Politics of borders and the distinction between inside/outside have become an important security practice of liberal states. Borders are strategically used to change the balance between security and liberties: to increase policing powers and to exclude people from legal rights and procedures. Indefinite detention in Guantánamo or the return of refugees on the high seas is justified by referring to the location of these spaces and by situating them outside the boundaries of the liberal state. Governments argue that people encountered in these spaces are outside the reach of ordinary legal rights, as they have not legally entered the territory of the state. Fundamental rights that are usually taken for granted in liberal states are denied in these spaces. Legal exclusion includes the denial of due process, unlimited detention, denial of access to courts, to conditions of quasi-isolation, combined with legally contestable return and rendition policies. Contemporary events have once again cast light on liberal security practices and highlighted the politics of place, the geographies of law and their effects on human rights and civil liberties. Liberal democracies that continue to operate under the rule of law and value legal rights restrict or even suspend fundamental rights at the same time for a specific category of people at specific places. These are the border zones of liberal states, border zones as they are based upon the politics of borders and, figuratively, as they illustrate the limits of liberal rule.

In an effort to come to terms with human rights violations committed by liberal democracies, recent literature has explored the relation between security, law and space through the lens of exception (Agamben 1998, 2000, 2004). It has referred to spaces that are under sovereign power but devoid of rights as archipelagos of exception, spaces of exception, camps, extra-territorial spaces, in-between spaces and states of exception (Butler 2004; Minca 2005; Morris 2003; Ramoneda 2007; Neal 2004). Each of these terms hints at efforts to come to terms with liberal security practices and politics of space and borders. The exception has provided an important lens to view contemporary politics and a key contribution of this literature has been to pinpoint to specific sites where individuals are excluded from fundamental rights. These spaces are not only exceptional due to the lack of fundamental rights, but appear to be also
exceptional in their constitution. They are characterized as in-between spaces, extra-territorial, legal black holes, states of exception or places of pure sovereign power. Inherent to these characterizations is that these security practices are an exception to ordinary liberal politics based upon the rule of law. These analyses focus on exceptional law, the state of exception, extra-legal approaches or the notion of lawless spaces and tend to ignore the significance of ordinary law for the constitution of border zones. They place illiberal rule outside of ordinary law and ordinary government and assume a distinction between ordinary law as the basis of the liberal state and border zones as an exception to this norm. An analysis of how these spaces are constituted remains insufficiently explored. This is the point of intervention for this research.

Are these spaces really located beyond the state or in an international space? Are they external to the state? Are these spaces beyond law and democratic procedures? How is inside/outside defined for the liberal state? Is territory the appropriate basis for this distinction? What is the scope of government and what is the scope of rights of the liberal state? In essence, these questions are fundamentally inquiries of political nature on the distinction of the inside/outside of the state, its law and its space of authority and responsibility (Walker 1993). None of these issues is new to our times. They are the subject of a long and varied literature on the limits of liberal democracies and questions of rule and rights in modern societies. To analyze these questions, I will focus on the legal structure of the border zone. Hereby, I will focus on contemporary liberal security practices and the politics of borders in the context of refugee and migration controls. The legal infrastructure of the border zone can provide an answer on whether these spaces are inside or outside the state, who bears responsibility and whether these spaces are exceptional spaces indeed. In this article I argue that, contrary to the exception debate, liberal security practices are embedded in ordinary politics of the liberal state. These spaces of legal exclusion are created by means of ordinary law and politics of space and borders. The legal design of the border zone creates a space that justifies excessive policing powers and concurrently restricts the outreach of rights for a specific category of people. Law is a liberal security practices used to create legal borders and restrict the fundamental rights of particular populations by placing them outside of normal legal procedures. The Achilles heel of fundamental rights is not their substance, but the scope of rights in comparison to the scope of government and its policing powers. Border zones highlight the geographies of security and demonstrate that both liberal and illiberal rule coexist in liberal democracies. This leads to three inter-related hypotheses on security, space and law that I will argue in the course of this article.

The first point is on security. This research questions the discourse of exception that separates liberal from the illiberal rule in liberal democracies, as if both belonged to different times and spaces with a clear boundary line between them. Security is often portrayed as an exception to the liberal order. It is seen as institutionally, legally and spatially distinct from the liberal state. Security practices, and specifically the routines of producing security through legal procedures show that border zones are not exceptional in their constitution, but rather a consequence of normal modes of government (Barry, Osborne, and Rose 1996; Burchell, Gordon and Miller 1991; Foucault 1991). Security is established by means of regular legal processes and practices of legal identification and legal bordering. The problem of security, I argue, is not its exceptionality, but rather its banality. Security is a normal mode of government in the repertoire of liberal democracies. Border zones are characterized by legal proliferation rather than being outside the law, by juridical complicity rather than executives acting on their own, and often also international consensus rather than unilateral approaches by states.
The second point is on borders. This research questions the space of government and the space of rights. Whether portrayed as borders, boundaries or frontiers, it is often by reference to political geographies limited vocabulary that borders are conceptualized. The border is often portrayed as a static border, physically fixed. A boundary is drawn between the state delimited by its territory and the outside. Rather than tracing the geography of territory as the basis of political mapping, this research turns to the geography of law and the space of government. From this perspective a state’s borders are multiple, shifting and fluid and their location depends on the population to be governed. The state is not a territorially fixed entity, but has multiple, fluid and selective borders (Rumford 2006; Walters 2006). These borders are in constant transformation, negotiation and contestation. Sovereignty gains its full power precisely through the possibility to define its legal borders, the space of its legal jurisdiction and the space of its legal rights. The possibility to expand and contract legal borders is a technique that states use to create border zones of limited rights. Two legal borders are of importance here: the legal borders of policing and the legal border of rights. It is precisely their separation that opens up possibilities for creating border zones within liberal states.

The third point is on law. This research questions the tools of governing and emphasizes the role of ordinary law and ordinary practices of rule. Contemporary analyses often focus on exceptional law, the state of exception, extra-legal approaches or the notion of lawless spaces. Each of these approaches places illiberal rule outside of ordinary law and assumes a distinction between normal law as the basis of the liberal state and border zones as an exception to this norm (Ewald 1991; Pasquino 2003). The limitation of rights is in fact part of the common repertoire of liberal states. The production and control of space and identities are fundamental to the art of government. Law is productive in creating inside/outside and placing certain people in outside spaces. Law creates border zones and other spaces where fundamental rights can be withdrawn, but powers of policing upheld. Law’s most powerful tools are also its most ordinary tools: the creation of legal identities, the creation of legal spaces and of legal borders, and the definition of the scope of legal rights. Law constructs borders, produces identities, regulates these, marks legal spaces, criminalizes and grants rights. These are normal tools of law that are also used to create border zones. Border zones are legal constructions and law is an ordinary mean by which the liberal state legitimizes illiberal rule. Therefore, border zones can be easily produced and reproduced without resorting to an exceptional tool of government.

These arguments are embedded in literature on border zones and the government of populations. This includes questions of security and global circulation controls, and more specifically the nexus between security practices and migration controls from a political sociology perspective (Huysmans 2000, 2006b; Bigo 1998, 2002; and Guild 2005). A number of state practices are geared to the control of unwanted populations, such as detention and deportation (Walters 2002) and interdiction policies (Crépeau 2003; Morris 2003). The analysis of security and migration controls is embedded in several technologies for the government of populations and geared to filter unwanted populations to be managed by illiberal rule. The exclusion of specific populations could not take place without the identification, documentation and control of the general population as a whole. Therefore, studies of practices of citizenship and control (Hindess 2000), documentary practices and the role of the passport (Torpey 2000), travel authorizations and visa regimes (Bo 1998; Bigo and Guild 2003), surveillance and social control of populations (Bigo 2006; Lyon 2006) and the role of borders (Walters 2006) provide an important framework for techniques of government employed in border zones. As a result of these various political
technologies, the unwanted have been kept at a distance. The borders of control have shifted abroad. This shift of controls abroad without correlate rights has led to the term “remote control” (Guiraudon 2002) to express the distance and “ban-opticon” (Bigo 2007) to express the selective surveillance of those kept at distance. Some of these studies have taken issue with the exception and started a critique of it from the point of view of security routines and migration controls (Bigo 2006; Huysmans 2006a; Doty 2007). This study uses legal analysis to complement these previous studies and to understand the structure of border zones.

This article consists of two parts. The first part analyzes legal bordering practices, which are the prerequisite for establishing spaces of limited rights. The second part, Legal Rights, compares rights in the border zone to the ordinary legal system of the states and demonstrates the dual structure of right in liberal democracies. The studies are based on three types of border zones: territorial border zones located on the territory of the state, offshore border zones located on the territory of third countries, and, maritime border zones. The case study used for offshore border zones, Australian offshore zones, illustrates how the territory of third countries can be used to establish border zones. These are complemented by the analysis of border zones in maritime spaces. Maritime spaces merit a special analytical category, as they are constituted under a special international framework, the Law of the Sea. The selection of border zones illustrates the variety of practices in establishing border zones.

**Legal Borders**

Establishing the inside/outside of a state is commonly based on a territorial definition. According to conventional understanding, the scope of a state is limited to its territory. This model portrays the globe as a puzzle of states with clearly defined territories allowing for an almost perfect aligning of the pieces (Albert, Jacobson, and Lapid 2001). This model has an important fallacy. It assumes that territory, political authority and the scope of rights are congruent. In practice, the relation between borders and territory is complex. Borders can be in the interior, at the edge or outside a territory. This requires a shift from the focus on territorial borders of the state to its legal borders. Law is crucial for establishing borders and border zones. Law defines the borders of the state’s jurisdiction, but also the borders of rights, and the spaces of the border zone. It can declare places under its jurisdiction to be foreign territory, expand government and policing beyond its territory and use legal spatiality to exclude people from the essential requirements of the liberal regime, access to rights. A number of different technologies are applied to expand the legal space of government and policing beyond territory and to contract the legal space of rights. This part will start with the legal borders of policing and government in maritime border zones and offshore border zones and compare these to the legal borders of rights inside the territory and outside of it.

**Legal Borders of Policing: Maritime Border Zones**

Politics of borders and the question of inside/outside are of importance for shifting the legal borders of government out. Legal borders of government and policing can be extended by means of ordinary legal procedures. Maritime border zones are established through interdiction measures that expand the state’s authority beyond its territory for purpose of migration controls [United Nations High Commission for Refugees (UNHCR) 2000]. State agents, such as the coast guard, gendarmerie, and military are employed outside the territory of the state—in international spaces or even the territory of foreign countries. To
understand how the legal borders of policing are expanded beyond the territory, we need to start from the Law of the Sea. According to the Law of the Sea, a state’s right to intercept is limited to territorial waters, the state’s contiguous zones, and outside of these maritime zones only to same-flag vessels [United Nations Convention on the Law of the Sea (UNCLOS) 1982]. These are vessels registered with the respective flag state. In these spaces, the state has full sovereignty and in the contiguous zone authority as provided for in its national laws. This is to a great extent in coherence with the model of sovereignty based upon territory. The high seas, on the other hand, are not under the sovereignty of any state. All states are free to sail their vessels there and the sovereign right to police and intercept in the high seas is limited to same-flag vessels. Over the recent decades, a number of legal adjustments have opened the possibility for maritime interceptions of migrants on the highs seas and in foreign waters, however.

The first set of exceptions has been introduced through bilateral approaches. Many border zones are set up through legal agreements with other sovereign states, which allow the policing of the high seas, but include also joint policing of the territorial waters of embarkation states or other forms of interdiction beyond territory. Bilateral approaches authorize the intercepting state to intercept the vessels of the flag state with whom the agreement is concluded. These agreements are based upon a variety of written instruments, including bilateral agreements, exchange of diplomatic notes, agreements of police cooperation, memoranda of understanding, and in individual cases they are based on oral agreements (Basaran 2007). An important precedent is the agreement between the United States and Haiti concluded in 1981 (T.I.A.S. No. 10241). These allow for the purpose of migration controls a zone of transnational policing and have many of their precedents in policing schemes dating from previous policing cooperation, such as anti-drug cooperation (Andreas and Nadelmann 2006). By now bilateral agreements between intercepting states and states of embarkation have become a common tool. A number of agreements exist between the states of the European Union and its neighbors to the south of the Mediterranean, the United States and its partners in the Caribbean, and Australia and its neighbors in the Pacific (Basaran 2007).

A second legal approach to overcome territorial limits and the limits of interception as provided for in the Law of the Sea is unilateral national proclamations. These have been used rather sparsely, however, if they were not already based on a bilateral agreement. Italian legislation, for example, allowed as of 2002 the navy to board vessels with unauthorized migrants outside Italian territorial waters; in 2003 the Italian Ministry of Interior issued a decree that enabled the navy to intercept ships carrying migrants and, if possible, to force the vessels back to the territorial waters of the countries where they came from (Pugh 2000; UNHCR 2002).

The third legal approach is a claim to a specific reading of international law. This has been used effectively to police vessels not protected by a sovereign state: vessels without a flag or where the flag is doubtful. Legal initiatives proposed to the Council of the European Union (CEU) in 2003 are telling for possible future legal moves to expect (CEU 2003). These include propositions to hold the state of departure responsible for the safety standards of its vessels, as provided for by international law (CEU 2003:57). It also includes a proposition to limit the rights of people rescued/intercepted by excluding the deck of the ship of its member-states from the application of national law. Consequently, people rescued/intercepted “cannot claim to have crossed the frontier into the territory of the country whose flag the rescue ship is flying” (CEU 2003:61). A specific space is carved out, the deck of a ship, that is not under the state’s jurisdiction, and can be viewed as extraterritorial for migration purposes.
Politics of borders and the question of inside/outside are also of importance for offshore border zones, that is border zones located on the territory of other states. These spaces abroad extend the government of the state and are again governed by ordinary legal procedures. The United States’ Guantánamo Bay in Cuba, Australia’s Pacific Solution with Nauru and Papua New Guinea, and recent European proposals to set up centers located abroad are some examples of the widespread use of this approach. Cooperation with third countries leads in these spaces to the effective extension of government without correlate legal rights. Bilateral agreements are the most commonly employed approach for establishing offshore border zones. To understand how legal government is created on the territory of another state can be illustrated by means of the Australian offshore zone.

Australia has bilateral agreements with a number of Pacific nations that allow it to send Australian refugees (from the excision zone) for processing to refugee camps in these third countries. The legal frameworks for Australian offshore processing are Memoranda of Understanding; they define roles and responsibilities amongst the states. The delegation of responsibility is a ministerial decision that does not require a counter-check by another instance. For Australia the framework that gives these immense powers to the minister is the framework law, the Migration Act (1958). Once the powers are given an indefinite expansion of delegation to third countries can take place. For the designation of a country as a declared country, according to Australian law the ministerial decision has to be based upon four criteria. The third country must provide access to refugee status determination, protection during the determination process and afterwards pending their repatriation or resettlement and meet relevant human rights standards in providing protection (Migration Act 1958:198A). These four criteria are not assessed in any way, however, but the minister decides whether the conditions have been fulfilled. Neither is it required that the third country is signatory to the 1951 Refugee Convention. This effectively has the power to place the refugee from a Refugee Convention country to one where it is not respected.

Legal agreements are also the basis for delegation approaches that seek to transfer responsibility to origin/transit states, but also to private companies, such as carriers and airlines, and international organization, such as the International Organization for Migration or UNHCR. These are also known as externalization or outsourcing. By delegation states try to avoid legal responsibilities that could arise outside their territory. It allows states to govern the structures from the center—almost with an invisible hand, whilst being able to put implementation connected with operational pressures, mistakes and—possibly human rights abuses—to other actors. The policy of delegation/externalization serves as a means of transferring responsibility for action and judgment from the legal arena of the state. By separating policy-making from policy implementation, it allows states to gradually absolve themselves from the effects of their policy. Other legal instruments are policy instruments such as readmission agreements and first country of arrival and safe third countries policies. Readmission agreements facilitate deportations by concluding agreements with origin countries of refugees. First country of arrival/safe third country concept assumes that refugees should remain in the first country of entry that offers them safety; it means that a refugee who has passed through a safe third country should be able to be returned to this country. This approach absolves countries that are farther away from conflict zones from taking on legal responsibilities for refugees. The policy of delegation is enforced primarily through bilateral and regional dialogue, partnership and association agreements, conditionality and sanction, financial assistance and technical assistance, and complementary incentives.
Contrary to the previous measures that are equivalent to an expansion of the state and expand the borders of sovereign authority, some border zones are to be found within the state territory. The international border is located inside the territory. International ports—whether airports, seaports or train stations—usually display an international zone, or the so-called customs area. As entry decisions cannot be made directly at the border, the entry takes place after being inside the territory within a part defined as the international zone. International zones are declared to be legally outside the territory. Thus a person can be physically present, but not legally present in the country. The border is moved inside the territory. It is under the full territorial control of the sovereign state and its law enforcement operating in the international zone. These borders are internally produced by the state. The declaration of an international zone is a purely sovereign act that does not require the agreement of other states or international organisations. Sometimes these spaces are claimed to be foreign territory. Policing powers are maintained over the full territory, while certain spaces are limited from a rights perspective.

The first, and most important, approach used for defining the geographical scope of rights is setting spatial borders to specific laws and regulations. The spatial delimitation of laws and regulations creates zones of different rights. In border zones legal spacing takes place by limiting the application of migration laws and statutes. The legal technology for establishing the border of rights is rather simple: the scope of the migration zone is defined in the relevant statute. Thus, the government can at any time provide a specific definition of core territory, distinguish it from the overall territory, and deny fundamental rights in this border zone. This approach plays upon the difference between legal entry and territorial entry. Drawing the boundaries of legal entry narrower than that of the state’s territory allows fundamental rights to be delimited to the zone in-between. 2001, for example, Australia passed two amendments to its Migration Act to excise a number of islands, offshore installations and eventually parts of its mainland from the migration zone. Refugees and unauthorized migrants found in this area are considered not to have entered territory, and ergo, not to have rights associated with being on Australian territory. Excision has also been widely used as a spatial tool for territorial waters. In the United States, for example, for migration purposes, territorial waters are considered not to be part of the territory (Memorandum 1993). With this construction fundamental rights still apply to all within the state, but certain populations can never reach the state, but always remain within the border zone. This politico-legal technology is not only applied for migration purposes, but also for other issues such as anti-terrorism measures. Spatial segregations, based upon race, poverty or gender, are long-standing precursors of multiple legal spaces and different fundamental rights based upon a combination of legal identities and legal spaces. Different rights are attached to different places. While legal spacing is used seldom when it comes to fundamental rights, it remains a common tool of ordinary law.

The law on the waiting zone in France and the law on the excision zone in Australia illustrate how internal borders are produced. These borders are not fixed, but can be multiple and fluid. Two technologies are especially of importance: spatial extension of border zones and multiplication of border zones. The French waiting zone illustrates the bordering processes for rights in the waiting zone. Initially one of the key characteristics of the border zone was that it was spatially fixed to the international zone. Based upon the argument of necessity, later the waiting zone was detached from the international zone to include accommodation within the parameter of the port, airport and train station (CESEDA 2004:L221-2) and the border of rights was ultimately delocalized, when
the waiting zone extended to include all the places where the foreigner needed to be for administrative or medical reasons—anywhere on French territory (CESEDA 2004:L221-2). Wherever a person went, he/she could not enter the French territory. Similar to the delocalization of the waiting zone, the Australian government introduced a bill (later rejected) to detach the border zone from its spatial fixation (Migration Amendment Bill 2006). This would allow it to process all unauthorized arrivals by boat, independent of the location where they were encountered (whether in the border zone or the migration zone). This means that even those who were in the Australian migration zone could be sent to offshore facilities, if the source of their arrival was by boat. The status of the person becomes a function of their means of arrival. The place of their arrival attaches to the person even if they are officially on Australian territory (beyond the excision zone). All unauthorized arrivals by boat were to be treated as if they were intercepted in the border zone. The correlation with the physical space of the border zone extended as a legal space across all of Australia.

Apart from its indefinite spatial extension, it is also the immense possibilities for the multiplication of border zones that poses a problem for liberal democracies. One approach to multiplication is the creation of waiting zones through law, a second, more problematic approach is the undefined multiplication of border zones within a legal framework, but by administrative regulation. While the law on the waiting zone provided a legal framework for the multiplication of border zones (the creation of individual new border zones) remained an inherently administrative decision. Individual waiting zones can be produced, extended and vanished by the sole decision of the administration. No counterchecks or balance of powers are foreseen for creating a waiting zone and, here-with, an area of different rights. The prefect of each department can decide on the necessity and location of a border zone, an area of different rights, as well as on its precise extension and delimitation. The prefect can create a waiting zone in all international ports—whether airports, seaports or train stations—within his/her territorial jurisdiction. In the newer legislation the reference for the decision is no longer the prefect, but “a competent administrative authority” (CESEDA 2004:L221-2), thus setting the administrative burden for the creation of the waiting zone even lower in the hierarchy. Rather than containing and fixing these spaces, the legislation thus allows the flexible multiplication of these spaces without possibilities for appeal. Possibilities for retrospective declaration of waiting zones further limit the possibilities of control. The space of the waiting zone can potentially be created anywhere. If we put the option for the multiplication for waiting zones together with possibility of their indefinite extension, then it becomes apparent that these are sophisticated tools for the government of people. The space of the waiting zone can be potentially anywhere and create a legal identity that can potentially go anywhere. The only limit to these potentialities is the temporal limit of twenty days that people are allowed to be in the waiting zone or, differently expressed, the possibility to escape this legal identity after twenty days.

Legal Border of Rights: Outside the Territory

Outside the territory, the scope of rights is defined by the access to courts or court jurisdiction. Jurisdiction is a legal technology for creating the border of rights. Court jurisdiction is a legal technology for defining the geographical scope of rights. Jurisdiction refers to the legal authority to decide, to speak law. One of the most fundamental legal questions is whether a court has jurisdiction over a case, meaning the authority to adjudicate. A court does not have the right to hear a case that is outside of its territory (geographic jurisdiction), its subject matter (subject matter jurisdiction) or a person/property that falls outside of its
jurisdiction (personal jurisdiction). Jurisprudence on jurisdiction has been critical for fundamental rights. Being under the jurisdiction of a court means having access to the adjudication of rights. The states’ placement of detainees in places geographically outside their territory precisely aims to hinder the courts’ outreach. Externalization efforts of states aim to benefit from this equation. The protection of rights cannot follow the state’s outreach. Proposals for refugee camps in Northern African countries, but also the case of Guantánamo or Australian offshore processing are some examples, when governments claim that these offshore border zones should be beyond court jurisdiction. Interdiction and delegation/externalization efforts are similarly an approach to avoid legal accountability. They are all an effort to place policy implementation beyond the courts’ reach.

It is important in this context that the scope of rights beyond territory is defined by a differentiation between citizens and non-citizens. In the course of the last century, as courts changed from a territorial to a jurisdictional approach, the benefits of this change were limited for constitutional protection to their citizens. As law increasingly broke out of a territorial container, constitutional protection only partly followed this approach, but created a wedge between two types of populations, citizens and non-citizens. For citizens it has become most common to use personal jurisdiction, whereas for foreigners it is territorial jurisdiction. A system of different rights was created and the international border became determinative for fundamental rights of foreigners. Constitutional protection is often limited for foreigners to a state’s territory (Raustiala 2006). This has important implications for foreigners who encounter a state’s intermediaries outside of the state’s border. Constitutional protection of the individual provided for within the state’s territory is less likely to be extended to foreigners if they happen to be outside the territory.

Legal Rights in the Border Zones

Border zones keep out constitutionally guaranteed rights and provide a number of substitute rights. The latter are not equivalent to ordinary rights in their substance. The law of the border is a law of security rather than protection. Constitutional protection finds here no or limited application. Governments argue that people in the border zone are beyond the reach of ordinary legal rights, as they have not yet legally entered the state territory. These are not places without rights, however, but places of different—and thereby lesser—rights. Two examples shall illustrate this situation: the waiting zone in France to demonstrate the creation of dual rights on territory; and Australian offshore processing centers to demonstrate the workings of a dual rights regime abroad. Three categories of rights are limited: criminal procedures that restrain excessive policing powers and pose limits to police investigations such as interrogation, limitations on search and seizure, and detention; criminal procedures that grant access to judicial adjudication, right to legal council, judicial review of administrative decisions and due process; and migration and refugee law.

Legal Identities

Before analyzing the dual structure of legal rights, it is important to understand the creation of legal identities. Legal identification is crucial for fundamental rights, as it creates and defines populations that can be excluded from the ordinary legal rights of the liberal state. The government of a specific population requires a legal identification. Law defines who is supposed to be governed. It creates legal identities. Once a specific population has been provided a legal identity, it is an easy step to develop laws to govern specifically this population.
In the context of migration controls, laws for border zones are specifically created for unwanted non-citizens: these are primarily refugees at the border exempt from entry requirements, but can also include non-citizens not authorized to enter. In France the law on the waiting zone specifies both categories of non-citizens as its object: the non-admitted and refugees at the border (CESEDA). The creation of legal identities for the border zone allows the French government to establish different rights regimes: one applicable to those legally on territory and one applicable to those at the border. In a similar move, the Australian government introduced distinctions between lawful non-citizens, unlawful non-citizens and offshore entry persons (Migration Act 1958). Lawful non-citizens are those who have entered Australia legally with a visa and then make a claim for refugee status; unlawful non-citizens are refugees who arrive without a visa; and offshore entry people are refugees interdicted in the border zone. The creation of each legal identity provides the basis for the extension of lesser rights.

Legal Rights and Territorial Border Zones

For a demonstration of border zones located within the territory of the state, we shall use the French law on the waiting zone as an illustration. The introduction of the law on waiting zones endowed persons held at in this border zone with certain rights that limited previous practices, but the law also simultaneously legalized some practices that are outside the normal rights regime, and thus created a parallel legal system that is in its legal protection inferior to the ordinary legal framework for France. It created a set of particular rights for people held in a territorial border zone. 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. Being at the border, and at its expansion the waiting zone, means, according to the government, not having yet entered the territory. The distinction between territory and border zone gave rise to a new legal system specifically created for the border zone. A distinction was created between rights at the border (in the waiting zone) and the normal rights regime (valid after legal entry). The procedure at the border is derogatory of the normal procedure. The ordinary legal system does not apply here; a separate legal framework is applied to non-admitted persons and refugees, which triggers a different set of rights, institutions and procedures. The law on the waiting zone facilitates legal solutions that would be contrary to international conventions on refugee law if applied on French territory, and even contrary to French criminal procedures. The dual legal system finds its expression in multiple components of the law, some of which shall be explored (Anafé 2003, 2006).

First, two systems for refugee status determination are created: one applicable at the territorial border zone also referred to as asylum at the border, and the ordinary procedure for those who are legally on the territory. Refugees at the border zone need a permit to legally enter the territory and access the ordinary procedures for refugee status determination. The asylum at the border is an additional step to the French ordinary refugee status determination and examines whether the claim of refugees is manifestly founded. For this pre-screening process, there is not a correlate procedure for those legally within the territory, and in fact there cannot be, as it would be contradict the Refugee Convention (1951). Apart from the procedure, also institutional responsibilities for refugee status determination are different in the border zone. The institutional responsibilities for refugee status determinations lie, according to ordinary French law, solely with the French Office for Protection of Refugees and Stateless Persons and the Refugee Appeal Commission. Asylum at the border, however, is under the
ultimate control of the Ministry of Interior. This structure emphasizes security to the detriment of rights.

Second, different rights are not only valid for process of asylum and refugee law, but there is also a different right regime compared to ordinary French law on criminal procedures. Safeguards from detention, and judicial access and rights of appeal are limited in the border zone. First, as for detention, the law on the waiting zone specifies that foreigners be held/detained until a final decision on the request has been reached (with a maximum of 20 days). Asylum on the territory does not require a similar procedure. The law on the waiting zone effectively recognizes that people in the waiting zone can be kept under pure police custody for the first 4 days, and that administrative detention for asylum seekers is acceptable. It places asylum seekers in the border zone not only beyond the Refugee Convention, but also beyond normal criminal procedures in France. Under normal French criminal procedure, the custody period, initial period of questioning without being charged for a crime, is 24 hours, with possible extension of up to 48 hours upon judicial consent. It is only for specific cases that the regular custody period in France can be expanded up to 4 days (trafficking, drug usage, terrorism) (Criminal Code:63 and 77). The detention period in the waiting zone, and herewith the policing powers in the waiting zone, were significantly expanded for this specific population, refugees and non-admitted. Second, as for access to the judiciary, the law on the waiting zones introduces appeal rights: non-admitted persons can appeal their detention, but also the administrative decision on entry. The possibilities for an effective appeal are limited, however. An appeal against the decision at the border is possible, but until last year it did not have a suspensive clause, meaning that the person not admitted in the first instance could be deported during the appeal process.

*Legal Rights and Offshore Border Zones*

Australia’s offshore processing on the other hand demonstrates how dual rights regimes are created beyond territory. There is not one law for the offshore zone, but it can be split in two main legal systems: offshore processing in Australia and offshore processing in designated third countries. It will be the latter that is of interest in this context to illustrate legal right on the territory of other states. The dual rights regime is created through two related delimitation on the scope of laws. First, Australia’s Migration Act is limited to the migration zone; this excludes the border zone (excision zone). This means that in contrast to onshore refugees, offshore refugees are not allowed to apply for an Australian visa, and can be moved to a declared third country for processing. Refugees held in third countries do not have an automatic right to resettle in Australia, even if they are recognized as refugees. They have to remain in the camps even if their refugee status is confirmed until their resettlement and can only receive a temporary protection for 3 years, after which their visa is only reviewed if unsafe conditions continue to prevail in their countries of origin (Migration Act 1958:46A, 198A). Offshore refugees from third countries also lack access to refugee status determination system ordinarily available in Australia; they are treated as if they were located in an overseas refugee camp and are assessed according to the determination system of the UNHCR. This means that the status determination is a purely administrative decision with very limited review possibilities, it does not include the right to legal counsel and appeals are limited to senior administrative officers. Offshore refugees do also not have access to administrative appeals found ordinarily in Australia, such as the merits review of the Refugee Review Tribunal. Offshore applicants are not only denied rights granted under the Australian Migration Act, but also deprived of access to Australia’s legal
system. Offshore refugees are denied due process rights as they are barred from access to the Australian courts. A privative clause is inserted in Australia’s Migration Act, which is a provision to remove the courts’ ability to review administrative decision, and this excludes a number of legal proceedings (Migration Act 1958:494AA). Offshore refugees do not fall under the ordinary Australian law, but neither do they fall under the law of the third country; they are under the law of the border zone.

Security Practices and Legal Exclusion

Apart from the dual legal structure, the securitization of the security zone is achieved from a more practical aspect through enforced isolation, avoidance of ordinary foreseen inspections and controls, and politics of non-transparency. This leads, in addition to the legal delimitation, to an effective limitation of rights (even if these are legally granted). Policing of the border zone takes place through administration by the police, border police and the military, but is also apparent in the security aspects of the refugee camps, and the enforced isolation and limited transparency. Locations for interdiction and processing of refugees remain mostly outside of normal controls available under the ordinary rights regime. The difficulty is not only in overcoming legal barriers, but also in overcoming financial, administrative and technical barriers for access, especially if these take place on maritime waters or in other countries. The location of policing operations is, as apparent across the spectrum of border zones, an important factor in allowing policing powers to increase to the detriment of the rights regime. The border zone is a space where the government prefers secrecy and tries to avoid publicity. As a result of these measures, the public remains largely uninformed about the situation in border zones. The government’s intention is not only to diminish the rights of the detainees, but also to make these border zones invisible. This includes a lack of documentation and information on the full costs of interception and refugee processing camps [Human Rights Watch (HRW) 2002]. This helps the government to enforce its security discourse and diminishes the possibilities for counter-forces. Most importantly, however, is the exclusion of third parties that can contest policies of the government.

The securitization of the border zones is enhanced through the exclusion of third parties. Policing takes effect through restriction of access rights and isolation, and often combined with these are access to legal information and possibilities to appeal. Access right are strictly regulated through the law. Border zones are usually inaccessible to the general public and the media. Access to the border zone is strictly regulated, often only including groups that have general control and supervision powers, that is, parliamentarians. Rights of access to border zones often follow a long period of negotiation and contestation with enhanced access on the territory and less controls abroad. In the French waiting zone, for example, it was only 3 years after the legal establishment of the border zone that UNHCR and a few accredited associations were granted a total of eight visits per year per waiting zone (Order of 2nd May 1995). After more than a decade, in 2004, an association gained permanent access to the waiting zone (Order of 31st May 2005). Currently the number of accredited association in the waiting zone has expanded to more than a dozen. Accreditation remains at the discretion of the Ministry of the Interior and permanent access is effectively limited to a part of the waiting zone, the accommodation area; access to terminals and the police stations is limited and only possible after initial appointment.

Offshore border zones provide an even more difficult environment to penetrate for purposes of public control, humanitarian support and legal advice. In Australia, the location of offshore zones places additional hurdles. First, due to
the remoteness of offshore zones access to Australian advocate groups, migration agents, the Ombudsman and social services are limited. Second, for third parties and especially for pro bono lawyers, it is not only difficult, but also costly to access their clients, as the legal funding of the Australian government (IAAAS) is limited to its territory. Third, important constraints are also visa requirements for offshore locations; many refugee advocates, lawyers and independent NGOs have been refused visas to enter the offshore zone in Nauru. Further, usual control mechanisms in place in mainland Australia are also questioned at the offshore locations. The Human Rights and Equal Opportunity Commission (HREOC) requests to visit facilities abroad were denied by the Department of Immigration, arguing that the HREOC Act is not valid beyond Australian territory. Similar to the process in the waiting zones with time access has also improved in the offshore processing centers. Journalists, lawyers and politicians have gained access to Nauru, but visits remain even if allowed legally, nonetheless a financial and logistical burden. The remoteness of the location is also the main problem for maritime interdictions. Here access by third parties is starkly delimited, if not outright impossible. Policing on the seas is bound to the vessel and uncontrollable until after debarkation.

Governments also use criminalization and penalization to keep third parties from intervening. Humanitarian rescue on seas, for example, is being penalized financially, administratively and sometimes even under criminal law. Contemporary state practices show a clear discrimination in general rescue and rescue of refugees at sea. Whilst rescue is a humanitarian obligation, states have the sovereign right to deny debarkation on their shores. After rescue operations of refugees, rescue ships are caught in international waters and denied entry to ports of coastal states. Wandering ships cannot debark, and often have to stay for many days or even for weeks in international waters as negotiations are led on the right of debarkation. The most famous of these modern odysseys is undoubtedly the one of MV Tampa (Rothwell 2002). In this instance penalization took place through, first, the closing of territorial waters toward the rescue ships, and second, the defence of these waters by military means, and third threatening the shipmaster with a court case. Certain countries, such as Australia, Norway, the United Kingdom, Germany and the United States, hold shipmasters criminally liable under domestic law (Pugh 2004). Not only shipmasters, but also fishermen rescuing migrants are being prosecuted for rescue operations, including recovery of migrant bodies, for possible complicity in illegal migration. The penalization of humanitarian action, whether intended or not, prescribes a change of moral and legal norms in rescue operations for a specific population.

Conclusion

In the course of this paper, it has been demonstrated how government by security functions through technologies of law, space and policing. The problem of security is not its exceptionality, but rather its banality—security appears as a daily, normal mode of government. Security zones are part of the liberal state. Liberal states have created a dual system with liberal rule inside and a security rule in the border zones. Border zones expose the limits of contemporary liberal democracies. They contradict the normative foundation of liberal democracies, their emphasis on fundamental rights and the guarantee of civil liberties against government power. Given that the constitution of these spaces is based on ordinary law and ordinary practices, creating security in this way is seen as a lawful and acceptable way of managing borders. As has been demonstrated, however, these spaces should not be distinct from the ordinary fundamental rights guaranteed by the liberal state, as they are under its (police) government and based on the legal exclusion of a specific population. The problem of
border zones is that legal exclusions can be easily produced by legal means. They can potentially be established anywhere for any population who are non-citizens by drawing upon the distinction between inside/outside. In these spaces ordinary law is not suspended for all the population, but rather specific parts of the population in specific areas. Law serves to govern populations differently. Given the normative foundation of liberal states, it is rather unquestionable that fundamental rights need to apply non-discriminatory in scope and population. Advancing fundamental rights needs to complement the substance of fundamental rights through a focus on the scope of these laws. The scope of these laws needs to extend to all within the jurisdiction of the state. The task of transformation toward a form of government that guarantees fundamental rights requires, among others, a control of ordinary legal procedures to secure a fundamental rights regime. This requires not only legal, but institutional changes to the structures of the liberal state.

References


Migration Act. (1958) An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons, No. 62 1958.


