues: “All waste, including wasted humans, tends to be piled up indiscriminately on the same refuse tip. The act of assigning to waste puts an end to differences, individualities, idiosyncrasies.” The very structure of the waiting zone is also conducive to abuse: individuals who are wronged are usually returned and do not testify. In this chapter, I have unveiled practices and discourses that occur in airport terminals, spaces where third parties rarely venture. I will dedicate the following chapter to an exploration of the second part of CDG’s waiting zone: the detention center.
Chapter 6. ZAPI 3: a place of deprivation of liberty where access to rights remains challenging

Introduction

In chapter 5, I explained that non-citizens accrued certain rights when placed under the waiting zone regime. But rights that exist on paper do not necessarily translate into protection on the ground. In airport terminals, some rejected travellers and asylum seekers never reach the waiting zone status. As for those who do, they face many barriers to accessing their rights. Airport terminals constitute the less visible part of CDG’s waiting zone. As I discussed in the previous chapter, third parties are rarely present; non-citizens are alone with the border police most of the time. I would now like to study the other part of CDG’s waiting zone: “ZAPI 3”. ZAPI 3 is the detention center located in CDG’s waiting zone. ZAPI 3 stands for *zone d’attente pour personnes en instance*, which can be roughly translated as “waiting zone for persons whose case is pending” in English. ZAPI 3 is the most visible and accessible part of CDG’s waiting zone. Anne, an employee from Anafé explains: “(...) It (CDG) is the most visible of waiting zones, taking into account the fact that waiting zones are not very visible” (Interview, December 2013).

Since 2004, Anafé noticed that the situation of non-citizens significantly improved inside the detention facility, which became a “showcase” (*vitrine*). Police officers are used to showing ZAPI 3 to visitors. The officer accompanying HRW researchers and myself during a visit in January 2014 told us that ZAPI 3 was a “very sensitive” place (“*c’est très sensible*”) as they received the visits of MPs, UNHCR, NGOs, embassies and lawyers. Previously, in September 2013 Dominique, the high-ranking officer who gave me a tour of the detention center, had insisted that I had
seen ZAPI 3 as it always was. Nothing had been modified for me: “It has been said that it is a place where people are tortured, but you can see, they were not told about our visit, it is always like that. We do not embellish anything for visitors.” (Observations). NGO presence in ZAPI 3 is unique: Anafé volunteers are present at the detention center two (or three) days a week. As for the Red Cross, its employees work in ZAPI 3 seven days a week, twenty-four hours a day. I observed that liberty and custody judges at Bobigny often told non-citizens that they could find Anafé and the Red Cross at ZAPI 3, as if NGO presence made confinement acceptable and guaranteed the respect of rights.

Yet, as I will demonstrate, the presence of visitors or third parties does not guarantee satisfactory access to rights in ZAPI 3. In this space, the issues are not so much the material conditions of detention but rather the issue of confinement as well as access to rights. ZAPI 3 very much remains a place of deprivation of liberty characterized by limited visibility and police omnipresence. ZAPI 3 is a place where abuse and tension transpire, in contradiction with euphemistic discourses presenting it as a hotel or a place of recreation. NGOs and their individual members face multiple challenges in the daily exercise of their mission, forcing them to reflect on and negotiate their positioning. To contextualize my findings, I begin by offering some background on ZAPI 3 in general and on my research methodology within this space.

I. Background information on ZAPI 3

ZAPI 3 was built specifically to confine individuals spending the night in CDG’s waiting zone. In 2010 and 2011, detainees spent an average of 3.10 days and 3.5 days at CDG respectively (Anafé, January 2013, 67). ZAPI 3 is unique in terms of 62

62 The French term “association” is translated as “NGO”.

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its capacity: 163 detainees in the adult area and six in the minor zone. On the ground level the following spaces can be found: the offices of the border police unit in charge of analysis and follow up of immigration affairs (GASAI), the refugee agency office and three rooms for visitors (such as family, friends, lawyers, embassy or consulate representative and others). CDG is the only waiting zone where OFPRA, the refugee agency, has an office. Detainees are kept away from these spaces by a set of closed doors. However they can circulate in the rest of the ground level and access phones, two TV rooms, the dining room and the medical facility as well as a small outside yard. The “minor zone” (*zone mineurs*), specifically dedicated to unaccompanied minors, is also located on the ground level but only opens from inside. The detainees’ bedrooms and showers are located on the first floor, as well as Anafé’s and the Red Cross’ offices and a small children playroom. I will now briefly describe how these two organizations secured access to ZAPI 3 as well as their mission.

The Red Cross has been offering humanitarian support to detainees in CDG’s waiting zone since 2003, after signing a Memorandum of Understanding with the Ministry of the Interior on October 6, 2003. This memorandum outlines the mandate of the Red Cross, which consists of psychological support and provision of “any useful information” to those detained in the waiting zone. The organization also commits to supplying first-necessity goods and in serving as mediator between non-citizens and civil servants working in the waiting zone (Cf Convention in De Loisy, 2005, 181). The term “mediator” (*médiateur*), which designates a Red Cross employee working in the waiting zone, seems to derive from this mission statement. As of 2012, twenty-three mediators worked in small teams in rotating shifts, enabling the Red Cross to be present in ZAPI3 twenty-four hours a day, seven days a week.
The 2003 memorandum was initially signed for six months but other agreements were signed afterwards.

I could not access the memorandum covering the period from January 1, 2011 to December 31, 2013 or the subsequent one. But the mission of the Red Cross seemed to have remained the same according to the organization’s internal report for 2012, which details the tasks performed by employees (Red Cross, 2013). The tasks include providing detainees with psychological as well as material support through the distribution of phone cards, childcare products, hot drinks, and clothes. The report also states that: “The Red Cross facilitates in general the relations between the police and the persons who are held (personnes maintenues), as well as with all the other stakeholders in the waiting zone” (Red Cross, 2013, 11). According to the report, the Red Cross intervenes on behalf of non-citizens, requesting information from the border police regarding their individual cases. Employees also forward to the police any specific request a non-citizen may have, for example to be sent to another country other than the country of his or her departure. The report goes on to explain that employees can help the asylum-seeker “to structure his or her asylum story and encourage him or her to be specific by asking questions”. This assistance has to take place “while respecting the Red Cross’s neutrality principle” (Red Cross, 2013, 11).

Anafé’s mission differs from that of the Red Cross. On March 5, 2004, Anafé signed a Memorandum of Understanding with the Ministry of the Interior whereby the organization secured the permission to access ZAPI 3 permanently, that is at any point in time and without any time limits. Anafé employees explained that the NGO decided to use this privileged access to offer legal aid to those placed in waiting zones to compensate for the lack thereof. In practice, Anafé is present in ZAPI two or three days a week (Interview, December 2013). Employees, Lise and Anne described the
organization’s mission: Anafé strives to ensure the respect of existing laws applicable to individuals arriving at the border, but also tries to modify laws and practices by either legal action or negotiation, although the latter is more complicated. In addition, Anafé also aims to inform the public about practices and proceedings at the border and to assist those placed in waiting zones (Interview, December 2013)

During the course of my research, I visited ZAPI 3 five times. I was lucky to have Dominique, a high-ranking border police officer, accompany me for my first visit, which occurred after I interviewed him in my capacity as doctoral researcher. I carried out the four other visits as a Human Rights Watch volunteer; half of these visits took place with HRW researchers, and half were conducted alone.

Formally interviewing Red Cross employees working in the waiting zone proved impossible. I had secured an interview with a Red Cross mediator. We were to meet outside of the waiting zone at the airport but at the last minute she cancelled. She explained that her supervisor, the director of the waiting zone, had forbidden her to answer any questions until I specifically obtained permission from the headquarters’ Department of Communication. After numerous emails and phone calls, the contact person at the communication’s department announced that I would receive permission, provided I signed a confidentiality agreement. However, I never received the said agreement and was always told to continue waiting. Hence the data comes from conversations with mediators during participant-observation in the waiting zone or from interviews with former Red Cross mediators. In general, the Red Cross’ mission in the waiting zone appears to be shrouded in secrecy. Previous researchers also failed to obtain detailed material on the Red Cross’ activities. Bacon, who explored the relationships between ZAPI 3 actors in her masters’ thesis, explained that she could not carry out any interviews with mediators or with the Red Cross’
director in ZAPI 3. The director told her that he had forwarded her request to the communication’s department but had never received any answer (Bacon, 2013). Some mediators are aware of this culture of secrecy. During one visit of the minor zone, one mediator told me: “The less we talk, the better it is at the Red Cross”.

Now that I have given an overview of ZAPI 3 and of some of the actors working in this space, I will show that some discourses present ZAPI 3 as a “hotel”.

II. Euphemistic discourses: ZAPI 3 as a “hotel”

In the early 1990s, some discourses minimized the issue of confinement, obscuring what was at stake for those detained in the international zone or in what was construed as its extension. Some actors expressed the idea that those confined in the waiting zone were hosted in desirable hotel-like conditions. Before parliamentarians, Marchand, the Minister of the Interior who introduced the 1991 amendment that later became the waiting zone legislation, insisted that non-citizens in transit zones were not detained: they were not on French territory (cf chapter 2). Contrary to non-citizens detained on French territory, those in waiting zones were free to move and therefore did not need as many legal safeguards. Marchand introduced a new legal term to distinguish between the two categories of non-citizens: those who are to be removed because they are residing illegally in the country are called retenus (a term that can roughly be translated as “detained”), whereas those who are placed in waiting zones are called maintenus (“held” in English). This different vocabulary conveys the idea that those in waiting zones experience a greater degree of freedom, the term maintenu not expressing as strong a constraint as retenu. The Constitutional Council legitimized this distinction manufactured by the government, which made its

63 Lucie Bacon, Jeux d’acteurs en zone d’attente, 2012-2013.
way into the final law. It has no legitimate basis and I therefore use the English term “detention” to refer to the deprivation of liberty to which people are subject when placed under the legal regime of the waiting zone.

In turn, parliamentarians embraced the government’s discourse and legal language. In June 1992, just before the National Assembly adopted the law that established the waiting zone (cf chapter 1), Pezet told the MPs of his recent visit to the hotel Arcade at CDG airport, where non-admitted citizens were confined. As the rapporteur of the law commission of the National Assembly, Pezet’s discourse carried a certain weight: he was addressing the MPs as a person who had examined the proposed bill scrupulously and who therefore had a better understanding of it. This is how he describes his visit:

I had the opportunity of going to Roissy very early in the morning, accompanied by an administrator from the National Assembly. We could observe what was going on. We saw the Arcade hotel of which so much has been said. A hotel just like any other! We go to the first floor: the doors are just like all the others. Of course, the police are there, there is a register with the name of the people staying on this floor and their room number. We visited these rooms. They brought back old memories. They look like youth hostels—three beds per room—but they are quite decent (correct) and each one has a shower. There are no bars to the windows (French National Assembly debates, June 24 1992, 2696).

I previously traced how, in the 1980s and early 1990s, non-citizen populations were detained in a legal vacuum. Asylum-seekers were particularly at risk of *refoulement* (cf chapters 1 and 2). Pezet compared the situation of those detained indefinitely after fleeing their countries to that of young travellers staying willingly in a youth hostel. This comparison negated the plight of the former.

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64 According to the website of the National Assembly, permanent commissions have a double function: preparing the legislative debate as well as informing MPs and controlling the government. The law commission (*commission des lois constitutionnelles, de la législation et de l’administration générale de la République*) is a permanent commission. Cf: Summary sheet n°24: permanent commissions (*Fiches de synthèse n°24: les commissions permanentes*), available at: [http://www2.assemblee-nationale.fr/decouvrir-lassemblee/role-et-pouvoirs-de-lassemblee-nationale/les-organes-de-lassemblee-nationale/les-commissions-permanentes.](http://www2.assemblee-nationale.fr/decouvrir-lassemblee/role-et-pouvoirs-de-lassemblee-nationale/les-organes-de-lassemblee-nationale/les-commissions-permanentes) Accessed January 22, 2016. See also the Regulation manual of the National Assembly (*Règlement de l’Assemblée Nationale*), Chapter IX.
The government’s willingness to understate the deprivation of liberty also transpires in the legal terminology still in use to refer to the waiting zones’ physical spaces of confinement. The Law on the Waiting Zone reads that the waiting zone may comprise “one or several hotel-like accommodations” located in or nearby the train station, port or airport (CESEDA, article L221-2, December 2015). Charles de Gaulle’s waiting zone is equipped with the biggest of such “hotel-like accommodation”: ZAPI 3. It is the only structure that was built specifically to detain non-admitted travelers. The number “three” is attached to the place’s name as other structures previously served to detain those placed under the waiting zone framework at CDG. ZAPI 3 opened in January 2001. Before this date, non-admitted non-citizens and asylum-seekers were confined in nearby hotels (such as Arcade and Ibis, called “ZAPI 1”) and then in a part of the Mesnil-Amelot detention center (ZAPI 2), whose initial purpose was and still is to detain non-citizens who are to be deported after residing illegally in the country. Overnight detention in ZAPI 2 and in airport terminals endured for a period of time after ZAPI 3 opened, due to the high number of individuals in CDG’s waiting zone at the time (Médecins du Monde, March 2003).

Fieldwork revealed that some people currently working in Charles de Gaulle’s waiting zone also adopted the legal language. During a terminal visit in February 2014, I saw a young and dynamic interpreter explain to Isabela, a distressed Nicaraguan national whose final destination was Madrid, that she would be taken to the “police hotel” (hotel de la policía). Inspectors of places of deprivation of liberty (cf chapter 3) also witnessed an officer explain to a rejected traveller that “ZAPI is a

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65 “Elle peut inclure, sur l'emprise, ou à proximité, de la gare, du port ou de l'aéroport ou à proximité du lieu de débarquement, un ou plusieurs lieux d'hébergement assurant aux étrangers concernés des prestations de type hôtelier.” CESEDA, L221-2, December 2015.
hotel managed by the police” (CGLPL, 2013, 64). Interestingly, several detainees I met referred to ZAPI 3 as a “hotel”.

Some actors still consider CDG’s detention center as a place of recreation, particularly for young people. Pierre, one of the doctors working at ZAPI 3, depicts the detention center as a sort of summer camp: “When you are 25, it is nice here; they make noise, they prevent the others from sleeping” (observations). With regard to unaccompanied minors in the minor zone, he remarks that they have access to toys. The Red Cross manages the minor zone in ZAPI 3. The organization’s internal report (2013) presents the typical daily schedule for children in the minor zone. Interestingly, this schedule curiously resembles one that could be found in a summer camp or in day care:

7:45 am: waking up, shower
8:30 am: breakfast
9:00 am: minors do their laundry if necessary
9:30 am: writing down the date, seasons, holidays: in order to be able to situate themselves in time alphabetization is offered to those willing to learn French language
10:30 am: several activities are offered to minors in the morning: dancing, singing, soccer, etc…
12:30 pm: lunch at the cafeteria
1:00 pm: free time: reading, watching TV, napping
3:00 pm: collective activities: artistic activities, board games, etc…
4:00 pm: snack preparation with the minors’ participation
4:30 pm: snack at the cafeteria
5:00 pm: return in minor zone
5:30 pm: collective activities: dancing, music, wii, etc…
6:30 pm: dinner
7:00 pm: return in minor zone
Activities: reading, stories, board games, TV…
10:30: bedtime

However, in spite of these discourses portraying ZAPI 3 as a hotel or place of recreation, it remains a detention center where individuals are deprived of liberty and face forced return.
III. A place of deprivation of liberty where tension transpires

Even google maps, google’s mapping application, designates ZAPI 3 as a “hotel” (but places the expression “holding area” in brackets next to it). Yet, when exploring Charles de Gaulle airport’s compounds with google maps, it is impossible to get too close to ZAPI3, no doubt for security reasons. Surrounded by a high fence topped up with barbed wire, ZAPI 3 hardly resembles a hotel. Figure 6. ZAPI 3. Source: google maps, August 2016

According to an internal report from the Red Cross (2013), about 15 video surveillance cameras are posted both within and outside the building. Windows cannot open and the furniture is attached to the floor for security reasons. Border officers frequently police the corridors, 24 hours a day. They call detainees through speakers between 7:00 am and 9:00 pm (Red Cross, 2013 and observations). Raoul, an Anafé volunteer with three years of experience, describes ZAPI 3 as a place “where the level of stress is unbelievable” (Interview, October 2013). Furthermore,
detainees routinely experience psychological mistreatment and humiliation at ZAPI 3. Raoul witnessed countless racist jokes on the part of the border police. For example, he heard the police call a Chinese national through speakers with a strong Chinese accent: “M. Chang is called downstairs with his luggage”. He narrates another incident that took place during a summer. In response to a detainee’s request to lower the blinds to block out the sunlight, an agent replied, “Kirikou, you are not used to sunshine over there?” (Interview, October 2013). Kirikou is the name of a small African boy in the eponym-animated film.

Red Cross and Anafé employees and volunteers explain that working at ZAPI 3 takes a toll. Being in ZAPI 3, as a detainee or as a worker, is physically and emotionally draining. Laura, a former Red Cross mediator, explains that she had to leave her job after two years because it was a “very tough and tiring job” (Interview, August 2013). As for Raoul, the Anafé volunteer, he explains that he regularly needs breaks from the waiting zone, as assisting individuals there is too trying:

Humanly it is not always easy. I went a lot to the waiting zone, and it true that since three years I am there a lot, but there are times where I stop going to the waiting zone. Because I go there a lot and after going there three times a week for three months I stop, I cannot do it anymore, I have a knot in the stomach before going” (Interview, October 2013).

In the past, tension used to reach even higher levels in ZAPI 3. Paul, former Red Cross mediator, explains that over the course of the eight years he spent in ZAPI 3 the Red Cross managed to secure some progress:

It was very difficult at first for everybody. When we arrived the waiting zone (ZAPI 3) was packed with a capacity of 164, anyway I do not recall. Tension was tangible, officers were waking up people at 4:00 am in order to present them to the court of first instance at 10:00 am, they make them go downstairs, with calls through speakers at any time of the day and night, with a (very loud) volume. Persons and their sleep were not respected, which meant that tension was more tangible (Interview with Paul, August 2013).
The Red Cross managed to reduce tension, by waking up people individually by knocking gently on their bedroom doors, instead of the police calling individuals through speakers or knocking on their door violently with their guns. Paul also credits the Red Cross for stopping overnight calls through speakers. When ZAPI 3 first opened, there were barely enough beds and detainees had to be returned promptly to make room for the next wave of arrivals. Paul recalls: “Policemen were under pressure, some people had to leave to be replaced, otherwise, if you do not have 60 individuals leave and today there are 60 individuals, there will be no more space and as the result ZAPI will be full, overloaded (Interview, August 2013).” Tension diminished over the years as fewer individuals were placed in the waiting zone.

ZAPI 3 is a place of confinement where detainees are subject to rules and constraints and have limited agency. People who are strangers to one another are assigned to the same bedroom, provided they are of the same sex. Women, men and families are all detained in the same facility. Women and men are detained together but do not share rooms, unless they are family members. Individuals are infantilized in ZAPI 3 and lose control over the simplest actions, like choice of TV channel. Detainees do not have direct access to the remote controlling of the television and need to ask the Red Cross to change channels (observations). Frequently, those confined in ZAPI 3 do not have access to their checked luggage, and have no choice but to spend the entire duration of their stay in the same set of clothes. There are no washing machines on site (observations and 2013 Red Cross report). A Bulgarian national I met in terminal 2C’s holding room asked me to speak to the police on his behalf, explaining that he had spent 15 days in waiting zone without access to his luggage.
Raoul, an Anafé volunteer, believes that confinement in the waiting zone constitutes in itself a form of violence: “So violence is already here. It is inherent to the waiting zone. It is detention, presence of cameras, presence of policemen, lack of information, lack of interpreters, disgusting food that does not respect your religious convictions. Violence is inherent to the waiting zone” (Interview, October 2013). Some detainees find comfort in the presence of compatriots at ZAPI 3, while others experience their confinement as trauma. Amine, a young Algerian man I met in a terminal’s holding cell in March confided: “At the hotel you are panicked in your room. At the hotel you do not understand anything”. Lea, a liberty and custody judge at Bobigny, laments that some individuals are locked up in spite of them fulfilling all the criteria to be able to enter France. The border police could release them but prefer them to be taken to court after four days of being placed under the waiting zone regime. Léa worries about the consequences:

The administration forwards to us (liberty and custody judges) all the documents that we need to support our decision but does not release them before. It waits for us to take this decision. And it is a bit unfortunate because we have individuals who are shattered, who miss their connection, who miss their stay, who are traumatized. And it is unfortunate. Let us say that there are mistakes that are very unfortunate. And it happens quite often (Interview, November 2013).

Even detainees who explain that the conditions of detention are good in ZAPI 3 confide the difficulties of detention per se. Cherif, an Algerian national I met in February in terminal 2A’s holding room explained: “In ZAPI the accommodation conditions are acceptable, but we can feel that we are locked. There is a fence, you are not free”. Detainees usually compared the entry policies at home and in the Schengen area. During a March visit, a woman from Burkina Faso told me it was the first time she was locked up, which was “humiliating”: “When you are locked up at home it is because you committed a very serious offence. At the airport in Burkina Faso if you
do not have a visa it is possible to buy one on site at the airport. It costs the double: you pay 100 euro instead of 50. In Burkina Faso you can enter the territory without passport and visa. We give you the slip and you come back two days afterwards”. Many detainees do not understand why they are deprived of liberty and feel that they are being treated like criminals. This feeling may be compounded by police omnipresence in ZAPI 3.

IV. Limited visibility and police omnipresence

ZAPI 3 is more open to NGOs than other waiting zones. Nevertheless it remains a structure with very limited visibility. ZAPI 3 is located in the freight area of the airport, close to the runway: detainees can watch planes take off and land from the small, enclosed yard where they are allowed to smoke. It is possible to reach ZAPI 3 using public transportation: a bus serving the airport compounds can be taken from the train station “Charles de Gaulle 1”. However, ZAPI 3 visitors may well get lost on the way for lack of directions. The detention center is not featured on the bus map at the train station “Charles de Gaulle 1”. Similarly, the bus stop’s name (Rue des Vignes, Vineyard street) does not give any hint regarding the location of ZAPI 3 and there are no indications between the bus stop and ZAPI 3. Drivers will be facing the same issues, as there are no road signs indicating the center. ZAPI 3 itself does not have any identification sign.

The general public knows nothing or very little of ZAPI 3; publicity is kept to a minimum. For example, documentaries about CDG airport simply omit the presence of ZAPI 3. Public TV channel “France 3” (December 12, 2013) produced an extensive report (duration: 1h50) on the airport in December 2013, called “Roissy Charles de Gaulle, immediate boarding” (Roissy Charles de Gaulle, embarquement
Explaining that Roissy was “a possible entry point for illegal immigrants”, the report did talk about the work of the border police and showed a gangway control of passengers arriving from Istanbul. The voice over explained that several passengers were brought to the airport police station and returned to their countries of origin. However, the report failed to mention the confinement of these young women, eluding the existence of both terminals’ holding cells and of ZAPI 3 entirely.

In general, ZAPI 3 is a place where detainees are highly reliant on the police. Phones with cameras are confiscated, as it is forbidden to take pictures on airport compounds. As a result, detainees have to request permission from the police in order to access their phone book (observations at the Bobigny court). Furthermore, as Dominique explains, the police are in charge of the entire “administrative proceedings” in ZAPI 3 (Interview, September 2013). This means that asylum-seekers first have to see the police in order to lodge a request to enter France on asylum grounds. The police then issue and forward a document (*procès-verbal de demande d’asile*) to the refugee agency (OFPRA) in ZAPI 3. This document “mentions the identity of the individual, the date of his or her entry to France, the documents he or she possesses, and policemen also explain to the individual the proceedings as well as his or her rights in the waiting zone. And we cannot hear anybody without this document” (Interview with Miriam, OFPRA agent in ZAPI 3, November 2013).

Likewise, the police notify claimants of the Ministry of the Interior’s decision. Miriam explains: “We (OFPRA agents) send our opinion to the Ministry which forwards its decision to the border police which inform non-citizens.” (Interview, November 2013). During the hearing, OFPRA agents write down the declarations of the claimants. It is the claimant’s right to receive a copy of this document, which is of particular use should they decide to appeal the Ministry of the Interior’s decision.
Again, asylum-seekers receive their declarations from authorities in ZAPI 3. While officers insist that they do not read the declarations, Anafé finds these practices problematic, and insists that it is not a practical question but rather a question of principle: the police should not have access to these documents (Interview with Raoul, October 2013).

Georges, an ad hoc administrator, observes that the detention center is a continuous space, making it a complicated structure to navigate, especially for asylum-seekers. ZAPI 3 is not legible to detainees, as establishing the distinction between the police unit and the rest of the center is challenging:

The waiting zone is not necessarily the best place to make an asylum-claim, this is certain. What I reproach is that it is always the same premises. In the same place we have the dormitory, the cafeteria, the TV, we go through a door and were are at OFPRA, we go through another door and we are at the GASAI (i.e. police unit in charge of following the administrative cases of those placed in the waiting zone), the lawyers, the visits it is almost the same rooms, we are at the same place, it is the same spatial unity. It is really unpleasant because I am convinced that one is not at ease other there. Even for myself, with my years of experience I do not go to the GASAI light-heartedly. To me it is a place of deprivation of liberty and at the GASAI I am not in my element, I am not home because it is a place… I know it is not a prison, but we are in a place that is not neutral (Interview, October 2013).

As George’s observation shows, ZAPI 3 is a place where asymmetrical power relations prevail, and manifest geographically. NGO members have to be constantly aware of the power relations at play in ZAPI 3. Otherwise they run the risk of putting at further risk the individuals whom they are trying to assist. One day at ZAPI 3, I was confronted with instances of mistreatment. While I was conversing with Anafé’s volunteers in the small room allocated to the organization, a group of six women from Central America burst into the office showing signs of great distress. Veronica, Joyce, Anafé and OFPRA gave me inconsistent information. According to OFPRA, agents print off the declarations and forward them to the police in a sealed envelope (Interview with Stéphanie, Miriam and Charline, November 2013). However, according to Raoul, OFPRA faxes the declaration to border officers, who then put the document in a sealed envelope (Interview, October 2013).
Amanda, Jazmin, Gabriela and Lola recounted mistreatment by police during the attempt to force them on the plane. They showed the multiple contusions that covered their bodies. Jazmin had a certificate from the facility’s doctor documenting the wounds.

Anafé’s employees (contacted at the headquarters over the phone) told the volunteers that the women could file a complaint if they so wished. The Central American nationals agreed. As none of the volunteers spoke Spanish, I was the only one who could collect their testimonies. Anafé’s employees warned us that we had to be careful and act with the highest discretion when preparing the complaints for the public prosecutor. The mistreated detainees could be returned overnight should the officers in ZAPI 3 realize they were launching complaints against their colleagues. We did manage to send the complaints to the state prosecutor without attracting the immediate attention of the police in ZAPI 3. But the state prosecutor did not investigate the allegations of abuse. Gabriela and Amanda were returned shortly afterwards while Veronica, Joyce, Jazmin and Lola were sentenced to a few months in prison by a criminal court for remaining illegally on French territory (cf section VI).

In general, detainees experience multiple barriers to accessing remedies in case of mistreatment.

V. Barriers to accessing remedies in case of mistreatment

As the case of the Central American women shows, ZAPI 3 is the place where abuse that occurred in other spaces of the waiting zone becomes visible. Red Cross and Anafé workers do not necessarily witness first-hand the alleged facts (especially when it comes to physical violence) but hear of them upon the individual’s return to the detention center. As I will demonstrate in this section, the presence of Anafé and
of the Red Cross in ZAPI 3 does not guarantee that individuals who experience mistreatment will be able to obtain remedy. Red Cross workers have been constrained by their organization’s mandate and positioning. The Red Cross has been reluctant to engage in any action that could damage its relation with border authorities. Anafé workers have not faced the same issues, as their organization chose to be vocal in the denunciation of abuse. However, launching a complaint for allegations of mistreatment is a challenging process. Furthermore, state prosecutors rarely investigate such allegations in the waiting zone. This leaves those who experienced abuse with very limited (or no) recourses. I begin with describing further the issue of police violence at CDG’s waiting zone.

Police violence in this space was documented by regional human rights monitoring bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2003, paragraphs 10-15 and 2007, paragraphs 54-56). Detainees have long complained of mistreatment taking place outside of ZAPI 3. Noémie, who worked in ZAPI 3 as an Anafé volunteer for ten months, attempts to analyze the causes of police violence:

There is a police violence that is legal. The boundary is not very clear; a return with escort is a return where officers have the right to tie you and there is an entire set of movements that are authorized, techniques, and therefore when you possess legitimate violence, the point where it becomes illegitimate it not really clear in your head. For me it is rather clear! And also there are orders from above, superiors that tell you “this person has to be returned” for example. It also has to do with the fact that in waiting zone non-citizens are considered a migratory risk, often liars, they are completely humiliated, they are nobody, their word is not worth anything if they do not have official documents they are nobody, and therefore it is part of the same process of infantilization, humiliation, the fact of being violent even verbally, there is a lot of verbal abuse, more than physical abuse...(Interview with Noémie, September 2013).

As Noémie mentions, instances of mistreatment have been particularly prevalent during attempts to force detainees on planes or during transfer from planes
to ZAPI 3 after the attempts have failed. Those placed in waiting zones can be sent back with or without escort. The decision to escort is made by the border police on a case-by-case basis, and depends on the individual’s willingness to comply. Makaremi (2009 b) has analyzed violence during return attempts with escort. As she explains, the French government created a police unit specifically dedicated to forced returns and deportations in January 1999: UNESI or National escort, support and intervention unit (Unité nationale d’escorte, de soutien et d’intervention). UNESI was created following the death of a Sri-Lankan asylum-seeker. UNESI officers receive specific training; they learn technical professional gestures (gestes techniques professionnels). These gestures were developed with the assistance of doctors. Escorting techniques are rationalized and the use of force is reduced to managing life and bodies: violence is denied. Makaremi (2009 b) remarks that during the flight, the use of force is extremely codified. Moreover, flight crew and passengers watch officers. However, before or after the codified procedure (i.e. before boarding or after disembarking the plane), brutal mistreatment occurs, in places far away from the public gaze: airport corridors, the van bringing the individual back to ZAPI, or police stations in terminals.

Red Cross workers wishing to address the issue of violence have been constrained by their organization’s mandate and positioning. When ZAPI 3 first opened, allegations of mistreatment were particularly numerous. Several Red Cross mediators tried to address the issue but their efforts were to no avail. Paul, a former Red Cross mediator, describes the procedure that had to be followed by mediators in such instances. Mediators were instructed to collect the person’s testimony and to forward it to their superior who would then raise the issue with the border police director at a weekly meeting (Interview, August 2013).
Journalist De Loisy spent six months in ZAPI 3 from October 2003 to April 2004. She conducted an undercover investigation, taking on the role of a mediator. She was a colleague of Paul. She wrote that, at some point, mediators received testimonies of abuse every day (De Loisy, 2005, p.143-159). Testimonies strongly resembled one another and were often backed by medical certificates issued by the medical service in ZAPI 3. De Loisy and her colleagues felt powerless when confronting police violence. Different teams of mediators raised the issue to their superior, who routinely answered: “The issue will be addressed at the next meeting with the border police. Meanwhile, remain NEUTRAL.” Their superior insisted: “We do not judge the work carried out by the border police, in any circumstance. We ask you, in the respect of the Red Cross neutrality principle, to stop writing sarcastic comments in the correspondence notebook” (used for communication between Red Cross mediators and their superiors) (De Loisy, 157-158).

While allegations of violence greatly diminished over time, Paul regrets the police’s attitude towards the issue: “It is true that the police ask us not to talk about it anymore. If the person arrives with traces of handcuffs these are not mistreatments, it is procedure. If we say, this is how it happened, they say (the police): ‘It is absolutely normal, it is the law that enables it when people are escorted’. For them it is not mistreatment.” (Interview, August 2013). Paul no longer works in ZAPI 3, but follows events occurring in the waiting zone in his current capacity at the Red Cross. The Red Cross report (2013) also laments that the border police stopped the dialogue with the Red Cross regarding allegations of mistreatment.

Contrary to the Red Cross, Anafé chose to be vocal in the denunciation of these issues, releasing reports documenting violence at the hands of the police (see for example Anafé April 2001, March 2003, November 2015) as well as supporting the
alleged victims’ claims to relevant bodies. However, more than ten years after De Loisy’s experience, Anafé employee Lise is as disheartened and frustrated as De Loisy. Lise explains that officers involved in mistreatment are never punished for their actions (Interview, December 2013). The aforementioned case (cf section IV) of the six Central American nationals illustrates her statement: two women were returned shortly afterwards while four were sentenced to a few months in prison by a criminal court for remaining illegally on French territory. Their complaints never went through; the state prosecutor never contacted them, and thus the police were not held accountable for their actions. Anafé 2015’s report documents the obstacles faced by those who experienced mistreatment at the hands of authorities. Lodging a complaint is itself a challenging process. As detainees cannot complain to the police, their only recourse is to file a claim with the state prosecutor, for which they need to be assisted. In many cases individuals cannot be heard, as they are returned shortly after lodging the complaint. Moreover, state prosecutors seldom launch an inquiry for these types of events. As for liberty and custody judges, they usually consider such allegations outside of their mandate, therefore not allowing them to impact the decision to extend the duration of detention after four days (Anafé, November 2015).

The presence of NGOs in ZAPI 3 does not guarantee that detainees will access (effective) remedies in case of mistreatment. Neither does it guarantee the implementation of the rights set out in the Law on the Waiting Zone.

**VI. Barriers to accessing legal aid**

In this section, I will show that detainees in ZAPI 3 experience barriers to accessing legal aid, in spite of the NGO Anafé providing such assistance a few days a week. Absence of accessible and sufficient legal aid leaves the door open to
fraudulent practices: detainees may fall prey to unethical legal counsel. I begin by explaining that, although detainees are entitled to certain rights under the Law on the Waiting Zone, the implementation of these rights is challenging. Accessing legal aid is more difficult for detainees in the waiting zones than for those deemed on the territory.

Legal assistance and the possibility to communicate in one’s language are crucial to accessing rights. According to the law, any person placed under the waiting zone status must be informed of his or her right to contact a lawyer and seek the assistance of an interpreter (CESEDA, article L221-4). But in practice, hiring a lawyer or an interpreter may prove challenging. Indeed, the detainees themselves must incur these expenses. Non-citizens can benefit from free legal counsel and interpreter only when presented to judges (CESEDA, articles L222-3 and L222-7). Apart from the actual hearing at the court, detainees are left without state-paid legal or interpretation assistance. Barriers to legal assistance are many: detainees must know whom to contact and must be able to afford such assistance. Allophone detainees may also need an interpreter to communicate with their legal counsel, which entails an additional cost.

Anafé mitigates this situation by providing free legal aid in ZAPI 3 a few days a week (two to three days). But this assistance is insufficient and cannot guarantee access to rights for all detainees. Only a fraction of those detained in ZAPI 3 benefit from this service: about one tenth go through Anafé’s office, an ordinary bedroom that was turned into a legal aid clinic (Interview, December 2013). Trained Anafé volunteers also rely on volunteers to provide interpretation services. The availability

67 Border officers must also notify the placement in the waiting zone as well as the attached rights to the individual in a language that he or she understands, cf chapter 5.
of these interpreters is limited and may affect the ability of Anafé volunteers to assist Allophone detainees.

In France, NGOs are paid by the state to provide legal aid to non-citizens who are detained for illegal residence in the country prior to their deportation (i.e. to those considered already on the territory, not in waiting zones). NGOs compete to get this market in a public tender; the government then funds the activities of the tender winners. The government therefore allocates funds for legal assistance when detainees are considered on the territory, but not before. Once again, those placed in waiting zones are disadvantaged compared to those in rétention.

Anafé employees insist that the organization cannot and does not aspire to legally assist all detainees in Charles de Gaulle’s waiting zone. Anafé advocates for a legal aid clinic financed by the state and staffed with lawyers. Lise from Anafé explained:

The law does not provide for lawyers in the waiting zone. There is nothing. So it is us who supply a part of this legal aid, knowing that it is out of the question for us to replace a service that should be financed and organized by the state. We do not, and we will never guarantee that non-citizens’ rights are respected in the waiting zone. We are first of all an observer and we use the law to support our demands and observations (Interview, December 2013).

Anafé decided to use its privileged access to ZAPI 3 to provide legal aid to some detainees but as explained in section I, the organization’s mission is much broader.

Anafé and its member organizations have long pondered the NGO’s involvement at the detention center. As early as 2004, Amnesty International feared that Anafé’s presence might be counterproductive and contribute to legitimization and reinforcement of the system rather than its denunciation (Amnesty International, 2004). I asked Raoul whether this debate was over. At the time of our interview

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68 At the early research stage, I had the opportunity to meet with scholar Makaremi who had researched Charles de Gaulle’s waiting zone as an anthropologist, taking on the role of an Anafé volunteer. She
(October 2013), Raoul had been volunteering with Anafé for almost three years and was a member of the administrative council of the organization. He answered: “It is a question that we still ask ourselves nowadays.” At my invitation to expand discussion of the issue of legal aid, Raoul confessed: “There is a crisis at the moment at Anafé. I will not go into details but the legal aid clinic is currently called into question; each organization (composing Anafé) has its own vision of non-citizens’ rights, of its realm of action, of its own mandate too” (Interview, October 2013).

Anafé functions mainly with private donations and, as already explained, does not receive money from the state to offer legal aid. Anne and Lise lament that many people fail to understand Anafé’s objective. Many stakeholders think that it is Anafé’s duty to offer legal aid to all ZAPI 3 detainees. Lise said: “There are false assertions regarding the mission of Anafé. Sometimes in court the administration lawyer affirms ‘Anafé is very well paid to do what it does’. No, we are not publicly funded to do what we do.” (Interview, December 2013). On different instances I indeed heard stakeholders complain about Anafé not fulfilling its mission well. For example, at the Appeals court in October 2013 the administration’s lawyer asserted: “Anafé is never here (in ZAPI 3), does not do its work in spite of receiving subsidies”.

Fraudulent practices thrive in the absence of accessible and sufficient legal aid. In France, lawyers do not have the right to approach potential clients first. This is explicitly forbidden by article 10.2 of the lawyers’ internal regulations manual (2007). However, there is evidence that lawyers contravene this rule regularly. At CDG’s detention center I met José, a Nicaraguan national who introduced himself as a professor of literature in Nicaragua. His initial goal had been to visit a friend in Spain. He explained that he had been standing on the first floor of the detention center, near
gave me access to materials produced by either Anafé itself or its member organizations. The document to which I hereby refer was an internal document produced by Amnesty International.
the phone booths. All of the sudden the phones started to ring “like magic”. He picked up and was surprised to hear the voice of a Spanish-speaking lawyer offering her services in his language. He hired her. Paul, a former Red Cross mediator, confirmed that these practices were indeed frequent in spite of the Red Cross tirelessly denouncing them. He explained that it was lawyers’ practice to offer a discount to clients bringing other clients (Interview, August 2013).

When Anafé is not here, rejected asylum claimants are left to their own devices. Upon expiry of the time allocated to appeal, they move from the category of “asylum seeker” to that of “inadmissible person”. Once assigned to the latter, they can be sent back at anytime. As I will show in chapter 8, barriers to accessing legal aid at CDG’s detention center are a serious issue for asylum seekers. Due to unsatisfactory access to legal recourse, rejected claimants risk refoulement to countries where their lives or freedom are at risk. For some detainees, having access to legal assistance may literally be a matter of life or death.

**Conclusion**

ZAPI 3 is not a spotless space; in the adult area the floor felt sticky below my feet, bathrooms were smelly and the family room I visited with Dominique was a bit run-down. However, overall detention conditions are quite good in ZAPI 3, especially compared to other administrative places of confinement or accommodation for non-citizens. In ZAPI 3 the issues are not so much material conditions of detention but

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69 According to Anafé, in some instances the border police may also attempt to send back claimants before the expiry of the legal time allocated to appeal to the administrative court. This is a serious violation of domestic and international law. It was the case at Orly around 2011 (Interview with Lise and Anne, December 2013). Cf also Anafé’s December 2013 report, p. 25.

70 For example, Agnès, Cimade employee, describes the administrative detention center of the Mesnil-Amelot, nearby Charles de Gaulle, where non-citizens are confined prior to their deportation after residing illegally in the country:
rather confinement in and of itself as well as access to rights. NGO workers try to remedy these issues but are constrained by their organizations’ mandates and asymmetrical power relations. In spite of discourses portraying ZAPI 3 as a hotel or place of recreation it remains a detention center where individuals are deprived of liberty and face forced return.

And after three years it is almost insalubrious in many areas because there are water infiltrations, the paint is completely flaked...There are no more locks on toilets’ doors, there are no more tables, the bedrooms had small tables, there were water fountains, nothing is working anymore, there are water drainage issues so water flows back including in the toilets, so there are unsanitary water inundations, it stinks, it is disgusting...(Interview with Agnès, March 2014).

Likewise, George the ad hoc administrator explains that some group homes for unaccompanied minors on the territory are incredibly filthy (Interview, October 2013).
Chapter 7. The symbiotic relations between carrier sanctions and the 
waiting zone

Introduction

The number of individuals seeking international protection at French borders has dwindled over the years. While in 2001 OFPRA’s border division heard 7018 claimants, this number had shrunk to 1093 in 2014 (OFPRA, April 10, 2015, 64). The refugee agency’s border team was comprised of 14 agents in the early 2000s, but only three were needed at the time of interview (Interview with Stéphanie, Miriam and Charline, November 2013). This dramatic drop in claimants is to be explained by the numerous (literal and figurative) fences that have been erected between refugees and France, or desired destination countries in general (Anafé, January 2013; Rodier, 2012). Hathaway first referred to such fences as “non-entrée” practices in 1992. They take extremely varied forms and present various degrees of formality. They include extra-territorial airport international zones (cf chapter 1) or excision of zones of arrival in general, airport transit visas, carrier sanctions, maritime interception on the high seas, immigration liaison officers at departure points, safe third country agreements such as the 2004 Canada-US agreement. Recent non-entrée mechanisms rely heavily on cooperation with states of departure or transit. For example, they encompass “reliance on diplomatic relations; the offering of financial incentives; the provision of equipment, machinery, or training; deployment of officials of the sponsoring state; joint or shared enforcement; assumption of a direct migration control role; and the establishment or assignment of international agencies to effect interception” (Hathaway and Gammeltoft, 2015, 243). One of the latest of these mechanisms includes the EU-Turkish agreement signed on March 18, 2016. Under
this agreement, individuals reaching the Greek islands irregularly are to be returned to Turkey. EU Member States have pledged to resettle one Syrian refugee for every Syrian refugee readmitted to Turkey.\(^{71}\)

In this chapter, I will study one of these tools that may come into play thousands of kilometers from French and Schengen territory: carrier sanctions. I will unveil the symbiotic relations between carrier sanctions and the institution of the waiting zone, showing how the former finance the later, making its very existence possible. I will begin by providing a brief history of the emergence of carrier sanctions at the international and at the French level, reviewing existing literature on them, before demonstrating that they constitute a formidable mechanism to keep claimants at bay. I will then situate France within the landscape of carrier sanctions. I will also present the perspective of some governmental actors on the impact of carrier responsibility on asylum seeking. Finally, I will trace how trade unionists attempted to resist to the carrier responsibility framework at CDG.

I. A brief history of carrier sanctions at the international and national level

Dauvergne (2016, 4) explains that “settler societies” are “nations built through extensive migration, and which as a consequence led the world in developing migration regulation”. Settler countries like the United States and Australia started to impose financial and criminal sanctions on carriers bringing inadmissible passengers as early as the 1950s (Feller, 1989). In Europe, these developments occurred over the 1980s, a key decade in the history of measures designed to keep undesirable migrants, and asylum-seekers in their midst, at bay (Feller, 1989). By 1989, the following

\(^{71}\) As many scholars and NGOs have observed, the agreement is in violation of international human rights and refugee law. Kenneth Roth, Human Rights Watch Executive Director, remarked “resettlement can be a very helpful supplement to asylum but can never be a substitute for the right to seek asylum” (Human Rights Watch, March 15, 2016).
countries had adopted laws providing for carriers sanctions: Australia, Belgium, Brazil, Canada, Denmark, the Federal Republic of Germany, New Zealand, Thailand, the UK and the US. Many European countries introduced repressive legislation against carriers specifically to curb the number of asylum-seekers. For example, the German Parliamentary State Secretary for the Ministry of the Interior explained (in August 1987) the rationale for introducing legislation imposing penalties in Germany: the number of asylum seekers had risen from 35,000 in 1984 to 100,000 in 1986, and many of them were running from economic hardship, not political persecution (Feller, 1989). Therefore, when the Schengen Convention was signed on June 19, 1990, many states worldwide had already equipped themselves with repressive legislation against carriers bringing undesirable travelers.

By contrast, the concept of carrier sanctions only made its way into French law in 1992, when the country integrated the requirements of the Schengen Convention into its domestic legislation (cf chapter 2). In the early 1990s France, like any party to the Chicago Convention, was already bound by the standards developed by the International Civil Aviation Organization’s (ICAO) executive council. Interestingly, at first, the Facilitation division of the ICAO had considered that the carrier’s obligation to transport back inadmissible travelers constituted sufficient punishment: in 1986 standard 3.36 specifically stated: “Operators shall not be fined”. However this quickly changed: at the 1988 facilitation meeting, the possibility of fining carriers was introduced (Feller, 1989). Prior to ratifying the Schengen Convention, France was therefore already compelled to consider administering fines to carriers bringing rejected passengers. Other Annex 9 standards were also in force:

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72 Pursuant to article 37 of the Chicago Convention of 1944, the executive council of the International Civil Aviation Organization (ICAO) is responsible for developing standards and recommended practices regarding customs and immigration matters. Such standards are listed in Annex 9 to the Chicago Convention.
carriers had to return passengers lacking proper documents and to cover the cost of their stay prior to return. France waited until 1992 to incorporate these requirements into its national legislation, via the Law of February 26, 1992. This law imposed financial penalties on those carriers bringing an inappropriately documented “foreigner who is not a national of a Member State of the European Economic Community” (article 3)\textsuperscript{73}. It also obligated companies to transport back non-admitted passengers and to pay for their living expenses before return (article 7).

Importantly, both the Schengen Convention and Annex 9 to the Chicago Convention mention the need for state parties to respect their obligations under the Refugee Convention. Article 26.1 of the Schengen Convention clearly states: “The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, to incorporate the following rules into their national law”. But are carriers’ sanctions and refugee protection compatible? Or were contracting parties merely paying lip service to their obligations under the Refugee Convention and its additional protocol?

The French Constitutional Council found that the Schengen Convention was compatible with the French Constitution on July 25, 1991. Nevertheless, several parliamentarians persisted in questioning the impact of the Schengen Convention on the right to seek asylum, a constitutionally protected right. For example, Allouche, a Socialist Senator, observed that he preferred “a foreign national staying illegally, but alive, in the Schengen area, to a foreign national persecuted or killed in his country because he was turned away when he wanted to flee” (French Senate debates, January 16, 1992, 206). Communist MP Gilbert Millet remarked that this bill proposed to turn

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\textsuperscript{73} 10,000 francs per inadmissible passenger.
airline companies’ employees into police auxiliaries (French National assembly debates, December 19, 1991, 8267). As for Lederman, another Communist Senator, he pointed out that the experience of European countries that had undertaken to enforce sanctions against carriers revealed that such sanctions were both harmful and dangerous. Finally he observed that paving the way of asylum-seekers with obstacles could only result in clandestine arrivals, the only option left to those fearing for their lives (French Senate debates, January 16, 1992, 215). Marchand, the Minister of the Interior, brushed aside parliamentarians’ concern by explaining that the carrier would only be responsible when bringing an asylum-seeker whose claim was “manifestly unfounded”. He argued that no special knowledge was required to identify such a claim; for example an asylum-seeker declaring that his goal was to find work in France had a manifestly unfounded claim (French Senate debates, January 16, 1992).

The law was adopted, notwithstanding these concerns. The Law of February 26, 1992 exempted companies from the fine of 10,000 francs when the asylum claimant was admitted to French territory or when the claim was not “manifestly unfounded” (article 3). These legislative provisions have not changed much in 24 years. I will demonstrate that parliamentarians were rightly concerned: carriers’ sanctions and refugee protection are fundamentally at odds. This should not come as a surprise, as countries introduced sanctions against carriers precisely to curtail the number of claimants arriving at their gates. I will start by examining carriers’ obligation to cover the costs of accommodation and return.

II. Carriers’ responsibility (part 1): accommodation and return

The CESEDA currently provides the domestic legislative basis for carrier sanctions. Transport companies bringing a non-EU national to France from a country
outside the Schengen area pay a heavy price when the individual in question is found inadmissible at French borders. First of all, companies are responsible for returning the rejected passenger to the point where he or she started his or her journey with the company. When it is impossible, carriers have to return the individual to the State that delivered the travel documents or to any other place where the person is admissible (CESEDA, article L.213-4, April 2016). Furthermore, carriers are financially responsible for the non-EU citizen from the moment he or she is declared inadmissible until his or her return (CESEDA, article L.213-6, April 2016).

The law does not specify whether the company’s financial obligations are limited to accommodation costs or if they also encompass medical and other expenses. It proved challenging to gather reliable data regarding the precise expenses incurred by companies under article L.213-6. But evidence suggests that these costs may be non-negligible at both CDG and Orly airports. In ZAPI 3 I talked to Gilles several times, as he accompanied me during my visits to the adult zone. Gilles occupies an important function in the police hierarchy. According to him, “the stay of an individual in the waiting zone costs 200 Euros per day” at CDG. Gilles explained that this amount included the maintenance of the building as well as civil servants’ salaries. However, he also said that the building’s maintenance was covered by the Ministry of the Interior, therefore suggesting that companies pay less than 200 Euros per individual per day (observations). I also asked Clotilde, from the Ministry of the Interior, about the cost of a non-citizen’s confinement at CDG per day. She replied: “It is a matter on which my colleagues are currently working. They are trying to put in place a frame of reference, to set a price for a day so that it integrates both

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74 The precise wording in French is “les frais de prise en charge de l’étranger”, which can be translated in English as “the expenses to support the foreigner”. 

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accommodation expenses and medical expenses if needed” (Interview, December 2013).

Those placed in the waiting zone at Orly airport are confined in a rather spacious room (about 50 square meters) at the airport’s south terminal during the day and transferred to the nearby Ibis hotel at night. I visited both parts of Orly’s waiting zone and met with Guillaume, a high-ranking police officer at Orly, and Anna, who occupies an important managerial position at Ibis Orly airport. The state requisitions 12 rooms at Ibis hotel to detain those placed under the waiting zone regime. These rooms are on the fourth floor, all located in the same aisle. According to Anna, the allocated rooms are the same as regular ones, except for the fact that windows cannot open. Sometimes the hotel even rents the rooms in question to “ordinary customers” (clients ordinaires). I asked Guillaume how expensive it was to maintain a non-citizen in Orly’s waiting zone. He answered that the cost varied: the price of a hotel room at Ibis Orly fluctuates from one day to the next, but averages 130 euros per night. Guillaume pointed out that there could also be additional costs, for example if the person needs an interpreter or a doctor. Guillaume concluded that it was impossible to provide a precise number. I lacked time to do so, but it would be worth interviewing airline carriers to unveil the precise extent of their financial obligations as regards article L.213-6.

75 I asked Clotilde in July 2016 whether this frame of reference had been put into place. Clotilde replied that she was no longer working at the department in charge of administering fines and encouraged me to contact the person that had replaced her. Her colleague said that the department was still working on the document establishing accommodation costs. As the document had not been finalized, the information could not be shared with me.

76 According to Anafé’s 2011 report on Orly’s waiting zone.

77 According to Anafé’s 2001 report (p.4) non-citizens may also be confined for a significant amount of time in police stations before being transferred to the holding room at the South terminal.
What is certain is that, from a financial standpoint, it is in the state’s interest to have undesirable individuals returned before they legally enter the country. According to the Senator Pierre Bernard-Reymond, in 2008 the state spent 20,970 Euros per individual removed from the French territory (i.e. on deportation of individuals already deemed present in France, not in the waiting zone). This estimate included detention centers’ running expenses, transport costs (boat, plane or train tickets), costs pertaining to legal and medical assistance in detention centers and costs of guarding and escorting detainees. Although high, this number did not reflect expenses actually incurred: for example, the costs of providing court-appointed lawyers and of financially compensating claimants winning their trials against detention and removal were left out of the estimate (Lipietz, 2012). I will now investigate the second component of the carriers’ responsibility framework: financial penalties.

III. Carriers’ responsibility (part 2): fines

In addition to costs pertaining to confinement in the waiting zone and return, air and sea companies are legally compelled to pay fines to the French state when the non-EU traveler is turned away at the French (and therefore Schengen) border for reasons pertaining to travel documents; i.e. when the passport and/or visa are at issue (article L.625-1). Importantly, companies are also responsible for ensuring that a non-EU citizen possesses the required documents to reach his or her final destination outside of the Schengen area, in cases where transit occurs through France. Likewise, failure to comply with this requirement will result in a fine payable to the French state.

Appropriate travel documents are just one of the criteria (listed in article 5 of the Schengen border code) that third country nationals need to fulfill to enter the Schengen area. When entry is denied for non-documentary reasons such as lack of sufficient financial means, medical insurance or proof of accommodation, carriers are not fined. However, transport enterprises still have to pay for the non-national’s stay and must provide for his or her return.
(article L.625-1). The website of the Ministry of the Interior (December 2015) specifies the circumstances under which a company’s responsibility is triggered: when the passport or visa are missing, when the passport is invalid or when either is falsified, usurped or forged. Clotilde, a civil servant working for the Ministry of the Interior’s department in charge of administering fines to carriers, gives examples of unacceptable passports:

(...)

You also have a very interesting variety, which are fantasy passports. For example, if you show a “Groland” passport, you will not be let in. It exists. There are also “citizen of the world” passports; it is pure fantasy. There are also other cases that are a bit different; it is the passports of the Sioux nation for example. You have nations, you have groups like the Sioux who consider that the border does not run through the United States and Canada so there is a Sioux nation passport, that is not recognized either. There are also passports that we do not recognize because we do not recognize the country. The fantasy passport is another notion (Interview, December 2013).

Since I interviewed Clotilde, in December 2013, the amount of fines actually doubled. Clotilde had explained that fines amounted to 5,000€ per traveler turned away at the border. This meant that an airline company paid 30,000€ when a family of six was turned away at the border for inappropriate travel documents. The CESEDA was modified by law n°2016-274 of March 7, 2016. Since then, companies face fines of 10,000€, not 5,000€ per inadmissible traveler. The fine’s amount may be lesser in cases where companies co-operate with the French government. As Clotilde explains:

The usual rate is 5,000€ (10,000€ at the time of writing) and we go below when the company helped the administration. It is often persons in transit. For example the person comes from Ouagadougou, transits through Paris on her way to Canada. When she is about to embark for Canada –so she stayed in international zone, she did not present herself to the border police, she did not have to- Air France realizes that the person does not have a visa for Canada. The company has a responsibility problem because it should have noticed it

from the start…They (company agents) notice it late but do a favor to the French state because had nobody noticed, the person would have been returned from Canada, she would have come back to us and we would have had to deal with the file. So we consider that the company helped and we issue a fine at 3,000€ instead of 5,000€. Objectively it did not fulfill its obligation but it rectified the situation. We will issue a smaller fine (Interview, December 2013).

Both the amount of the fine and the procedure to be followed are different in the case of unaccompanied minors (article L.625-4). Carriers may pay up to 20,000€ when bringing a child with no legal guardian (previously this amount was capped at 10,000€). Immediately after the procès-verbal is issued, the company has to place 10,000€ on an escrow account. This sum could then be partially or totally reimbursed to the company at the end of the procedure, after it has had the opportunity to defend its practice. If the carrier refuses to disburse the money and its responsibility is indeed engaged, the fine will be 20,000€. This is how Clotilde justified this difference of treatment:

Isolated minors are a particular public, no matter which topic we are dealing with. There are OACI norms, Community norms, and there is an obligation of particular vigilance towards minors…personnel in charge of control have to be particularly vigilant regarding the situation of the child, to ensure that he or she is accompanied by persons having authority: parents or if it is not the case to check the quality of the person accompanying the child (Interview, December 2013).

Clotilde explains these specific norms on account of children’s vulnerability: there are international kidnappings within family settings but also human trafficking for sexual exploitation. But Clotilde, espousing the perspective of the state, also notes that unaccompanied minors place a heavy burden on the state when brought in by an immigrant trafficking ring (filière): “So the kid voluntarily threw away his or her passport, he or she was told to throw off the passport. He or she will not utter a word and will be placed in group homes managed by regional councils (conseils généraux)

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80 Cf footnote in chapter 4 on the use of the term “filière” (network).
until his or her majority. The arrival of a foreign minor within these frameworks is an enormous burden for the state” (Interview, December 2013). Fines do represent a significant amount of money for transport companies.

**IV. The impact of fines on companies’ budgets**

Fines certainly weigh heavily on carriers’ budgets and can even force carrying companies to shut down. Dominique, the high-ranking authority who accompanied me during my first visit to ZAPI 3, told me:

> You know, I think in Africa in particular, there are less and less airline companies that endure. There are airline companies that appear that do not necessarily have the means to focus on control. For us the objective is, rather than to have to deal with difficult human cases upon arrival, not to uproot these people and to sort (people) it is easier to tell someone “you will not be able to enter France”. So some companies do not always have means (to control) and we will have populations coming because a company opens. Six months later it shut down because initially it faces penalties or has difficulties functioning. So if a route stops, a route that existed and was a heavy immigration provider, I am thinking for example about the African company (inaudible company name): when the company closed it was over. Now there is “Camair-Co” that is a bit in the same situation and we tell ourselves: “If it closes it will be over, we will have less (unauthorized migration)”. It is not necessarily only Cameroonians: sub-Saharan population transit through these airports because it is easier, there is a company serving France directly (Interview, September 2013).

Only companies that possess sufficient financial resources will be able to train their employees and withstand a few fines. Others, particularly in Southern countries, will perish.

Even companies that invest a lot of resources in personnel training are not fine-proof. Clotilde explains that, at Air France, entire departments are dedicated to training. But Air France is still, in absolute numbers, the company that pays the most fines to the French state. This high number of fines derives from volume of traffic: Air France gets fined less than other companies, proportionally to its activity
According to Clotilde, each year the border police forward to the Ministry of the Interior approximately 2000 decisions taken against carriers (called *procès-verbaux*) that transported sea and air passengers unequipped with the required travel documents. Interestingly, the Ministry of the Interior seldom receives decisions to penalize sea carriers from the border police. Yet Clotilde pointed out that many boats from North Africa arrived at the port of Marseille and that, surely, not all passengers were in possession of the required travel documents. Clotilde could not provide me with an explanation as to why sea carriers were fined less than air carriers, proportionally to their activity (Interview, December 2013). What is certain is that air carriers bear the brunt of the fines. As Charles de Gaulle is the first airport in France, it is safe to assume that most of the fines incurred by airline companies are taken to penalize irregular arrivals at Charles de Gaulle.

Upon receiving the *procès-verbal*, the Ministry of the Interior informs the company of its intention to fine it. The later may then dispatch a representative to the Ministry of the Interior to access its file. The carrier has one month to provide a written rebuttal to the Ministry of the Interior (CESEDA, L.625-2). This procedure allows the company to present its side of the story and may lead to a fine annulment. Indeed the law provides for exemption from fines in two cases: when the individual is admitted to the territory after his or her asylum claim was declared not manifestly unfounded or when the carrier demonstrates that the inadmissible individual was in possession of the required documents upon boarding and that these documents were not “openly irregular” (CESEDA, L.625-5). Dialogue may benefit the company: for

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example the company may demonstrate that an impersonation case was impossible to
detect to the naked eye and thereby be exempted from the fine. In cases where the
passenger presents a valid passport (and a valid visa if applicable) upon boarding but
then disposed of his or her travel document before reaching the border, the fine will
be cancelled if the company can prove (with a photocopy for example) that the
passenger was indeed in possession of a valid document upon commencing the
journey (Interview with Clotilde, December 2013).

Financial issues may be one of the most important rationales behind gangway
checks: by controlling passengers as they exit the plane, border agents can connect
passport-less individuals to a specific flight and therefore collect the carrier’s fine.
They can also make sure that the individual is transported back by the company that
brought him or her to France.

Ultimately, the company may contest the fine in court (CESEDA, L. 625-2). Clotilde and her colleagues noticed that companies started going to court more when
the price of airline fuel increased: the number of cases rose from 30 to 70 (at the time
of interview, according to Clotilde) per year. According to her, the government wins
in 98 percent of the cases. Importantly, once the final fine has been set, it is
impossible for the company to waive it. While in some countries companies can
negotiate with the government, it is not the practice in France. When companies do
not pay, the government’s budgetary services do not hesitate to take retaliatory
measures against those having their headquarters in France. Clotilde gave the example
of a company whose bank account had been recently frozen (Interview, December
2013).

For all the aforementioned reasons (price of fines, low odds of winning court
cases, impossibility of negotiating the fine’s amount) letting undocumented asylum
claimants on board is not in carriers’ economic interest to say the least. Feller’s observation, although dated (Feller 1989, 57), is still relevant: “A high risk-taking and profit-oriented transport carrier cannot reasonably be expected to make humanitarian decisions based only on a possibility that sanctions will later be waived, particularly when the burden of proof is on the carrier”. Refusing improperly documented refugees makes sense for carriers, especially since they face fines in many countries.

V. France within the landscape of carrier sanctions: one country among many

It is essential to keep in mind that France is only one country among many in the carrier sanctions’ landscape. A European Directive (2001/51/EC) on carriers’ liability of June 28, 2001 compels EU countries to fine transport companies bringing inappropriately documented passengers. This said Directive gives leeway to countries to set the fines’ amount but forces them to impose penalties no less than 3000€ or the equivalent in the national currency (article 4). The Directive specifically refers to Member States’ obligations under the 1951 Refugee Convention and its 1967 Protocol, stating that these obligations remain unaffected by the Directive. In particular, article 4 reads that the states’ duty to administer fines to carriers is “without prejudice to Member States' obligations in cases where a third country national seeks international protection”. However such a provision is very vague and, unsurprisingly, has been interpreted differently by member states. The criteria to fulfill for fines to be waived in case of arrival of inappropriately documented asylum seekers vary tremendously from one state to the next. Some EU countries exonerate companies only when asylum claimants are subsequently recognized as refugees while others also provide for exemptions when claimants receive some form of subsidiary protection (EC-EMN, December 2012).
For example, the UK belongs to the former group of countries: fines will be waived only after the asylum seeker is granted full refugee status (Scholten, 2015). Austria is more generous, as stated by its legislation: “The fine will be void in case the foreigner in question receives asylum or subsidiary protection or cannot be sent back to his country of origin for reasons of non-refoulement” (EC-EMN, December 2012). Other countries go one step further, waiving penalties in cases where the inadmissible person seeks international protection, irrespective of the outcome. This seems to be the case of Lithuania, according to the information that the country itself provided: “A carrier shall not be imposed any fine where: 1) the alien being carried applies for asylum in the Republic of Lithuania in compliance with the Law of the Republic of Lithuania on the Legal Status of Aliens” (EC-EMN, December 2012).

France can be situated somewhere in the middle of this European spectrum: fines will be waived if the individual’s request to enter the territory on asylum grounds was not found “manifestly unfounded” (Interview with Jeanne, November 2013). A claim is found to be not “manifestly unfounded” when considered worth examining on merits for both refugee status and subsidiary protection (Interview with Stéphanie and Miriam from OFPRA, November 2013). In any case, the European Council on Refugees and Exiles points out that legislation relieving carriers of their liability is not applied consistently.\textsuperscript{82} Discrepancies and unpredictability in implementation incite companies to outwardly reject inappropriately documented asylum claimants. I would now like to provide the perspective of some governmental actors on this “non-entrée” tool.

\textsuperscript{82}Cf ECRE’s website. Available at: http://www.ecre.org/topics/areas-of-work/access-to-europe/7-carrier-sanctions.html. Accessed April 6, 2016.
VI. Governmental actors’ perspective on fines and asylum seeking

To some actors working on Charles de Gaulle’s waiting zone, measures blocking asylum-seekers’ access to sovereign territory do not constitute an issue. My conversations with Clotilde and Jeanne, civil servants working for the Ministry of the Interior, were particularly enlightening. I told Clotilde that, according to some NGOs, the carriers’ responsibility framework was detrimental to asylum-seekers. At first, Clotilde acknowledged that my remark was interesting. But she quickly went back to her role, refusing to change her perspective and finally justifying measures keeping asylum-seekers away from France’s territory, explaining that it was not in the state’s interest to handle too many claimants. Clotilde was very welcoming, eager to share her experience and knowledge with me. But her tone changed when answering my question, betraying exasperation and anger. The issue of asylum was emotionally charged for her.

Researcher: According to NGOs, carriers’ responsibilities hurt asylum-seekers.
Clotilde: In what way?
Researcher: In the sense that asylum-seekers are not able to reach French territory to make their claim.
Clotilde: They can make them at the embassy. And there are other ways of applying for asylum, I think. You need to ask, the department in charge of asylum would tell you better than myself.
Researcher: I do not know if it is possible to do it at the embassy anymore.
Clotilde: It is, objectively, a remark that seems interesting. But my job is to prevent people from setting foot in France! But every one has one’s own position, like we were previously saying. Everyone is in one’s role. But here there is a massive influx, as you know we are in the first ranks in terms of asylum claims in Europe and there is saturation. The colleagues from (the department of) asylum probably told you, the CADA (accommodation centers for asylum seekers) are fully packed, the system is ready to implode because the delays of instruction became too long; it is neither in the interest of the claimant nor in the interest of state services because people remain on the territory, in overloaded structures. People who, once rejected, do not want to leave. It is really, really heavy to handle and to find ways out afterwards (Interview, December 2013).
According to the report published by the Intergovernmental consultations on migration, asylum and refugees (ICG) in 2012, it is possible to apply for an asylum visa at French embassies\textsuperscript{83}. However, according to the information submitted by the French government itself, “There is no provision in French law that governs this procedure, which means that asylum applications at diplomatic missions are dealt with on an exceptional basis” (IGC, December 2012, 186). Not only is this procedure meant to be exceptional, it also erects a number of barriers for the claimant. After the individual has described the merits of his or her case, the diplomatic mission will decide whether or not to transfer the request to the Ministry of the Interior or to the UNHCR. The Ministry of the Interior will then consider the visa request along with the interview report (IGC, December 2012). It is important to note that the refugee agency may not have a say at this stage of the procedure. As the IGC notes, “The case is then examined by the Ministry of Interior, which may include a consultation with OFPRA” (December 2012, 186, emphasis added). Once granted an asylum visa, the claimant still has to go through the regular procedure on French territory.

Earlier in our conversation, Clotilde had told me that visas should not be granted lightly. She had pointed out that, in the past, some individuals had taken advantage of visas, in order to claim asylum once on French territory:

The Commission initiated with member states a policy of liberalization of visas, which means that we explain to third countries currently subject to visas that, if they make efforts, especially with regard to the readmission of illegal individuals, we can liberalize visas. And we noticed that this liberalization could have very negative effects: for example when we liberalized for the Balkans we ended up with an exponential increase of asylum claims. Because until then, since a visa was needed to come to Europe, I mean to the Schengen area, people were blocked at consulates. Now, with a biometrical passport in

\textsuperscript{83} The IGC defines itself as “an informal, non-decision making forum for inter-governmental information exchange and policy debate on issues of relevance to the management of international migratory flows” (ICG, 2012). The IGC 2012 report reads: “The IGC brings together 17 Participating States, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the European Commission”.
general they enter without a visa, so the first thing they do when they arrive is rush to the préfecture (i.e. where claims are registered). They are considered mostly unwarranted claims but they weigh on everything: on the system, on the system’s slowness, financially. It leads to expenses in terms of administrative functioning and in terms of accommodation in the CADA (i.e. the centers accommodating claimants) (Interview, December 2013).

Clotilde’s statement matched Macklin’s observation that we are witnessing an “erosion of the idea that people who seek asylum may actually be refugees” (2005, 1). Clotilde did not think that some people may genuinely need international protection, and therefore advocated for a non-entrée mechanism: visas. Just like Clotilde, Jeanne refused to ponder the implications of carriers’ sanctions on asylum claimants. Clotilde and Jeanne both elected to confine themselves to the role that had been attributed to them, refusing to consider the issue in its entirety. Both used the sentence “everyone is in one’s role” (chacun dans son rôle) that summarized their refusal to adopt a holistic perspective. In response to my question “have you noticed some changes since you have occupied this position”? Jeanne replied:

Yes, a significant decrease in asylum claims at the border. When you will meet NGOs, you will hear them complain about this. The border police’s services have correspondents in states.

Researcher: Liaison officers?
Jeanne: Immigration (officers). They already do really important checks in airport zones and prevent them from boarding. Every year we meet NGOs who deal with asylum at the border. They (NGOs) complain about this regularly, saying that we seriously impinge on the right to seek asylum. It is their version; we do not think that it is the case. You really have both perspectives (Interview, November 2013).

Governmental actors are not the only ones to consider asylum-seekers’ lack of access to the territory to be a non-issue. Louise used to be a lawyer representing individuals making claims to asylum on the territory and was a Senator at the time of interview (January 2014). To my question “do you not think that there are some genuine asylum seekers that can never reach the territory?” Louise answered:
But of course, we know it very well. Some did not go through, but well… And there are others that did not go through. But the worst is not this, the worst is those who entered and claimed asylum but were turned down in spite of being real political refugees. I met some” (Interview, January 2014).

To Louise, it is not shocking that some claimants will never be able to file a claim, blocked by measures taken kilometers away from the waiting zone. However, she truly laments the system’s lack of fairness: some true political refugees -who managed to cross the border and entered regular procedures- are denied status. In her eyes, this is the most blatant injustice, not the extra hurdles created by the waiting zone itself and prior non-entrée mechanisms.

The vocabulary used by Clotilde both reveals and contributes to the dehumanization and trivialization of asylum claimants. She explained that the border police should refrain from forwarding decisions taken against carriers to the Ministry of the Interior when individuals have been admitted to the territory on asylum grounds. However, mistakes may occur, forcing the Ministry of the Interior’s departments in charge of asylum at the border (i.e. Jeanne’s department) and in charge of administering fines (i.e. Clotilde’s department) to exchange information. Clotilde explained:

Normally the DCPAF (border police) should not send me the procedure (i.e. when the person was admitted on asylum grounds), they cancel it; it is the only case. It happens sometimes that they send it to me anyway because they have a problem with organization. When we see files of individuals who presented themselves without passports it happens that we check with Jeanne to see if she has these names. Because it happens that DCPAF sent us by mistake people (‘s names) that have been considered as having a non-manifestly unfounded claim. In these cases the fine is cancelled (by the court) right away. Normally the DCPAF should not send me the file. If they sent it and we did not check and we go to court it is an automatic cancellation with interests to be paid because we should not have pursued this case. So when we have a doubt with my colleague we seize Jeanne’s department. We ask: “We have this person arriving from this flight pretending to be x, do you have an asylum claim?” Sometimes there is one but the person was not admitted. So we can press on with the procedure. We call this expunging (emphasis added, purger, a strong term in French) the asylum petition proceedings from the
I would like to end this study of carriers’ obligations by examining how trade unionists resisted the carrier responsibility framework.

VII. “We are not border police auxiliaries!” Trade unionists’ resistance to the carrier responsibility framework

Air France trade unionists campaigned against carriers’ sanctions. They protested about having to play the role of border agents. At the time of the interview (February 2014), Aurélien and Christophe were still affiliated with the airline section of the CFDT trade union, while Jean had just left. CFDT stands for Confédération française démocratique du travail and can roughly be translated as “Democratic French Work Confederation”. CFDT is a trade union of employees that belong to different professions and work in different companies, ranging from public to private. Aurélien, Christophe and Jean all worked or used to work for Air France in varied capacities. All three of them were instrumental in shaping the history of CDG’s waiting zone and of French waiting zones in general. They participated in the creation of Anafè and were all very active in CFDT, some of them occupying key functions in the trade union’s airline section. Christophe recounts:

It was also an action that we launched around this time (i.e. from 1999-2005). It was (about) the role that Air France employees had to play upstream, in source countries. We worked a lot on these questions. Furthermore we had situations that were a little strange. I remember that I intervened because, in Turkey, Air France personnel were Turkish and obviously had a position, commonly shared amongst Turks…they were not favorably inclined when it came to Kurds. In our personal capacity we told them “wait, you do not have to...(discriminate against Kurds)”. Since Air France paid a fine if the person did not have (the required documents), there was some pressure on these people: “be careful if at the other end we realize that the person does not have
the required documents... it is your job to check, you, company employees.”
So we also worked with the help of ITF
Researcher: What is ITF?
Jean: The International Transport Workers’ Federation. It dates back to the eighteenth century.
Christophe: It gathers all trade unions worldwide that work in transports-seafarers, bus drivers, as well as those working in road and urban transport, (with) the railways and civil aviation.
Jean: 150 countries, the headquarters are in London, they organize conferences in several languages
Christophe: They had worked at our request: the CFDT had asked (them) to work on the Chicago Convention and on the role that airline employees have to play; they are asked to check and recheck, to do the job of immigration officers. Companies put a lot of pressure because at the other end they had to pay so they said: “I am going to train my staff to avoid paying”. So we worked on these issues.
Researcher: Did it pan out?
Christophe: No, it is still the case.
Researcher: The same system is still in place. When did this action take place?
Christophe: Between 1999 and 2005. Around this time. We worked a lot during these 5 or 6 years (Interview, February 2014).

Not surprisingly, the trade unionists’ action was not successful. How could it have been? The notion of carriers’ sanction was then well enshrined in international, regional and domestic laws. In order not to perish, airline companies had to align their practices with legal requirements and this directly entailed putting the burden of document control on their own personnel.

Today, airline companies’ personnel have no other option but to receive training in document control. This training is achieved in close cooperation with government officials. Clotilde’s department at the Ministry of the Interior receives the representatives of companies who wish to analyze their fines. Clotilde and her colleagues establish a typology of the fines administered and provide tips on how to avoid them. Border agents also deliver training in companies’ headquarters (Interview, December 2013). As Guiraudon points out, companies’ employees are forced to engage in practices that violate human rights. She writes:

There are reasons to believe that carrier sanctions will result in discriminatory
practices. The competition between airlines (and airport authorities) is ferocious and they are keen to save time on passenger processing and speed transfers. Airline security personnel have therefore spoken in favour of ‘profiling’, i.e., selecting a few individuals for additional checks rather than delaying boarding time by submitting everybody to the same treatment (Guiraudon, 2006 b).

Christophe, who had already alluded to Air France’s discriminatory practices against Kurds in Turkey, specifically described passenger profiling in this country:

I saw things in Africa and in Turkey, in these places at the confines of Europe where Air France personnel was asked many things; they were told to photocopy passports otherwise people afterwards ate them, destroyed them, put them down the toilet and then “look, you let this person through without a passport”. “But how should we proceed? Do we make photocopies of everybody (’s documents)?” “Oh no, only those that you think…(we will have issues with). I remember talking with Turks in Turkey, Air France employees, who said “I do not want to make photocopies, how do I do? This one sounds dodgy; I make a photocopy. This one will maybe attempt something so I make a photocopy (Interview, February 2014).

Aside from advocating against carriers sanctions, trade unionists also resorted to artisanal methods to try to stall returns of individuals in danger in their countries of origin. Aurélien recalls:

Monica from Anafé often called us at the last minute: “be careful on this flight”. There were really tense situations when it came to returns. I would say that we were improvising a little, and we only had one possible interlocutor in such emergency, it was the captain. So regularly with Jean we burst into cockpits as they were preparing their flight. We were not always received well; I remember a strong anecdote. It was the case of Christian Iraqis during the war, Barbarin had forwarded the case to Anafé, he was probably the archbishop of Lyon. He had indicated that these persons would meet their death if sent back to Iraq. There was a family with children and a general who was a deserter. We climbed on the cockpit with you, I think (talks to Jean). We had explained (the situation) to the captain who had said “but I really do not care”. So the plane went to Amman, because they were not landing in Bagdad anymore and they stayed on the plane and came back. We made a lot of noise on this case. You see the extreme difficulty (Interview, February 2014).

The trade unionists explain that they are still very sympathetic to Anafé’s cause but cannot be as active as in the past. Aurélien explains:

The issue of blackmail for an (airport) access pass (chantage au titre d’accès) impacted employees and mostly activists. We have passes. And now it is a really sensitive topic because without it you do not work anymore. There is a really important presence of renseignements généraux (RG) on the airport compounds, and also possibly of the DST (Direction de la Surveillance du Territoire). Both RG and DST agents specialize in intelligence gathering. This is why we do not really expose our activists nowadays, because there are interrogations. We do not question our engagement but it is much more complicated today.

Researcher: At first you had less issues with blackmail for the pass?

Aurélien: It did not appear

Christophe: It really worsened after 2001, after the New York attacks. In the years 2002, 2003 and 2004 there was a huge clampdown. I do not recall the figures but 4000 passes were withdrawn at the time on the airport compounds… (Interview, February 2014).

Aurélien means that the pass that allows access the airport secure zone could be easily withdrawn, depriving activists of their livelihoods. It became more complicated for trade unionists to engage in activism after the 9/11 terrorist attacks.

Conclusion

In conclusion, the institution of the waiting zone is financed by carriers’ sanctions. Transport companies pay a steep price for bringing inadmissible travelers. In addition to having to cover the costs of confinement and return, they are legally compelled to pay fines each time a passenger is refused entry for reasons pertaining to travel documents. Carriers’ sanctions and refugee protection have been mutually exclusive from the very beginning, in spite of the Schengen Convention and Annex 9 to the Chicago Convention mentioning the need for state parties to respect their

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obligations under the Refugee Convention. This outcome was predictable, since countries introduced sanctions against carriers in order to reduce the number of asylum seekers reaching their borders. Trade unionists at CDG refused to endorse the role of border police agents, but their actions against the carrier responsibility framework were bound to fail. By this time, the notion of carriers’ sanction had been well established in international, regional and domestic laws and airline companies had no choice but to abide by the legal requirements in place, transferring the burden of document control to their own employees.

Civil servants working for the Ministry of the Interior do not see carriers’ sanctions as problematic for asylum claimants, for they do not think that some people may be genuine refugees. These findings support Macklin’s argument that the refugee is disappearing discursively (2005). As she writes, “a significant segment of the public believes that many asylum-seekers are frauds, that is, migrants with no fear of persecution who attempt to use the refugee system to circumvent otherwise restrictive entry provisions” (Macklin 2005, 2). After demonstrating that carriers’ sanctions, a non-entrée mechanism, are funding the waiting zone, in the next chapter I will argue that the waiting zone itself functions as a non-entrée mechanism.
Chapter 8. The waiting zone: the last gate to keep asylum seekers away

Introduction

In the previous chapter, I demonstrated that carriers’ sanctions and refugee protection were fundamentally at odds from the very beginning. I also described activists’ attempts to rectify this situation. In this chapter, I will present evidence supporting the claim that the waiting zone in itself constitutes the ultimate gate that asylum-seekers need to pass before finally reaching the regular refugee status determination system. These findings buttress the argument developed throughout this dissertation: the waiting zone serves the same purpose as its predecessor, the international zone. It is one of many devices crafted by states to keep asylum claimants away from their territory. In fact, the waiting zone constitutes the last “non-entrée” mechanism when all the upstream ones (including carriers’ sanctions) have failed.

I will proceed by demonstrating how interpretation and communication issues, along with unsatisfactory access to legal recourses, filter asylum claimants dramatically. It is challenging for asylum claimants to appeal against the decision refusing them entry to the territory. As I will explain, observation of court hearings, statistics and interviews suggest that administrative judges embrace the executive’s perspective on and narrative about those seeking international protection at French borders. I will highlight how asylum claimants may be returned to countries where their lives or freedom are at risk. Finally, following this completion of my overall argument, I will offer general conclusions, contributions, and new questions opened by the dissertation.
I. Interpretation and communication issues

OFPRA, the refugee agency, has a small unit inside ZAPI 3, at the heart of Charles de Gaulle’s waiting zone. From there, OFPRA agents hear all claimants placed in the waiting zone on the grounds of asylum claims, whether located at Charles de Gaulle or in French territories overseas. Interpretation always takes place over the phone, a practice which raises complications. Michaël’s company (cf chapter 5) provides interpretation services for OFPRA’s department of asylum at the border occasionally. Michaël explains that the conditions in which interpreters work are far from ideal:

Michaël: Work conditions are not good over the phone: being an interpreter over the phone does not make sense.
Researcher: It was one of my questions.
Michaël: You cannot hear anything. Do you know how they work over there? The microphone is on the table.
Researcher: I saw the desk.
Michaël: You have the microphone on the table. So the claimant is here, it resonates; you do not hear the question from the protection officer (officer de protection, i.e. refugee agency agent tasked with hearing asylum claimants)…it is impossible (Interview, July 2014).

These difficulties are compounded when both OFPRA agents and interpreters carry out the interview over the phone. Poor audio quality and lack of visual contact may impede understanding. Furthermore, telephone interviews fail to create a sense of safety for the claimant. In response to my question “is there anything that could be improved regarding asylum at the border?” Jeanne, from the Ministry of the Interior, answered:

About what can be improved, my opinion is that OFPRA should not confine itself to phone interviews; they should at least have the person on videoconferencing, so that they see him or her. There are things that you cannot hear over a phone; you will not necessarily hear that someone is tense,

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86 At the beginning of the 2000s, interpreters would come on site from time to time. This is no longer the case. OFPRA agents mentioned only one recent exception: two children aged 12 and 6 had arrived accompanied by a smuggler. An interpreter in Filipino was brought in order to “reassure the children” (Interview with Stéphanie, Miriam and Charline, November 2013).
or maybe you will, but you will see a behavior on videoconferencing. And the person will also see to whom he or she is talking to. This is a matter on which we (Ministry of the Interior) disagree with OFPRA. But it requires means (…). And even when we have an asylum claim in the Reunion Island, it is them (OFPRA in CDG), over the phone. I find it problematic. Of course they introduce themselves, of course they explain who they are, but the claimant does not see who (it is).

Researcher: Yes it is difficult to trust in these conditions.
Jeanne: or to feel that you can trust. It is a little complicated (Interview, November 2013).

While OFPRA assured me that every individual claiming asylum at the CDG border was heard in person (Interview with Stéphanie, Miriam and Charline, November 2013), Christian could not agree less with this statement. According to this experienced lawyer, many claimants in ZAPI 3 talk to OFPRA agents over the phone:

Christian: Often, I mean always, the person is interrogated over the phone.
Researcher: Not at Roissy, it is the only exception. This is what I have been told.
Christian: It is often by phone; for all the files I had, most of the time it was over the phone.
Researcher: Really? Even those at Roissy do their OFPRA interview over the phone?
Christian: Yes, yes, over the phone. OFPRA is not always on site. It is not true. The last case I had, it was 10 days ago, it was a homosexual from Cameroon. He had been to the infirmary just before his interview; the doctor had given him a sedative because he was really unwell. He did his phone interview; one answer out of two was off the mark (à côté de la plaque). He explained that it was difficult for him to discuss his homosexuality over the phone with someone he did not know, who was not necessarily listening carefully. It is difficult by phone and the judge reproached him that. To reject his claim, his appeal, the judge said: “answers are stereotyped, conventional, not personalized, summary; his story is not credible.”

Researcher: Because the conditions he was in did not allow him to present his story.
Christian: He was rather in extremely unfavorable conditions to narrate an intimate story over the phone. So this is an important critique. Try to get numbers, information. But as far as I am concerned, each time I get asylum seekers it is over the phone.
Researcher: At Roissy?
Christian: Yes, at Roissy, I insist.
Researcher: I am a little … (confused). I met OFPRA; they told me that at Roissy … (interviews with refugee agency personnel took place in person)
Christian: They lied to you; it is not possible. If you want I can give you the file of Ambe, the Cameroonian. I have always had phone interviews (Interview, December 2013).
Claimants interviewed in person at CDG may find it challenging to present their stories. Miriam from OFPRA explained that a policeman was always sitting on a chair just outside OFPRA’s office in ZAPI 3, “to make sure everything is going well” (Interview with Miriam, November 2013). But the presence of authorities may not resonate well with someone who experienced persecution at the hands of state agents, creating an unsafe environment. Those seeking international protection at Orly airport face even more adversarial conditions, having to undergo their phone interview inside the police headquarters. It is actually written policy that claimants be heard in such conditions. The internal regulations document, posted on the wall of the room serving as Orly’s “day” waiting zone, reads: “this confidential interview (with OFPRA agents) will be carried out from the premises of Orly border police, by phone” (observations, February 2014). Since the European Court of Human Rights condemned France in 2007 in the Gebremedhin case, asylum-seekers whose story was found “manifestly unfounded” have 48 hours to appeal against this decision. They cannot be returned during this period of time. However, while this procedure may be satisfactory on paper, in practice it is extremely difficult for claimants to initiate such recourse.

II. Unsatisfactory access to legal recourses against refusal to enter territory on asylum grounds

The number of individuals passing the manifestly unfounded test fluctuates from year to year. While 38.4 percent of claimants entered France on asylum grounds in 2000, it was the case of only 4 percent of claimants in 2003. In recent years

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87 In 2000, OFPRA agents at the border heard 5262 claimants, of which 2019 were admitted to the territory. This admission figure dropped dramatically in 2003 where 5633 claimants were heard, resulting in only 229 admissions.
admissions to the territory have increased. In 2011, 10.1 percent of asylum seekers were admitted to the territory (1857 OFPRA hearings for 188 admissions). This figure rose to 13 percent in 2012 (1954 hearings for 255 admissions), 16.9 percent in 2013 (1263 hearings for 214 admissions) and 28.9 percent in 2014 (OFPRA, April 10, 2015, 64). The law changed after I collected data. Since July 29, 2015, a third party may be present at OFPRA interviews. Claimants can elect to be accompanied by a representative of an NGO (accredited by the government) or by their counsel (CESEDA, article L.231-8-1, April 2016). It would be interesting to study whether, or to what extent, this new legislative provision impacted OFPRA’s decisions at the border. But it has to be noted that the law confers a limited role to third parties: the accompanying person can only intervene at the end of the interview to make observations (CESEDA, art. L.723-6, April 2016).

Individuals who had requests for entry on asylum grounds rejected face hardships in appealing their cases. Appeals against the Ministry of the Interior’s decision have to be launched within 48 hours of receipt of the decision. Appeals need to be written in French and be sufficiently well formulated to meet the administrative court’s requirements: otherwise they will be automatically rejected without any hearing. It is therefore impossible for a non-native French speaker not well-versed in French administrative law to write such an appeal.

The chances of going to court are very slim for those receiving their rejection letter during the weekends, as Anafé volunteers do not provide legal aid during this time. Dorian, from the UNHCR delegation in Paris, acknowledged that this situation,  

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88 At the time of writing, statistics for 2015 were not publicly available.
albeit satisfactory on paper, was not satisfactory in practice (phone interview, January 2014). Ségolène, custody and liberty judge, went further in suggesting that the European Court of Human Rights may well condemn France for depriving asylum claimants of an effective recourse. She explained:

Sometimes you have in front of you a person who asked to enter France on asylum grounds and who is still within the delay to appeal. Therefore you explain to him, you say: “Sir, you asked to enter France on asylum grounds and it was turned down but you are still within the delay to appeal this administrative decision.” Then you tell him: “Sir, my decision is to keep you (in the waiting zone) and there you can appeal within 24 hours, starting from now, time of notification”. How do you want these poor detainees coming from Ghana or Brazil to understand? If they had a lawyers’ clinic they could go there with the decisions and the lawyer could say: “here you can do that”. I believe that one day we will get condemned because these are not effective recourses.

Researcher: You mean by the European Court of Human Rights?
Ségolène: Yes, one day someone will say “wait, there are no effective recourses” (Interview, November 2013).

Anafè volunteers assisting detainees with their appeals find this task challenging on two accounts: it is emotionally draining and it is rarely successful. Raoul explains:

It is always said regarding asylum claims that telling is reliving, and listening is reliving with the other person too. So you go home with all these stories. When the person lived a year of atrocities, when she takes two hours to tell you, you are left with five minutes in your head. One year already condensed in two hours; you are left with the horror (Interview, October 2013).

Volunteers are well aware that, from a statistical standpoint, appeals are rarely successful. For example, in 2013, out of 1346 individuals seeking authorization to enter France on asylum grounds, 1044 were turned down after meeting with OFPRA. Of the rejected 1044, only 84 entered the territory after the administrative

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90 222 individuals were granted leave to enter France after meeting with OFPRA, and 80 were not heard by OFPRA.
court heard their appeal (government statistics, Anafé 2015, 161).91 Raoul continued: “So you see, it is not always easy; from a humane standpoint what we are told is difficult and when you know it is useless…” (Interview, October 2013). I observed a few hearings before the administrative judge and will now share these ethnographic findings.

III. Administrative court hearings: when the judge embraces the state’s perspective

I only observed a few hearings before the administrative court and therefore do not claim to have enough information to draw general conclusions. I went to the Paris administrative court on three different days in September 2013. Claimants were appealing the Ministry of the Interior’s decision denying them the possibility of entering France on asylum grounds at CDG.92 One case particularly struck me. An Afghan unaccompanied minor was appealing the Ministry of the Interior’s decision. His court-appointed lawyer did her best to rebut the Ministry of the Interior’s arguments. She argued that a legal mistake had been made: OFPRA had gone beyond the examination of the manifestly unfounded character of his claim. According to the Ministry of the Interior, the minor’s answers were too vague. For example, the question “Where is your province located in Afghanistan?” should have elicited a precise response, as this information was “common knowledge”. His lawyer urged the administrative judge to take into account the environment in which the young man

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91 Unfortunately, official statistics do not give the number of claimants launching an appeal before the administrative court. Of the 1124 claimants who did not enter France through OFPRA (i.e. 1044 individuals whose claim was found manifestly unfounded + 80 individuals whose claim was not assessed by OFPRA), 355 were released from the waiting zone by the liberty and custody judge, and 36 were released by the Appellate court (i.e. the court that rules over decisions made by the liberty and custody judge). Cf official statistics published in Anafé’s 2015 report, p 161.

92 At the administrative court of Paris, non-waiting zone cases are also heard.
had been raised: he had not attended school, had not learned geography and did not know how to read or write. Instead he was working in the fields with his father. The Ministry of the Interior also reproached him for not giving enough precision regarding the Taliban’s mode of recruitment.

Yet, his lawyer pointed out that the UNHCR had acknowledged in a 2012 report that intimidations and threats were indeed common in the region. The counsel insisted that her young client had received death threats. Referring to recent “gruesome events” (événements macabres), she remarked that sending him to a province where safety was not guaranteed would violate both article 33 of the Geneva Convention and article 3 of the European Convention on Human Rights. The ad hoc administrator asked for the permission to speak. The judge agreed, provided he had “new elements to bring”. Explaining that he had known the young man for a week, he said he did not doubt he was telling the truth. He had seen many of his friends disappear in the mountains and never come back. As for the Ministry of the Interior’s lawyer, she attempted to discredit the minor’s story, pointing out that “it was strange for the Taliban to come 15 times to his home, only to leave a threat letter”.

The interpreter, Mariam, was sitting next to me during the hearing. She told me that the minor was “really persecuted” and said she knew what she was talking about, being an Afghan national herself. He recounted that he had seen two of his friends being murdered. Mariam told me that this judge was “really tough”. According to what she had observed on two previous days, the judge had not released any of the claimants from the waiting zone. These observations matched those of many other actors. Before the audience even started, I heard a chosen lawyer complain that the judge had already made her decisions, prior to hearing the
claimants: “Anyway, she never releases anybody” 93. This judge was also well known to Anafè volunteers and employees. Raoul contributed to the NGO’s December 2013 report on asylum procedures at the border. He observed many hearings before the administrative court in this capacity. Raoul never saw this judge quash a single Ministry of the Interior’s decisions (Interview with Raoul, October 2013). My interview with Noémie took place before I went to the administrative court. This is how Noémie presented her experience at the administrative court:

Researcher: Have you been to the administrative court?
Noémie: Just once. It was horrible. I saw a judge in particular, very mean, and even border officers with whom I was talking were telling me “anyways she never releases anybody, forget about it (“c’est mort”). She did not release anyone. And I was told: “There is no chance, even with a chosen lawyer (i.e. not a court-appointed lawyer), even someone from Sri Lanka with proofs of persecution will not be set free” (Interview, September 2013).

When I observed appeals before the administrative judge, I understood that Noémie had been describing the judge whose rulings I witnessed.

Mariam, the interpreter, explained that she had been instructed by the judge not to translate counsels’ sentences because it was inconveniencing the judge. Under these conditions it must be difficult for appellants to understand proceedings enough to produce articulate answers. Furthermore, the judge instilled fear, allowing claimants to talk only if they had “something new to say”, interrupting them (“I told you I was not interested in hearing again what your counsel just said”). To a national of Togo who had started explaining persecutions at home, the judge replied: “if you want to say that you belong to a political party do not bother, I read the OFPRA decision”. More research would need to be done regarding the procedure before the administrative judge. But statistics, observations and interviews suggest that some

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93 I use the term “chosen lawyer” to describe a lawyer who has been approached by his client or his client’s family.
administrative judges embrace the executive’s perspective and narrative when it comes to asylum claimants at the border, leaving the latter with only slim chances of entering France. The judge rejected all the appeals that I observed and the young Afghan’s case was no exception. His request to enter France to seek asylum was turned down. I later learned that he had been returned to Afghanistan where his life was in danger.

IV. *Refoulement of asylum claimants to countries where their lives or freedom are at risk*

Both Anafé (Interview with Raoul) and Red Cross representatives informed me that the young Afghan national had been returned to Afghanistan, where he became victim of the Taliban. I discussed this case with Gérard, an experienced Red Cross ad hoc administrator (cf chapter 3):

Researcher: I saw an Afghan minor who was finally sent back.
Gérard: Is not it the one we were following? A minor who was then identified as an adult?
Researcher: I am not sure but a Red Cross ad hoc administrator was there.
Gérard: We had a case. It must be him. This minor was returned because we were taken off the case. I think that he would not have been returned had he still been considered as an isolated minor… But the police had found documents stating he was an adult. We fought the decision to take us off the case; we went before the liberty and custody judge, before the public prosecutor but it did not work. So we were no longer ad hoc administrator on this case. He was sent back and it is true that it did not take place in good conditions. We found his trace but it was complicated.
Researcher: If we are talking about the same person, Anafé told me that he was in the hands of the Taliban.
Gérard: Yes, absolutely, it is him. From the moment he was considered an adult, he was returned to his country of transit, the United Arab Emirates (UAE). We contacted human rights organizations in UAE so that they could find him but we never got an answer. And Mathieu, who was ad hoc administrator, was in touch with the family in Germany as his mother and brother were asylum-seekers in Germany…At the end the family told Mathieu—we were in contact with Anafé on this case- that they had received news from his aunt; he had been returned from Dubai. *The aunt said she had found him but he was abducted under her eyes by a group of Taliban* (emphasis added, Interview, December 2013).
Individuals whose claim is found manifestly unfounded by OFPRA and whose appeal to the administrative court is unsuccessful (or upon expiry of the delay to appeal) move from the category of “asylum seeker” to that of “inadmissible person”. Once assigned to the latter, they can be sent back at anytime. Anafé attempts to follow individuals once they leave the waiting zone. According to the organization’s findings, the case of the young Aghan is not isolated. In fact, the NGO documented how a number of failed asylum claimants experienced mistreatment once returned to their countries of origin or transit (Anafé, April 2010). Worrisomely, local authorities seem to have access to information regarding the asylum claim in some cases. Anafé recommended to French border agents to refrain from forwarding information pertaining to asylum claims to their counterparts in countries of return (Anafé, April 2010). Anafé volunteer Noémie recounted:

Sometimes authorities in the country of origin know that (returned) individuals sought asylum in France.
Researcher: But how can they know that?
Noémie: We do not know exactly. You were asking me how local authorities could know that a person sought asylum. Actually, when someone leaves Roissy or the waiting zone, there is a file with all his or her documents that is given to the pilot. Or, if there is an escort, the escorting officers have it. This file is not supposed to contain asylum-related documents, but sometimes it happens.
Researcher: Really?
Noémie: We do not really know but we have testimonies of persons who arrived and were imprisoned. Local authorities knew and we think that the documents were given to them.
Researcher: How else could they know? If the person himself or herself does not say anything…
Noémie: Also, at Anafé we visit airport terminals and it is really interesting because we have the opportunity to talk to many border officers. Because there are four police stations and four holding rooms and each time you talk to different agents. We often ask them the following question: “when you return someone, are there also documents pertaining to the asylum claim in the file?”

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94 According to Anafé, in some instances the border police may also attempt to send back claimants before the expiry of the legal delay to appeal to the administrative court. This is a serious violation of domestic and international law. It was the case at Orly around 2011 (Interview with Lise and Anne, December 2013). Cf also Anafé’s December 2013 report, p. 25.
And sometimes they tell you “yes of course”. Then they do some research and they tell you “no, actually no” (Interview, September 2013).

While the officers interviewed by Noémie may not be the ones directly responsible for the return of failed claimants, their answers are nevertheless a matter of concern. They indicate a widespread lack of understanding of asylum-related issues within the border police force.

Air France trade unionists shed light on the mechanisms by which local authorities may come in possession of a returnee’s travel documents. Christophe and Jean told me:

Christophe: We had problems with passports too, do you remember? (Talking to Jean) In countries where they (the police) gave passports to airline personnel, including to the pilot, when returns took place.
Jean: They gave (it) to the pilot who, instead of giving it back to the individual gave it to authorities and the person was arrested with all the dangers of mistreatment.
Christophe: People who had accepted to leave were returned. But instead of giving the passport back to the person, (the police) handed it to the pilot with instructions to give it to the police upon arrival. Some pilots were not doing this. During the flight they had the passport given back to the individual. They said: “it is none of my business, let him handle it, it is his passport after all…” (Interview, February 2014).

Their statement shows that returnees’ treatment depends on luck. It is highly variable and depends on the pilot’s ethical compass.

Conclusions

France, like other states, has been resorting to law and geography to keep undesirable non-citizens, including asylum claimants, away from its territory and from the rights attached to it. More specifically, a part of Charles de Gaulle airport has been used since the 1980s to exclude foreign nationals from rights granted by domestic and international law. This space has been successively called “international
zone”, “transit zone” and “waiting zone”, and its scope has been extended significantly overtime. The notion of extra-territoriality has sustained exclusion in the material form of the waiting zone. My research detailed the legal mechanisms, enforcement practices and mental landscapes that have upheld this space at Charles de Gaulle airport. Results deconstructed the idea that a parallel and less protective system of rights based on the distinction between physical and legal entry was normal and necessary in a liberal democracy bound by human rights and refugee conventions at the regional and international levels.

In this dissertation I traced why, despite civil society organizations’ many years of activism, people detained at the airport are still subject to a less advantageous legal framework. The history of the birth of the waiting zone and its subsequent extensions highlights the paradox of legal activism. As I demonstrated, defending non-citizens through litigation has resulted in significant extensions of the scope of the waiting zone. Each time lawyers and NGOs sued the government for an illegal administrative practice, the latter managed to turn this very practice into a law, thereby establishing a greater space of lesser rights.

Contrary to what many stakeholders say, the Law on the Waiting Zone did not represent a striking shift from the previous era, when asylum-claimants and rejected travelers were excluded from legal guarantees based on their presence in international zones construed as extra-territorial. In fact, this less protective legal regime was premised precisely on the idea that international zones, renamed “transit zones” and then “waiting zones”, were somehow excised locations. The waiting zone is the heir of the international zone: the initial construction of the international zone as an extra-territorial space has endured in contemporary mindsets and practices. Amongst individuals working in or on the waiting zone can be found the deeply ingrained idea
that the waiting zone is not French territory (at least) for non-citizen populations. This argument, just like in the 1980s and early 1990s, has been used to exclude non-citizens from rights. This is why I take issue with the perspective of some legal scholars on excision. As I established, this device does not belong to the past.

Furthermore, the Law on the Waiting Zone has reinvented exclusion through another form of extra-territoriality, premised on the non-citizen’s legal status at the border. The waiting zone regime forces an exclusionary framework upon the most vulnerable groups at the border: unaccompanied minors and asylum-seekers. The waiting zone legislation illustrates the fact that liberal democracies use law as a technique of government to take away fundamental rights from certain populations (Basaran, 2011). It will be interesting to study how the Law of July 29, 2015 has been translated into practice: has a significant number of asylum claimants, including unaccompanied minors, been released from the waiting zone on the basis of this new legislation? This information was not available yet at the time of writing.

**Policy recommendations regarding unaccompanied minors and asylum-seekers**

Unaccompanied minors should never be assigned the waiting zone regime at French borders. Instead, they should all be legally admitted into the territory, in order for professionals to assess what constitutes their “best interest”. Domestic law presently authorizes the detention of unaccompanied minors in the waiting zone under many circumstances. Yet confinement in the waiting zone is, in itself, against international law and may result in physical and emotional abuse. Unaccompanied children in the waiting zone may be forcibly returned at any time (save during the assessment of their application to enter France to seek asylum) to places where their safety is not guaranteed. Unaccompanied minors at French borders should be treated
first and foremost as children and as such should benefit from all the protections afforded to minors under domestic law.

As far as asylum-seekers are concerned, their hearing with OFPRA agents should take place in a closed room, without authorities being present. Like all detainees, asylum claimants should have access to a legal aid clinic in ZAPI 3 staffed with professional lawyers and financed by the state. This legal aid clinic should be open seven days a week. When needed, lawyers should be able to phone professional interpreters, also paid by the state. Currently, individuals who had requests for entry on asylum grounds rejected lack effective recourse. Due to unsatisfactory access to legal aid, rejected claimants risk *refoulement* to countries where their lives or freedom are at risk. Finally, in no circumstances should documents pertaining to the asylum claim be included in the file of returnees. Returnees should be given back their passports at the start of their journeys.

While the rights conferred to those placed under the waiting zone regime are no panacea, they are nonetheless better than being denied legal existence. Yet, the international zone remains a legal vacuum for non-citizens, when authorities refuse to register them under the waiting zone status. Some passengers are still deprived of the “right to have rights” (Arendt, 1968) in the international zone. This illegal practice may have dramatic consequences for people’s lives. As in the era preceding the birth of the Law on the Waiting Zone, asylum-seekers may experience *refoulement* in the international zone of Paris airports. The international zone remains a non-entrée mechanism (Hathaway, 1992).

**Policy recommendations regarding individuals in the international zone**
Should individuals located in the international zone fail to fulfill the criteria to enter French and Schengen territory or claim asylum at French borders, authorities need to register them under the waiting zone status.

As for the waiting zone, it serves the same purpose as the international zone. It is one of many devices crafted by states to keep asylum claimants away from their territory. In fact, the waiting zone constitutes the last “non-entrée” mechanism when all the upstream ones have failed. It is the ultimate gate that asylum-seekers need to pass before finally reaching the regular refugee status determination system. The waiting zone is financed and made possible by another non-entrée mechanism: carrier sanctions. The institution of the waiting zone is financially advantageous for the State, as the latter transfers to airlines the cost of returning those deemed undesirable. The State forgoes financial responsibility when it comes to the waiting zone, refusing to pay for legal assistance.

I showed that the rights conferred by the waiting zone status may not be available in practice. Barriers to rights enjoyment are particularly prevalent in airport terminals, where detainees are also subjected to isolation and arbitrariness. But the presence of visitors and third parties does not guarantee access to rights in ZAPI 3. In spite of discourses presenting this space as a hotel or place of recreation, it remains a detention center characterized by limited visibility and police omnipresence. Many stakeholders working in or on CDG’s waiting zone perceive rights as something that can be dispensed with, akin to charity.

**Policy recommendations to improve all detainees’ access to rights**

All interpreters should be professionals and should translate the entire content of administrative documents, including the part mentioning rights. All detainees should be able to benefit from the *jour franc* if they so desire. Border authorities
should not make this decision on their behalf. Each detention cell in terminals should include posters featuring Anafé’s phone number, the list of lawyers accredited by the bar office of the Seine Saint Denis department as well as country codes and instructions pertaining to the usage of the phone. These posters should be written in all six UN languages and in Portuguese.

Charles de Gaulle’s waiting zone is in fact a vanishing point (Mountz, 2013). Individuals trapped there are perceived and treated as economic migrants, undeserving of the guarantees applicable to their counterparts who have crossed the legal border. In the eyes of the state, their categorization as illegal migrants trumps their status of rights-holders. Even those entrusted with safeguarding the rights of detainees can embrace the state’s perspective, according to which border control should take precedence over rights. The vocabulary used by actors working on and in the waiting zone both reveals and contributes to the dehumanization and trivialization of asylum claimants and of detainees in general. Findings support Macklin’s (2005) argument that the refugee is disappearing discursively. Furthermore, some authorities’ mindsets towards non-citizens and their border enforcement jobs may be conducive to ill treatment. Individuals placed in waiting zones are seen as impoverished and uniform masses to be kept at bay for the economic sake of the country. Once categorized as “non-admitted” or “asylum-seekers”, individuals disappear. The very structure of the waiting zone is also conducive to abuse: individuals who are wronged are usually returned and do not testify.

Further lines of inquiry will compare other countries’ laws, policies and practices pertaining to airports’ transit zones. It would be interesting to know whether individuals in these spaces encounter the same challenges as at Charles de Gaulle airport. A genealogy of other transit zones would reveal whether extra-territoriality
has been similarly used to exclude people from the rights they are entitled to under domestic and international law.
**Appendix**

Pseudonyms are used except when consent was explicitly given to disclose identity and when it could not be foreseen that such disclosure would be detrimental to the interviewee.

**Appendix 1. Table of research participants: experts**

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<th>Organization</th>
<th>Role</th>
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<td>Managerial position</td>
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<td>Employee</td>
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<td>Trade unionist</td>
<td>M</td>
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<td>Cédric</td>
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<td>Priest</td>
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<td>Employee</td>
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<td>Legal counsel</td>
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</tr>
<tr>
<td>Clotilde</td>
<td>Ministry of the Interior</td>
<td>Employee-department administering fines to carriers</td>
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<td>Danièle Lochak</td>
<td>University of Paris-Ouest-Nanterre la Défense</td>
<td>Professor Emeritus of public law</td>
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<tr>
<td>Dominique</td>
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Appendix 2. Table of research participants: individuals placed under the waiting zone regime

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<td>Veronica</td>
<td>Central America</td>
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European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2007. Rapport au Gouvernement de la République française relatif à la visite effectuée en France par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 septembre au 9 octobre 2006 [Report to the government of the French Republic regarding the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’s visit to France from September 27 to October 9 2006] CPT/Inf (2007) 44.

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95 The first page of Annex 9 reads: “This edition incorporates all amendments adopted by the Council prior to 8 March 2005 and supersedes, on November 2005, all previous editions of Annex 9”.


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