



## ‘See no evil’: towards an analytics of Europe’s legal borderlands

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### Abstract

This article argues that spatial exclusion is a central element of, and a precondition for, exclusion from fundamental rights. Keeping individuals who are seeking access to rights geographically separated from spaces ordered by the rule of law is a defining feature of the contemporary European legal order. The European legal space is surrounded by borderlands, which are not only humanitarian borderlands, but also legal borderlands. Unpacking the meaning of borderlands and frontier zones could, therefore, be greatly productive for future perspectives on legal geography.

**Keywords:** borderland; migration control; asylum; legal geography

In April 2021, the non-governmental organisation (NGO) Legal Centre Lesvos filed a suit before the European Court of Human Rights (ECtHR) against the Greek state for ‘pushback’ operations against a group of approximately 200 migrants, including 40 children, who were trying to cross the sea and were violently expelled to Turkey.<sup>1</sup> The incident is by no means unique. Although the ECtHR, most notably in the *Hirsi* case, clearly pronounced that a state cannot evade its responsibility and its human rights commitments when intercepting vessels at high seas, the ‘pushback’ and ‘pullback’ strategies remain a salient feature of border control at the European Union’s (EU) external border regions.<sup>2</sup> In the border areas with Libya, the Western Balkans, Turkey and Belarus, among others, EU Member States and EU agencies such as Frontex are frequently accused of having developed a systematic strategy of pushing back those wishing to enter, and seek protection in, the European legal space.<sup>3</sup>

These politically and legally contentious practices reveal how spatial exclusion is a central element of, and a precondition for, exclusion from fundamental rights. Keeping individuals, who are seeking access to rights, geographically separated from spaces ordered by the rule of law is a defining feature of the contemporary legal order. The EU is thus surrounded by areas of immobilisation and spatial separation, some of them – such as asylum camps in Greece – are also geographically within its territory; yet housing large populations who find themselves in a legal limbo. The EU

<sup>1</sup>Guardian, ‘Greece accused of ‘shocking’ illegal pushback against refugees at sea’ <[www.theguardian.com/world/2021/apr/26/greece-accused-of-shocking-pushback-against-refugees-at-sea](http://www.theguardian.com/world/2021/apr/26/greece-accused-of-shocking-pushback-against-refugees-at-sea)>, accessed on February 4th, 2022.

<sup>2</sup>Annick Pijenburg, ‘From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strassbourg?’, 20 (2018) European Journal of Migration and Law 396–426.

<sup>3</sup>Roberto Cortinovis, ‘Pushbacks and Lack of Accountability at the Greek-Turkish Borders’, 2021–01 CEPS Paper in Liberty and Security in Europe <[www.ceps.eu/ceps-publications/pushbacks-and-lack-of-accountability-at-the-greek-turkish-borders/](http://www.ceps.eu/ceps-publications/pushbacks-and-lack-of-accountability-at-the-greek-turkish-borders/)>. <[www.theguardian.com/global-development/2021/may/12/eu-states-cooperating-informally-to-deny-refugees-asylum-rights-report](http://www.theguardian.com/global-development/2021/may/12/eu-states-cooperating-informally-to-deny-refugees-asylum-rights-report)>, accessed on February 4th, 2022.

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and its Member States are using enormous resources on practical measures and legal and political arrangements to keep these spatial orders in place.<sup>4</sup> These practices show, unmistakably, the importance of linking legal studies with geography. A spatial perspective is therefore central for understanding the conditions of access to human rights in the EU.

In this article, I will not further examine these practices of spatial exclusion, but will instead focus on their importance in terms of theoretical and conceptual innovation. I argue that the European legal space is surrounded by borderlands, borderlands that are not only humanitarian but also legal.<sup>5</sup> Understanding and unpacking the meaning of a borderland is thus vital for understanding the nature of the European legal order, as boundaries are constitutive of the nature of the inside.

### 1. Global frontiers and borderlands

More than two decades ago, in her pioneering analysis of globalisation, Saskia Sassen pointed out the importance of analysing frontier zones that are born out of the interactive overlapping of global and national orders.<sup>6</sup> Such zones, Sassen argues, are likely to be marked by operations of power and domination and, 'from the perspective of research and theorization, these analytic borderlands are sure to require independent theoretical and methodological specificity'.<sup>7</sup> While Sassen's focus is on the geography of economic globalisation and the socio-spatial temporalities of global capitalism, there are lessons to be learned for scholars of contemporary legal orders. The concepts of borderlands and frontiers are useful for describing the murky geographical and legal spaces that represent some of the greatest human rights challenges in contemporary Europe.

Semantically, the term 'borderland' denotes a 'territory at or near a border' or 'a vague intermediate state or region'.<sup>8</sup> The term has been used frequently, yet in slightly different ways, by several disciplines, particularly anthropology and history. In his attempt to create some level of conceptual clarity, historian Bradley J Parker defines borderlands as 'regions around or between political or cultural entities where geographic, political, demographic, cultural, and economic circumstances or processes may interact to create borders or frontiers'.<sup>9</sup> His definition does not mention legal bordering processes and circumstances, yet it is precisely these that are central for understanding the precarious situation of migrant populations today.

One of the central features of borderlands is that they are spaces of intersection and 'in-betweenness'.<sup>10</sup> The frontier conditions created in borderlands define them, as Anna Tsing observes, as 'zones of not yet – not yet mapped, not yet regulated'.<sup>11</sup> And although most of Europe's borderlands are, in geographical terms, clearly on the map, they are often described as 'no man's lands', where people find themselves in almost permanent legal limbo. They are not yet admitted into the European legal space and are not acknowledged as subjects of rights. They may be partially included into the humanitarian space, yet excluded from accessing human rights and fundamental rights accorded to EU citizens.<sup>12</sup>

<sup>4</sup>Martina Tazzioli, *The making of Migration: The Biopolitics of Mobility at Europe's Borders* (Sage Publications 2020).

<sup>5</sup>Katja Franko Aas and Helene Ingebritsen Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', 55 (1) (2015) *British Journal of Criminology* 1–18.

<sup>6</sup>Saskia Sassen, 'Spatialities and Temporalities of the Global: Elements for a Theorization', 12 (1) (2000) *Public Culture* 215–32.

<sup>7</sup>*Ibid.* 216.

<sup>8</sup>Borderland, 'Merriam-Webster.com Dictionary, Merriam-Webster' <[www.merriam-webster.com/dictionary/borderland](http://www.merriam-webster.com/dictionary/borderland)>, accessed on February 4th, 2022.

<sup>9</sup>Bradley J Parker, 'Toward an Understanding of Borderland Processes', 71(1) (2006) *American Antiquity* 80.

<sup>10</sup>Sassen, 'Spatialities and Temporalities of the Global' 6.

<sup>11</sup>Anna Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press 2015) 28.

<sup>12</sup>Didier Fassin *Humanitarian Reason: A Moral History of the Present* (University of California Press 2012).

## 2. 'See no evil' and jurisdictional games

In trying to develop an analytics of borderlands Sassen observes that they are marked by regulatory fractures and suspensions of national legal orders.<sup>13</sup> When it comes to EU migration control practices, several observers highlight their multi-scalar nature. As de Witte points out, the EU's external borders are regulated in a piece-meal approach, relatively ill-defined and allow for the interaction between very diverse sites, actors and types of movement.<sup>14</sup> The in-between nature of borderlands enables the playing of jurisdictional games between various national, supranational and humanitarian actors.<sup>15</sup> This then creates possibilities for the avoidance of responsibility and tacit acceptance of violations of rights.<sup>16</sup>

Violations of rights that migrants are subjected to, for example, in Libya or by Greek authorities, are thus officially seldom seen by EU actors. I have written elsewhere on how migrant suffering, particularly death, hardly features in the communications of the EU border control agency Frontex, despite the fact that thousands of people have died in the Mediterranean Sea, making it the most dangerous border in the world.<sup>17</sup> To illustrate the point, the agency used the word 'dead' of 'deadly' only twice in their Twitter communications between October 2018 and October 2020. Also, the torture and abuse happening in detention centres in Libya is not mentioned at all in Frontex communications with the public.<sup>18</sup>

## 3. Beyond the borderlands

The tragic fatalities at Europe's borders reveal how borders are an expression of the sovereign ability to inflict death and to exclude life from the sphere of legal protection. These themes, among others, that have been fruitfully theorised through the use of Giorgio Agamben's concept of 'zoëpolitics' and Achille Mbembe's concept of 'necropolitics'.<sup>19</sup> Seen from this perspective, Europe's borderlands could be defined as spaces of exception, as waiting areas, zones of chaos, brutality and humanitarian need, where law is simply suspended.

However, this might be too simple a conclusion. I suggest that if legal geographers and other scholars further develop an analytics of borderlands proposed by Sassen, a fruitful way to proceed would be to examine their constitutive nature. Rather than seeing them as spaces 'beyond law', populated by subjects who are beyond the sphere of legal protection, we should examine how these socio-spatial formations function as the law's pre-constitutive element. Europe's border zones and extra-territorial spaces of immobilisation are doing the lion's share of contemporary border control and guarding the boundaries of membership. In that sense, the relatively ordered and legally regulated nature of EU Member States is defined by the chaotic nature of its margins. These spaces matter and should be seen as spaces created by law, rather than beyond the law. The spatial exclusion and containment in borderlands functions as a precondition for legal exclusion from the European legal space and as a precondition for the creation of a particular type of legal

<sup>13</sup>Sassen, 'Spatialities and Temporalities of the Global' 6.

<sup>14</sup>Flor de Witte, 'Here be Dragons: Legal Geography and EU Law', *European Law Open*, 113.

<sup>15</sup>Maartje Van der Woude, 'A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty', 24 (1) (2020) *Theoretical Criminology* 110–31.

<sup>16</sup>Cortinovic, 'Pushbacks and Lack of Accountability at the Greek-Turkish Borders' 2.

<sup>17</sup>Katja Franko, 'The Two-Sided Spectacle at the Border: Frontex, NGOs and the Theatres of Sovereignty', 25(3) (2021) *Theoretical Criminology* 379–99. International Organization for Migration, *Fatal Journeys Volume 3 Part 1: Improving Data on Missing Migrants* (IOM 2017) <<https://publications.iom.int/books/fatal-journeys-volume-3-part-1-improving-data-missing-migrants>>, accessed on February 4th, 2022.

<sup>18</sup>Franko, 'The Two-Sided Spectacle at the Border' 16.

<sup>19</sup>Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998). Achille Mbembe, 'Necropolitics', 15 (1) (2003) *Public Culture* 11–40.

subjectivity. They distinguish between members and aliens; a distinction that is central to defining who is considered a subject of rights within the European space.<sup>20</sup>

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<sup>20</sup>Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).