



# **THE EU'S MORAL RESPONSIBILITIES TOWARDS REFUGEES**

A Normative Reconstruction of the EU's Normative  
Self-Understanding

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Self-Understanding

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*Front picture: Amnesty International, 2020*

## Abstract

For Europeans, borders are usually not consciously present. With the increase of refugees at the European borders, they became clearly visible. Since February 2020 refugees at the Greek borders have been refused to cross the borders to enter Europe. These refugees tried to ask the European Union (EU) to protect their human rights. They appealed to a universal claim to human rights, since the political community they belong to can no longer guarantee their protection.

In its normative self-understanding the EU committed itself to human rights. The Charter of Fundamental Rights of the European Union says that the human dignity of all human beings should be protected, irrespective of nationality. The fact that refugees have been refused to enter Europe and by that are prevented from claiming their human rights to safety and asylum is a normative problem.

A cosmopolitan interpretation by Seyla Benhabib of the EU's core values shows that a moral commitment to moral rights should imply the possibility to claim these rights in a political community. If the EU committed itself to these human rights, they should enable refugees to actively claim these rights. Refusing refugees at the Greek border is against the EU's own commitment to human rights. A political commitment to human rights is required from the EU's commitments in the normative self-understanding as well as from a cosmopolitan perspective as described by Benhabib.

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## 1. Introduction

Recently the European Union (EU) has been confronted with an increase of refugees at its external borders. For Europeans, these borders are usually not consciously present, but with the increase of refugees they became clearly visible: images of plastic boats full of refugees, a young boy drift ashore and people climbing fences and walls became part of daily news. Despite these images, the EU claims to be open for refugees who have fled their countries and cannot claim their basic rights in their country of origin. The Charter of Fundamental Rights of the European Union shows Europe's commitment to values as human dignity and corresponding human rights from which protection of refugees should follow. Nevertheless, the EU is often seen as a "Fortress Europe" that refuses non-Europeans to be part of its bounded community. For example, the EU has constructed almost 1000 km of walls to prevent migrants from entering Europe (Benedicto & Brunet, 2018).

That the EU is not as open for refugees as it claims to be is exemplified by the recent situation at the Greek and Turkish borders. Several reports, for example, from Amnesty International and Human Rights Watch, addressed in March 2020 that refugees have been violently refused to enter the EU.<sup>1</sup> This approach of border protection has been openly supported by many leaders of the EU; Greece is considered a "shield" in keeping refugees away from Europe.<sup>2</sup> The EU protection of its borders raises different questions from a normative perspective: Can it be justified that the EU enforces its border control to prevent refugees from coming? What responsibility does the EU have towards accepting refugees? Is the border control in line with the European values? Can the protection of European borders meet the human rights standards? If so, under what conditions?

In this thesis I will focus on the following question: *What does the normative self-understanding of the EU entail with regard to its moral duties towards refugees at the external borders?*

The method for answering this question is a normative reconstruction. This would mean to

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1 Eg. Human Rights Watch, (17-03-2020). Greece: Violence Against Asylum Seekers at Border, from, <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> [accessed on 29-04-2020]. & Amnesty International, (2020). Caught in a political game: asylum-seekers and migrants on the Greece/turkey border pay the price for Europe's failures, from, <https://www.amnesty.org/download/Documents/EUR0120772020ENGLISH.PDF> [accessed on 30-04-2020].

2Amnesty International, (05-03-2020). Explained: The situation at Greece's borders, from, <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/> accessed on 23-3-2020

first reconstruct the relevant aspects of the normative self-understanding of the EU. In doing this, I will focus on analysing the core elements of the EU Charter of Fundamental Rights. This document is central in my reconstruction because it combines values that are previously mentioned in other European treaties. It is therefore based on a broad spectrum of European values. Besides that, it also explains explicitly the founding values that form the basis of the normative self-understanding of the EU. Therefore, it should be a central document in any reconstruction of the normative self-understanding of the EU.

The method, secondly, consists of a normative aspect and, therefore, I will consider the method to be a normative reconstruction. This means that I will investigate what the reconstruction of the normative self-understanding of the EU implies from a normative perspective, and more specifically from a cosmopolitan perspective. The cosmopolitan perspective is relevant since it can address the implications of the universality of the values, like human dignity and human rights, presented in the EU Charter of Fundamental Rights. When analysing the core values of the normative self-understanding of the EU from a cosmopolitan perspective I will mainly draw on the ideas of cosmopolitan thinker Seyla Benhabib. Her perspective is relevant since she explicitly applies her philosophy to the EU. She sees potential for the EU to adopt cosmopolitan norms and to protect the human rights of non-EU citizens.

In my opinion it is relevant to analyse the core values of the normative self-understanding of the EU from Benhabib's point of view because this perspective can enable us to interpret the EU's values from a normative perspective that does justice to the human rights perspective of refugees at the external borders, while at the same time looks at the functioning of the EU as a democratic sovereign. Besides that, this thesis has a relevance for assessing current excluding practices at the EU external borders and the human rights violation of refugees. It is therefore relevant to understand and argue for the duties that the EU has towards refugees. A turn to a cosmopolitan perspective can provide the EU with a normative interpretation of the EU's human rights commitment.

In this thesis I will argue that the EU's commitment to human rights does imply duties for the protection of refugees at its external borders. I will argue for this based on a normative reconstruction of the self-understanding of the EU. Europe fails to recognize the normative consequences of its commitment to human rights. This is problematic from both its normative self-understanding as well as from the cosmopolitan perspective of Seyla Benhabib. I explain

in the remainder of this introduction in more detail what these central concepts mean and how they are related to the central problem.

## 1.1 Conceptual introduction

The empirical example at the Greek borders provides a starting point in clarifying the normative problem at stake. Starting at the end of February 2020 the Greek authorities have been sending back refugees to Turkey who came to the EU to ask for protection. According to Amnesty International and Human Rights Watch, a violation of human rights has been reported. The refugees that are central to this thesis are these refugees at the external borders, who irregularly try to cross European borders in order to be able to ask for protection in the EU.

In the Geneva Convention of 1951 a refugee is legally defined as someone who has a “*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*” (Geneva, art.1). The amendment of the Protocol in 1967 removed the geographic and temporal limits of the 1951 Convention and gave the Convention universal coverage (Spijkerboer & Vermeulen, 2005). Still this definition of a refugee is contested by moral philosophers, the legal definition is found too restrictive. Much emphasis is made on ‘being persecuted’. Persecution can be seen as one aspect of a broader phenomenon, namely the absence of state protection of human rights.

Refugees are in need for protection, not only because of persecution but also because of civil war, famine, extreme poverty or other reasons that cause the urgent need for protection. I follow an expansion of the Geneva definition and define refugees as human beings “*whose human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, or prolonged natural disaster*” (Miller, 2016, p.83).

Important to add is that someone becomes a refugee if their country of origin failed to guarantee the basic needs of those under its protection: “*refugees are, in essence, persons whose basic needs are unprotected by their country of origin, who have no remaining resources other than to seek international restitution of their needs.*” (Shacknove, 1985, p.277). The duty of the host state then, is not only about meeting a certain need, but even more about avoiding a specific wrong of returning people to persecution.

Refugees have a right to protection which includes the right to *non-refoulement* (Cherem, 2016). The principle of *non-refoulement* means that no contracting party will return a person, who is a refugee based on the previous mentioned reasons. What follows from this definition of refugees, is that host states have an adjudicative duty to ensure that irregular arrivals are not sent back to their country of origin without a procedure to determine whether they should be granted a refugee status (Cherem, 2016).

According to Cherem (2016) this is a right that refugees should have and a duty that belongs to the state of arrival: a state cannot simply pay a neighbouring country to do its chores. The state that the refugee asks for protection is consequently responsible to provide safety. What happens at the Greek borders therefore raises moral questions with regard to the moral justifiability of the exclusion of these refugees.

This exclusion that refugees face is a consequence of the borders that separate members from non-members. Refugees rely on universal human rights to get protection from bounded communities, as the EU, of which they are not members. For refugees a certain openness of borders is required. They need to be able to cross the border to be able to claim their rights. In the case of the Greek borders, by refusing refugees to cross the borders, the Greek authorities deprive refugees of the ability to ask for protection. This is problematic from a cosmopolitan perspective since cosmopolitan thinkers seem to agree that all human beings have universal rights that apply to the whole human community, irrespective of the community they belong to (Kleingeld & Brown, 2019). For refugees these universal cosmopolitan rights are especially relevant since they address the rights of refugees as human rather than as citizens to a community.

I follow this general understanding of cosmopolitanism and I focus in detail on the perspective of Seyla Benhabib. Benhabib addresses specifically what the idea of cosmopolitanism implies for EU's commitment to non-Europeans, as refugees. In short, Benhabib understands cosmopolitanism as moral norms that ought to govern relations among individuals in a global civil society (Benhabib, 2006). These norms should apply to all human beings no matter to which political community they belong.<sup>3</sup> This cosmopolitan commitment is visible in the EU's normative self-understanding.

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<sup>3</sup> Conceptual analyses of cosmopolitanism will be more in-depth in Chapter 3



The normative self-understanding of the EU is understood as the values in which the EU's decisions are grounded. These are the founding values that are mentioned in the EU Charter of Fundamental Rights. In this thesis, only the relevant aspects of the normative self-understanding of the EU are analysed with regard to Europe's border protection and refugee protection. Having an understanding of the values in which policy and decisions are grounded upon, is an important step in understanding the normative problems that currently arise at the European borders.

In drafting the EU Charter of Fundamental Rights the EU made a commitment to human rights. These human rights have a universal character, they apply to all human beings despite their nationality. The EU's commitment to human rights therefore has a cosmopolitan character. This will lead to my thesis that the EU's commitment to human rights does imply duties for the protection of refugees at its external borders. This is a consequence that follows from EU's commitment to human rights in the normative self-understanding.

## 1.2 Thesis structure

This thesis is structured in four chapters. In the first chapter I illustrate an empirical example of the current border practices at the Greek and Turkish border. This example shows that the border control, that is supported by the EU, is at the cost of human rights for the refugees that are trying to reach the EU.

In the second chapter I then argue that this violation of human rights is not in line with the normative self-understanding of the EU. I analyse the European normative self-understanding by turning to its most important document containing the founding values, the EU Charter of Fundamental Rights. I show that the EU committed itself to the value human dignity from which human rights follow. The EU understands this value as a universal value irrespective of nationality. One might wonder, therefore, whether a moral obligation is not directly implied in the EU's own normative commitments.

In chapter three I go deeper into the question how the core values should be interpreted from a normative perspective, more specific a cosmopolitanism perspective. I start by exploring the general concept of cosmopolitanism and specifically the moral and political cosmopolitanism. I argue that a moral commitment to universal values also implies a political commitment, since a refugee requires a state to apply to, in order to be able to claim its universal rights and have them enforced. I then turn to Benhabib's understanding of cosmopolitanism. Her

concept helps to explore the paradoxical relation that there seems to be between cosmopolitan norms on the one hand and democratic sovereignty on the other. Based on this, a democratic community, as the EU, might argue that it is justified to decide the meaning of its own law and what this implies for who is allowed to enter the community. I argue, however, that it is not plausible that a claim to self-determination allows for any interpretation of what it means to respect and protect human rights. I argue that the EU's commitment to human rights implies from the start that there are limitations to the outcomes of the democratic decisions. In the fourth chapter I ask what solution there could be for the EU to comply to its commitment to human rights with regard to the refugees at the external borders, especially in light of the tension between democratic sovereignty and human rights. I, therefore, introduce Benhabib's understanding of democratic iteration and what this means for the external borders of the EU. Benhabib argues that the EU has potential to incorporate something that she calls 'democratic iterations' to do justice to their human rights commitment. I argue that this is too optimistic and that the first step towards a solution is that the EU takes its commitment to human rights and the corresponding consequences seriously.

## 2. The European border practice: the Greek-Turkish border

In this chapter I give an insight in the recent developments at the external borders of the EU. Refugees are actively refused from entering the EU and have no ability to claim their rights to have a fair asylum procedure. As was explained before, refugees require a certain openness of borders. They need to be able to cross the borders to be able to claim their rights. A host country has certain duties to protect refugees and to not return people to persecution. I discuss, firstly, the way the borders are protected by the Greek authorities and, secondly, how this approach is openly supported by the EU. With this example I show that the current border protection at the Greek and Turkish border is at the cost of human rights of refugees. Starting with this example helps to specify the normative problem that is at the heart of this issue.

### 2.1 The EU-Turkey deal and the Greek borders

*"This border is not only a Greek border but it is also a European border and I stand here today as a European at your side... We have come here today to send a very clear statement of European solidarity and support to Greece. (...) I am fully committed to mobilising all the necessary operational support to the Greek authorities."*

Ursula von der Leyen – Head of the European Commission <sup>4</sup>

On February 27<sup>th</sup> 2020, four years after the EU-Turkey deal, Turkey announced that they would no longer keep refugees from crossing the borders.<sup>5</sup> In March 2016 this EU-Turkey deal was established. The EU and the Prime Minister of Turkey decided together to regulate the irregular migrants arriving at the Greek borders. All irregular migrants would be returned to Turkey. In return, Turkey would receive €6 billion in order to host refugees and Turkish nationals could travel visa-free to the EU.<sup>6</sup> Additionally, the EU and the Prime Minister of Turkey made the agreement that for every Syrian that the Turkish took back from Greece, one Syrian would be relocated from Turkey to Europe (Poon, 2016).

Four years later, Turkey could no longer handle the population of refugees and said that

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<sup>4</sup> BBC News, (03-03-2020). *EU chief says Greece is Europe's shield in migrant crisis*, from, <https://www.bbc.com/news/world-europe-51721356> [accessed on 29-04-2020].

<sup>5</sup> Amnesty International, (05-03-2020). *Explained: The situation at Greece's borders*, from, <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/> [accessed on 23-3-2020].

<sup>6</sup> Amnesty International, (20-03-2017). *The EU-Turkey deal: Europe's year of shame*, from, <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/> [accessed on 05-05-2020].

Europe did not honour the deal: not enough refugees have been relocated and not enough financial aid was provided. Consequently, Turkey announced that they would no longer stop refugees from trying to cross the border to Greece.<sup>7</sup>

The EU-Turkey deal has some problematic implications from the outset. The deal is not in line with European law and ethics, even though it might have reached its aim of reducing irregular migration (McEwen, 2017). A serious concern is that in this deal, Turkey is seen as a safe ‘third country’ for refugees to return to. However, the Turkish asylum procedures are not sufficient according to European standards. Additionally, Turkey is not a member of the EU and not bounded to European legislation, as a result, there is less control in protecting Turkish asylum procedures. Another serious concern, consequently, is that sending back refugees to Turkey could be seen as an indirect violation of the principle of *non-refoulement* (Poon, 2016). To repeat, this principle means that refugees cannot be send back to a place if they might suffer of inhumane treatment and fear for their lives. There is greater risk that the refugees in Turkey would get inhumane treatment or would be deported without an actual asylum procedure.

The EU-Turkey deal prevents refugees from seeking a refugee status in the EU, to which they would otherwise have the right under the 1951 Geneva Convention (McEwen, 2017). This deal can be seen as an illegitimate attempt of the EU to escape its own duties to protect refugees.

As a result of Turkey’s announcement in the beginning of 2020, many refugees went to the Turkish-Greece border and attempted to cross it. Greece responded by inhumane measures that violate the EU law and international law: “*what people found when they arrived were heavily armed Greek border guards, tear gas, rubber bullets and razor wire.*”<sup>8</sup> An interview by Human Rights Watch with 21 refugees, who tried to cross the border, showed that all those interviewees said similar things about the behaviour of the Greek security forces.<sup>9</sup> A 31-year old man from Syria said the following in an interview with Human Rights Watch: “*They beat*

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<sup>7</sup> Amnesty International, (2020). *Caught in a political game: asylum-seekers and migrants on the Greece/turkey border pay the price for Europe’s failures*, from, <https://www.amnesty.org/download/Documents/EUR0120772020ENGLISH.PDF> [accessed on 30-04-2020].

<sup>8</sup> Amnesty International, (05-03-2020). *Explained: The situation at Greece’s borders*, from, <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/> [accessed on 23-3-2020].

<sup>9</sup> Human Rights Watch, (17-03-2020). *Greece: Violence Against Asylum Seekers at Border*, from, <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> [accessed on 29-04-2020].

many of the other men [in the group] and forced all of them to take off almost all their clothes. They took our phones, money and passports. After two hours they took us in one truck back to the river where a man in a boat in black with a balaclava went back and forth [across the river] until all of us were back in Turkey.”<sup>10</sup> Human Rights Watch said that Greek security forces have detained, (sexually) assaulted, robbed, and stripped refugees and then forced them back to Turkey.<sup>11</sup> Amnesty confirmed that money and identity papers of refugees were taken, and refugees including children were held in detention. Turkish authorities claimed that three refugees were killed.<sup>12</sup>

The Greek Prime Minister, Kyriakos Mitsotakis, however, blamed the refugees for irregularly trying to cross the borders to Greece. He stated: “*Significant numbers of migrants and refugees have gathered in large groups at the Greek-Turkish land border and have attempted to enter the country illegally. I want to be clear: no illegal entries into Greece will be tolerated.*”<sup>13</sup>. As a consequence of these events, an emergency legislative act suspended new asylum applications in Greece. Refugees were forced to return without registration, either to their country of origin or their transit country, Turkey.

In the following section I show how this approach has been assessed by both human rights organisation and the EU. Human rights organisation reported a violation of human rights at Greek borders, while the EU has openly supported the Greek approach.

## 2.2 Human rights violation at Greek borders

The way in which Greece protected its borders has been assessed by both Amnesty International and Human Rights Watch as a violation of the human rights of refugees. Human Rights Watch said that the EU should protect refugees, the European Commission should urge Greece to reinstate asylum procedures for people irregularly entering Greece from Turkey. Sending back refugees who fear for their lives, like Greece did, is against the principle of *non-refoulement* from international and European law. UNHCR mentioned that neither the Geneva

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<sup>10</sup> Human Rights Watch, (17-03-2020). *Greece: Violence Against Asylum Seekers at Border*, from, <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> [accessed on 29-04-2020].

<sup>11</sup> Human Rights Watch, (17-03-2020). *Greece: Violence Against Asylum Seekers at Border*, from, <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> [accessed on 29-04-2020].

<sup>12</sup> Amnesty International, (2020). *Caught in a political game: asylum-seekers and migrants on the Greece/turkey border pay the price for Europe's failures*, from, <https://www.amnesty.org/download/Documents/EUR0120772020ENGLISH.PDF> [accessed on 30-04-2020].

<sup>13</sup> Amnesty International, (2020). *Caught in a political game: asylum-seekers and migrants on the Greece/turkey border pay the price for Europe's failures*, p.4, from, <https://www.amnesty.org/download/Documents/EUR0120772020ENGLISH.PDF> [accessed on 30-04-2020].

Convention nor the EU's refugee law provide any legal basis for suspension of asylum requests. People cannot be punished for entering irregularly, nor can they be returned, this is enforced in European law.<sup>14</sup> The border protection of Greece cannot ensure the protection of human rights of refugees. This has already been the case since the EU-Turkey deal in 2016, and this recently increased to the serious concerns about.

Even though the practice is assessed as a violation of human rights, EU leaders have openly supported Greece's hostile approach. The President of the European Commission, Ursula van der Leyden, said to support Greece's attempts to prevent refugees from crossing the borders. She said that since Greece is an European "shield", the priority is to ensure order at the Greek external border, which is also a European border.<sup>15</sup> Greece is given an additional €700 million euros for migration management, extra forces for border protection and civil protection aid by the EU. The issue at the Greece borders is seen as a European issue for which European aid is needed. As Van der Leyen said: "*the Greek worries are our worries*".<sup>16</sup> Later on she added that the protection of borders and fundamental rights have to go hand in hand.<sup>17</sup> Amnesty International reported that Europe's reaction is very misleading: Europe does not need to be "shielded" from people seeking safety.<sup>18</sup> The way Greece is currently protecting its borders does not go hand in hand with respecting fundamental human rights of refugees.

It is clear that this example shows that human rights are being violated at the Greek borders. This human rights violation at the European external borders, additionally, refers to a normative problem. The normative problem is the fact that refugees are prevented from crossing the borders, they are prevented from their right to ask for safety and an asylum procedure. This is difficult to combine with the commitment that the EU made to human rights. The EU seems to ignore the implications of what this commitment means. To have a better understanding of this normative problem, an understanding of the EU's commitment to human rights is needed. In the following chapter the question how the EU understands the

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<sup>14</sup> UNHCR UK, (02-03-2020). *UNHCR statement on the situation at the Turkey-EU border*, from, <https://www.unhcr.org/uk/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html> [accessed on 30-04-2020].

<sup>15</sup> BBC News, (03-03-2020). *EU chief says Greece is Europe's shield in migrant crisis*, from, <https://www.bbc.com/news/world-europe-51721356> [accessed on 29-04-2020].

<sup>16</sup> Idem.

<sup>17</sup> Politico, (09-03-2020). *Von der Leyen wants 'workable agreement' with Erdogan on migration*, from, <https://www.politico.eu/article/europe-turkey-greece-migration-ursula-von-der-leyen-wants-workable-agreement-with-erdogan/> [accessed on 29-04-2020].

<sup>18</sup> Amnesty International, (05-03-2020). *Explained: The situation at Greece's borders*, from, <https://www.amnesty.org/en/latest/news/2020/03/greece-turkey-refugees-explainer/> [accessed on 23-3-2020].

universal values that it has committed to in its normative self-understanding and which rights and implication follow from this is central.

### 3. Normative self-understanding of the EU

In this chapter I reconstruct some aspects of the normative self-understanding of the EU based on the EU Charter of Fundamental Rights. As mentioned in the introduction, the normative self-understanding will be understood as the values that are seen as founding values of the EU. An understanding of these values helps to clarify the normative problem that is at stake, namely, what the EU's commitment to certain values implies. I address the values of the normative self-understanding that have a universal character because these values should not only apply to European citizens but also to non-European refugees. The EU Charter of Fundamental Rights is used as the source to extract these values.

Firstly, I show that the EU is committed to several universal values that reach further than only the EU's citizens. I show that a commitment to human rights is part of the normative self-understanding. Secondly, I address the border issue of the EU and show that the borders seem to indicate a limitation on the universal values as present in the normative self-understanding of the EU.

#### 3.1 Fundamental values of the EU

The normative self-understanding of the EU can be extracted from the moral character that the EU consolidated. In the EU Charter of Fundamental Rights<sup>19</sup> the fundamental values and the concerning rights are expressed. The EU Charter of Fundamental Rights aimed at reaffirming fundamental values that were already present in other treaties and European Law (Facchi, Parolari & Riva, 2019).

In the EU Charter of Fundamental Rights the EU democratically constructed a moral identity by which it committed itself to several values that are referred to as the founding values of the EU. The EU shapes its identity as a moral agent by committing itself to moral values. These fundamental values have an increasing role in the political field. They are a relevant guideline for the EU policies and democratic decisions. These values are the basis for the normative reconstruction of the self-understanding of the EU. In what follows I reconstruct the founding values mentioned in the EU Charter of Fundamental Rights.

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<sup>19</sup> The Charter of Fundamental Right is solemnly proclaimed in 2000 but only gets its legal status in 2007 with the signing of the Lisbon Treaty. It reaffirms values and rights that are already present in other treaties and conventions, eg European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters, Treaty on European Union etc. (Preamble)



In the Preamble of the EU Charter of Fundamental Rights it is mentioned that these founding values are: human dignity, freedom, equality and solidarity. The Preamble says: “*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.*” (Preamble). It explicitly mentions that these duties entail responsibilities with regard to the human community. This could mean that not only European citizens are entitled to certain rights, but also non-members like refugees. This is especially relevant for the human rights of refugees at the external border. Hence, in this section the values human dignity, freedom, equality and solidarity are reconstructed.

The value of human dignity is, firstly, marked as an “inviolable” value. This value of human dignity is considered as a precondition for all the other values, it constitutes the real basis of fundamental rights.<sup>20</sup> It therefore is an important founding value. Human dignity implies a right to life for everyone. It is described as something inherent to human beings irrespective of their nationality (Facchi, Parolari & Riva, 2019).

The EU Charter of Fundamental Rights, among other things, mentions that human dignity implies a right not to be tortured: “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*” (art.4). This human dignity is for every human being, it is a dignity that reaches further than only for European citizens. It has a universal character and entails a duty of member states to protect and respect human dignity. This should then include that refugees cannot be sent back to their country of origin if they might suffer of inhumane treatment and fear for their lives (Facchi, Parolari & Riva, 2019). As shown before, in international law this is known as the principle of *non-refoulement*.

This right to asylum and the duty of *non-refoulement* is further expressed in the articulation of the value freedom in the EU Charter of Fundamental Rights:

“*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*” (art.18)

“*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*” (art.19)

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<sup>20</sup> EUR-Lex, (14-12-2007). Explanations relating to the Charter of Fundamental Rights, p.17-35, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007X1214%2801%29> [accessed on 07-04-2020].

The articulation of freedom as the right to asylum and *non-refoulement* is relevant for the admission of refugees to the EU. These rights are not freedoms in the strict sense, but they are necessary condition for effective enjoyment of one's freedom (Facchi, Parolari & Riva, 2019). The protection of a right to asylum for refugees can be considered a precondition for enjoyment of other rights. It is unclear which responsibilities follow from this commitment to asylum. For example, where does the responsibility of the EU start? Only for those refugees who are already within the borders of the EU or also those trying to cross the borders? If human dignity is taken into account and understood as a value that expands to the human community, it could be said that the right to asylum is grounded on this moral commitment of giving every human being a right to live and to not be tortured.

Additionally, freedom is articulated as a right to liberty and security for everyone (art.6). The EU Charter of Fundamental Rights shows a complementary relation between liberty and security, which contrasts the idea that national security can only be attained by restricting freedom of non-citizens. Protection of one's freedom implies the restriction of the freedom of another. However, the EU Charter of Fundamental Rights confirms that there is no freedom without the security of individual rights and these individual rights can also be the rights of non-members (Facchi, Parolari & Riva, 2019). This is relevant for refugees since it confirms that national security can be maintained while giving freedoms, like the ability to claim asylum, to refugees.

The other values that are mentioned in the document are equality and solidarity. Equality is, among other things, explained as non-discrimination (art.21), equality before the law (art.20) and it explicitly includes respect for cultural, religious and linguistic diversity within societies (art.22). Solidarity, among other things, is articulated as rights related to the welfare system and social rights (Facchi, Parolari & Riva, 2019). It, for example, gives a right to social security (art.34) and a right to health care (art.35). The way these values are legally articulated is less relevant for the admission of refugees at the external borders. It does not give refugees a legal claim to admission or protection of life.

However, from a normative perspective this can be contested. If solidarity is interpreted as a universal value that applies to human beings in general, this should not be limited to the EU's citizens (Facchi, Parolari & Riva, 2019). These values of equality and solidarity are grounded in the value of human dignity (art.1) and therefore have this universal character. From a commitment to the values equality and solidarity should follow some minimum standards that

can be granted to everyone. This minimum standard would mean those social rights that are needed for a state not to violate the prohibition of inhuman treatment (Facchi, Parolari, Riva, 2019). A first step towards more rights that follow from solidarity and equality would be to provide entry to refugees to claim their rights.

An important insight from this analysis, is that the value of human dignity is given much emphasis as a founding value and forms an important part of the normative self-understanding of the EU. I focus on this value in this thesis since human dignity has a universal character: it concerns the human dignity of all humanity despite nationality of citizenship. Besides that, human dignity is a precondition for the other values. This means that the normative foundation of the other values is based on the human dignity of human beings.

From this value of human dignity follows a protection of human rights. This right is irrespective of one's nationality and therefore opens up possibilities for refugees. Of course it can be questioned what specific duties follow from this commitment to human rights and what it entails that this human rights concern human beings in general. For example, is refugee protection of those who are not yet within the territory of the EU a duty that follows from it? However, there are some things that this commitment directly implies, also from the perspective of the EU. Part of the normative self-understanding of the EU is explicitly that every human has the right to life (art.2) and not to be tortured (art.4). Therefore, there is a duty to the protection of refugees and a right to asylum for those whose state of origin cannot protect their human rights.

There might be friction between this normative commitment to human rights and the borders of Europe that potentially exclude refugees from claiming these human rights, as could be seen at the Greek borders. Borders distinguish between members and non-members. If refugees are denied the ability to cross the borders, refugees cannot claim their human rights. The precondition to claim human rights is taken away, namely the first entry to a political community in which one can claim human rights. In the following section I show how borders demarcate this political community and the consequences that follow from having borders.

### 3.3 Borders of the EU

The European borders are defined in the Schengen Agreement of 14 June 1985, implemented in 1995.<sup>21</sup> In this definition a distinction is made between the internal and external borders of the EU. In the Schengen Agreement borders are defined as following:

*“Internal borders: shall mean the common land borders of the Contracting Parties, their airports for internal flights and their sea ports for regular ferry connections exclusively from or to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories;*

*External borders: shall mean the Contracting Parties' land and sea borders and their airports and sea ports, provided that they are not internal borders;”*(Schengen Agreement, art.1)

The Schengen Agreements makes free travel between contracting parties possible without border control. The internal borders are therefore not visible. For a refugee it does not matter whether he enters Europe through, for example, Spain or Italy, since after entering Europe free travel is possible (Zapata-Barrero, 2009). Refugees make these external borders explicitly visible by trying to cross them and therefore question the consequences of having borders. In order to understand the meaning of borders, its consequences and its implication for the EU, I look at a philosophical understanding of borders.

According to Zapata-Barrero (2009), a function of a border is to confine a political community. There cannot be a political community without borders, and that there cannot be borders if they cannot fulfil their main function to demarcate a political community (Zapata-Barrero, 2009).

According to Benhabib (2004) it is inherent to a democracy that it is a bounded political community: democracies require borders. She defines the EU as a democratic sovereignty, this means that full members of a *demos* (the members) are entitled to have a voice in the articulation of the law by which the *demos* is governed. According to Benhabib this is a relational concept due to the ongoing process of defining the people that belong to the *demos*. For a sovereign to have authority, it should be clear over which *demos* the sovereign has

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<sup>21</sup> The Schengen Agreement is an agreement between the member states that create the ‘Schengen Area’ in which internal borders were lifted and made free travel between member states possible. Due to the Schengen Agreement the external borders of the European Union become important for all member states. The document forms an important bases for Europe’s understanding of borders and border protection.

authority. In forming a democracy there is always a non-democratic process of exclusion of those who are not members. Every democratic *demos* gives full citizenship to some of the members and excludes others.

Additionally, Zapata-Barrero (2009) says that there are two functions of borders: to join and to separate. These two functions are necessarily intertwined, borders will always have both a joining and a separating function, yet migration policy can favour one of these over the other. If one prefers the separating character of borders, then borders define a community and therefore separate the members of the community from those outside the community. Migration policy would be about enforcing borders to exclude non-members. If one favours the joining character of borders, then borders are a way of connecting the inside with the outside. Borders can then be seen as flexible; they can be renewed and redrawn. The inside and outside are both seen as part of a global whole.

These two characters of joining and separating can also roughly be seen in the debate on open or closed borders. Those in favor of closed borders argue that a political community can determine itself how to demarcate a political community and who is allowed to enter. A state can decide who is excluded. A state can for example exclude non-members because of preservation of its own culture or establishing security within the state (Wellman, 2019). Those in favor of open borders argue that justification of borders is not possible at all, for example because there is a liberal right to freedom of movement to all human beings (Wellman, 2019).

I am aware that there are many different positions in this debate that can be held towards the justification of borders in general. For this thesis I assume that states have a right to exclude and uphold a justified border under certain conditions, which does not mean that all exclusion of all people can be justified. The question that is relevant to this thesis is whom states may not exclude and under what conditions.

This question is relevant to ask for the protection of the human rights of refugees. Borders have a consequence for refugees in their ability to claim certain rights. This is problematic, since refugees, as non-members, are excluded from the process of the demarcation of the political community. This means that in the democratic process of articulating who belongs and who does not, the ones that do not belong are inherently excluded, since they are not part of the decision-making process from the beginning. They are not part of the political

community, they also have no democratic voice in their own exclusion.

This is even more problematic since refugees are in need of protection and therefore rely on their human rights protection of a state. By excluding non-members with borders, these people are also excluded from their ability to ask for protection of human rights. The exclusion of refugees leads to practices where their human rights are violated, as can be seen at the Greek borders. As a consequence, it should follow that there are some special duties towards the admission of refugees. Refugees require a certain openness of the border.

The exclusion of refugees is not only a humanitarian, but also a normative problem. The borders indicate a limitation on the universal values as present in the normative self-understanding of the EU. From a normative perspective the exclusion of refugees at the EU borders is especially problematic since the commitment to human rights is not something that is forced upon the EU, it is a commitment that belongs to the normative self-understanding of the EU. Due to the exclusionary practice of borders, Benhabib says that we have a moral obligation to justify the borders (Benhabib, 2004b). In the following chapter the question how this commitment of the EU to human rights should be interpreted from a cosmopolitan perspective as described by Benhabib is central.

## 4. A cosmopolitan perspective

In the following chapter I analyse a normative interpretation of the EU's commitment to human rights and the moral and political implications that follow from this. Refugee protection is eminently a case where cosmopolitan rights play a role. These are different from civil rights granted by a state or community, since these cosmopolitan rights concern humanity as a whole. As we could see in the previous chapters, universal rights, like human rights, are present in the normative self-understanding of the EU. However, a tension was shown within the EU between, on the one hand, the human rights of refugees that are part of its normative self-understanding and, on the other hand, the enforcement of the Greek borders to exclude refugees.

First, I start with an understanding of moral and political cosmopolitanism and the relation between these concepts. Secondly, I show the moral obligation that follows from the EU's commitment to human rights. Thirdly, I show that due to the EU's right to self-determination it can claim to decide itself what this commitment entails. Lastly, I argue in accordance with an idea of political cosmopolitanism that human rights should limit the outcome of democratic decisions. A commitment to human rights entail from the start certain duties.

### 4.1 Moral and political cosmopolitanism

There are many different interpretations of the meaning of cosmopolitanism. Cosmopolitan thinkers, however, agree that all human beings have certain universal rights that follow from being human, irrespective of the community they belong to. Cosmopolitan thinkers envision the commitment that follow from this differently: it can be economic, cultural, moral or political (Kleingeld & Brown, 2019). For this thesis a moral and political understanding of cosmopolitanism is relevant.

Moral cosmopolitanism regards all human beings as fundamentally equal. According to Kant (who greatly influenced the moral cosmopolitan idea) all human beings are members in a single moral community.<sup>22</sup> There is a universal idea at the heart of moral cosmopolitanism that concerns norms that apply to the whole humanity irrespective of nationality or citizenship. It regards the human dignity of all human beings.

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<sup>22</sup> Kant's idea of cosmopolitanism is expressed in his idea of 'hospitality'. This means a non-violent attitude towards those that enter your territory. It is an obligation to provide a safe haven for those that fear destruction. If denying entry would mean that this person fears for his life, no matter due to which reason, admission is obligatory (Kleingeld, 1998).

According to Kleingeld & Brown (2019) this can be a strict or moderate form. Strict moral cosmopolitanism entails that the duty to help others cannot be restricted by certain duties towards compatriots that it does not have towards others. The duty to help others should be the same for every human being. The moderate form does allow special duties towards compatriots, for example towards those bounded in a political community.

From this idea of moral cosmopolitanism follows the idea that all human beings have certain human rights. These are rights they have as human beings. In order to have human rights protected, there needs to be a possibility to claim these rights. This idea of moral cosmopolitanism leads to a political claim to human rights.

I argue that in order for moral cosmopolitanism to be ensured, it is required that these moral norms can be claimed in a political community. Therefore, this idea of moral cosmopolitanism leads to an idea of political cosmopolitanism. Political cosmopolitanism is concerned with the institutions that can ensure a moral idea of cosmopolitanism. There are many different vision on how this should be achieved and which role a state should play in this. Some argue that political cosmopolitanism would mean to address humans as world citizens directly instead of indirectly through their state citizenship (Kleingeld & Brown, 2019).

There are roughly three positions of what kind of institutions political cosmopolitanism could envision. Firstly, some plead for a centralized world state while, secondly, others favour a federal system with a global body or an international political institution. A third position argues for an institutional reform in which human rights issues are not address by one decision maker, but that this is a more horizontally spread process between several decision makers on different political levels (Kleingeld & Brown, 2019). This political idea of cosmopolitanism is implied in moral cosmopolitanism, since the universal rights that are implied in a moral cosmopolitan idea can only be effectively claimed within a political community.

Benhabib acknowledge this relation between moral and political cosmopolitanism. Her ideas can be understood as being both moral and political cosmopolitanism. Benhabib (2006) understands cosmopolitanism, following Kant, as norms that ought to govern relations among individuals in a global civil society. Cosmopolitan norms apply to all human beings, independently of someone's citizenship or nationality. Her moral perspective is based on whether you are human and not on your citizenship or nationality. These cosmopolitan norms



are moral norms that should ground a legal claim (Benhabib, 2006). Cosmopolitan norms will announce that all people in the world have a legal claim to rights, despite their membership to a bounded community (Benhabib, 2006). The cosmopolitan right is a right precisely because it is grounded upon the common humanity of each person. Benhabib acknowledges that it is necessary to be able to claim these rights somewhere in a political community. A political idea about cosmopolitanism is therefore necessary to be able to adhere to moral cosmopolitan norms.

In the following section I show what this moral and political understanding of cosmopolitanism implies for the normative self-understanding of the EU and the refugees at the external borders.

#### 4.2 The EU's moral obligation

Refugees at the external borders of Europe ask the EU for protection of their human rights. They appeal to cosmopolitan rights, based on their humanity, for the EU to give them protection. Despite the transcending character of cosmopolitan rights, being part of a political bounded community is still crucial to be able to claim these human rights.

Hannah Arendt (1951) wrote that a loss of citizenship would mean a complete loss of rights. She said that people need a sovereign to protect their rights. As soon as a refugee has no sovereign to turn to for protection, all rights, as well as human rights, lose their meaning. The loss of state protection or nationality, as is the case for refugees, would mean a loss of all rights. According to Arendt these refugees are deprived of 'the right to have rights'. The first 'right' in this sentence refers to a moral claim to be able to have rights in general. The second 'rights' is a positive right, this is a right that either obliges or permits actions. According to Arendt, this first right is a fundamental moral right to have access to legal protection of rights. Arendt asks for a civic instead of ethnic ideal of polity of belonging (Benhabib, 2004). In practice, this requires that everyone can be part of a political community to have their human rights institutionally protected. The moral rights, therefore, imply that one can legally claim these moral rights. This is not self-evident for refugees who do not have a sovereign to claim their rights.

The refugees at the external borders appeal to the EU as a political community to protect their human rights. Based on its own normative self-understanding, the EU has from a moral point

of view, a *prima facie* obligation to protect refugees. In their interpretation of the moral obligation towards refugees, the EU fails to acknowledge the ability for refugees to have a legal claim to these moral rights. The EU fails to see that a moral commitment implies a political commitment. In doing so, the EU misunderstands that the implication of their own human rights idea should include the ability for refugees to claim their rights. The EU can however claim that it can determine itself what this obligation towards refugees entails, as a consequence of their moral right to self-determination.

In the following section I explain the EU's claim to self-determination and how the EU can use this claim to justify its exclusion of refugees.

### 4.3 The EU's right to self-determination

The EU can justify the discrepancy between its moral commitment to human rights and the interpretation of this commitment, based on a claim to self-determination. On the one hand, there is this moral commitment of the EU itself to the protection of human rights. I argued that from this should follow that the EU provides refugees with the ability to claim their human rights in the EU. On the other hand, however, what this implies can be contested by the EU's moral claim to self-determination. The EU can claim that it determines itself what its own *prima facie* moral obligation to protect refugees means and what the consequences are that this moral commitment implies. This act of self-determination means that a state has a moral and legal right to demarcate its boundaries and to decide who is admitted and who is not. It is an act of setting your own membership rules (Carens, 1992).

Walzer is one of the main philosophers who argues that a political community has a right to exclude non-members as a consequence of the claim to self-determination. He argues that "*admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.*" (Walzer, 1983, p.62). Walzer does acknowledge that refugees are a special group of non-members that are in need of membership in order to be able to get protection. Even though Walzer said that, on the one hand, everyone should have a place to live, this is, on the other hand, not the responsibility of the host state. Granting asylum is, according to him, not a right that can be enforced upon a host state, but it is submissive to self-determination: "*the right to restrain the flow [of refugees] remains a feature of communal self-determination.*" (Walzer, 1983, p.51). Self-determination is

according to him a morally legitimate concern that may justify the exclusion of refugees (Carens, 1992).

This is a point of view that is used to legitimize actions in the EU's politics. For example former European Council president Donald Tusk said that the agreement with Turkey in 2016 was necessary "*because it is the job of every political authority to enforce the law, to protect its territory and the border.*"<sup>23</sup> The aim of the agreement was to reduce the inflow of refugees to protect the borders. Tusk said that concessions could be justified if this aim was reached.<sup>24</sup> Comments like those of Donald Tusk are used to justify the actions that are taken at the borders in light of protection of the borders and the territory.

Additionally, Whelan argues that a claim to self-determination is necessary in order to maintain a democratic community. He says that it is inherent to a democracy that people are excluded. Democracies require that people are divided into groups of peoples, known as *demos*. According to Whelan, each *demos* needs to be a stable and coherent unity in order for democracies to function. If membership fluctuated, then self-determination would not occur because the self would not be the same. (Wellman, 2019).

This argument is rising in the public and right wing political debates in Europe. Arguments emphasize that refugees would be a threat to the unity of the political community. The proponents want to hold on to a fixed *demos*. For example Hungarian president Viktor Orbán said: "*We may lose our European values, our very identity, by degrees like the live frog allowing itself to be slowly cooked to death in a pan of water.*"<sup>25</sup> Or a member of the Five Star Movement (political party in Italy) have stated that the national identity is primarily a cultural one, an influx of refugees with different cultural backgrounds might disintegrate this.<sup>26</sup> Polls in Germany showed that citizens fear for a loss of their national identity and concerned that the large number of refugees will threaten Germany's societal and cultural

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<sup>23</sup> Politico, (30-06-2018), *Tusk claims victory on migration deal*, from, <https://www.politico.eu/article/tusk-migration-xenophobia-claims-victory-over-deal/> [accessed 25-05-2020].

<sup>24</sup> European Council, (13-10-2015), *Invitation letter by President Donald Tusk to the members of the European Council*, from, <https://www.consilium.europa.eu/en/press/press-releases/2015/10/13/tusk-invitation-letter-european-council/> [accessed on 02-06-2020].

<sup>25</sup> Politico, (20-09-2016), *Hungary's 'zero refugee' strategy*, from, <https://www.politico.eu/article/hungary-zero-refugee-strategy-viktor-orban-europe-migration-crisis/> [accessed on 08-06-2020].

<sup>26</sup> , (24-07-2019), *Muslims in the West and the rise of the new populists: the case of Italy*, from, <https://www.brookings.edu/research/muslims-in-the-west-and-the-rise-of-the-new-populists-the-case-of-italy/> [accessed on 08-06-2020].

values.<sup>27</sup> These examples show that some would justify the exclusion of refugees based on a protection of the claim to self-determination. I am aware that this raises moral questions, however, due to the scope of this thesis this point is only used to exemplify that in the public debate there is a tendency to exclude refugees, justified by the protection of a right to self-determination.

In the following section I show that it is implausible that from a claim to self-determination the EU can interpret its commitment to human rights the way it wants. I argue that the EU's moral commitment to human rights from the start implies that it has to acknowledge the limitation that this brings for the self-determination of the democratic sovereignty.

#### 4.4 The EU's political obligation

According to Benhabib the exclusion of refugees, based on a claim to self-determination, indicates the problem that is a consequence of the paradoxical relation between a human rights commitment and the self-determination by a democratic sovereign. A claim to self-determination might mean a loss of human rights protection of non-members and therefore put refugees in a vulnerable position. One side of the paradoxical relation has been shown already: refugees depend on a state to protect their universal human rights and a state, that is self-determined, decides itself how it interprets its commitment to human rights. On the other side, Benhabib argues, human rights limit the outcome of democratic decisions. Refugees at the border make this tension between these two concepts visible: they appeal to the EU as a democratic sovereign to protect their human rights but are confronted with exclusion as a consequence of the self-determination of the EU.

The problem that arises here is that, on the one hand, the EU values the protection of human rights while, on the other hand, it values their moral right to self-determination. However, I argue that human rights and democratic sovereignty do not stand opposed to each other, but are in fact related to each other. There are three arguments in which this relation between democratic sovereignty and human rights can be expressed. In what follows these arguments are given.

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<sup>27</sup> Politico, (12-10-2015), *Germany's identity crisis. As refugees keep coming, Germans ask 'Who are we?'*, from, <https://www.politico.eu/article/german-identity-threat-refugees-migration-merel/> [accessed on 08-06-2020].

Firstly, even though cosmopolitan rights are universal rights that are always interpreted within a particular community, they pose a limitation on democratic sovereignty. Cosmopolitan rights require a political community to interpret the universal principles within the local context (Benhabib, 2004b). Cosmopolitan rights create an interdependent and interconnected relation between the global and local community: *“the local, the national and the global are all imbricated in one another.”* (Benhabib, 2006, p.74). With this Benhabib means that cosmopolitan rights, like human rights, have a context-transcending character since they extend to all of humankind. However, cosmopolitan rights are always interpreted within a certain context and time and depend on a political community to be protected. This does not mean that there are no limits to how the normative consequences of human rights may be interpreted. Benhabib argues that cosmopolitan rights, as human rights claims, limit the outcome of democratic sovereignty and the outcome of democratic decisions. They are universal rights that can “trump” state sovereignty claims (Benhabib, 2004, p.10). The power of the sovereign is not unlimited or unconditional: *“that the republican sovereign should undertake to bind its will by a series of precommitments to a set of formal and substantive norms, usually referred to as “human right.”*” (Benhabib, 2004, p.47).

Secondly, even though the EU values both human rights and democratic sovereignty, it is implausible to say that a claim to self-determination allows any interpretation of human rights. By committing itself to human rights in the normative self-understanding, the EU recognizes from the start that there are limits to how it may exercise its sovereignty. It follows from their moral commitment to human rights, that democratic decision made by the EU are bound to their own commitment to human rights which imply certain duties. For example, it is explicitly part of the normative self-understanding of the EU that every human has the right to life (art.2) and not to be tortured (art.4).

Thirdly, there are limits to the idea of democratic sovereignty if the decisions by a *demos* affect those that are non-members. As Benhabib expressed, non-members are not democratically part of the decisions that lead to their exclusion. To protect the human rights of non-members, the human rights commitment should limit the outcome of democratic decisions. It follows from this that the exclusion of refugees at the external borders is not normatively justifiable in light of the EU’s own commitment to human rights. This commitment implies that refugees are able to claim their human rights in the EU. The EU has

to acknowledge that their moral commitment to human rights implies a political obligation to provide protection to refugees at the external borders.

In the current practice the EU does not meet its cosmopolitan commitment to human rights, since it fails to acknowledge that a political commitment to human rights follows from their moral commitment. However, Benhabib sees potential for the EU to adhere to these cosmopolitan rights while maintaining democratic sovereignty. The EU has a liberal idea of democratic sovereignty and therefore Benhabib sees the ability for the EU to comply to a political idea of cosmopolitanism in which human rights limit the outcome of democratic decisions. In the following chapter I address the question what solution there could be for the EU to comply to its commitment to human rights, with regard to the refugees at the external borders.

## 5. The EU's moral responsibility to protection of refugees

In this chapter I show that the paradox between democratic sovereignty and human rights can be mitigated. To repeat, this paradoxical relation between human rights and democratic sovereignty consists of a dependent relation in which the protection of human rights depends on the willingness of the democratic sovereignty on the one hand. On the other hand, a commitment to human rights limit the democratic outcomes of a democratic sovereignty. Benhabib argues that for the EU, there is a positive possibility of implementing these human rights that limit state sovereignty.

Firstly, I address Benhabib's idea of 'democratic iterations', by which she offers a solution to the paradoxical relationship between human rights and democratic sovereignty. I explain how her idea of democratic iteration helps to see how democratic sovereignty and human rights can go together. Benhabib sees possibilities for the EU to incorporate a process of democratic iterations and to do justice to human rights. I explain that her idea of the possibilities for this within the EU is too positive. Secondly, I argue instead, that the first step for the EU is to take serious what its human rights commitment implies and to define clearer what duties follow from a moral and political commitment to human rights.

### 5.1 Democratic iterations in the EU

Benhabib (2004) argues that the paradoxical relation between democratic sovereignty and human rights cannot be completely solved, but it can be mitigated. There will always be a tension between these concepts, however, one can be aware of this tension and take a reflective attitude. With such a reflective attitude, she means a reflection process in which a local community keeps on reflecting on the interpretation of universal rights within the local context. This mitigation aims at connecting the global to the local: to reflect on the interplay between cosmopolitan rights and the local context. This process of reflection is what Benhabib (2004) calls 'democratic iterations'.

Benhabib (2004) bases her understanding of iteration on the idea of Jacques Derrida's iteration in language. An iteration is a repetition of something, with an additional meaning. Benhabib connects this to law, an addendum to a law could be understood as an iteration. It is still the same law, but it is understood within the changing context. This is also the case for cosmopolitan rights that are understood within the local context. The meaning of these rights

is subject to the changes in the local society. In a process of democratic iterations this meaning is always enhanced and transformed. This process of democratic iterations makes people engage in a process of reflecting on principles, norm and laws in light of changing circumstances. New and excluded groups address this reflective process.

A process of democratic iteration is necessary for respecting the universal implications of universal norms despite the fact that they are interpreted in the local context. According to Benhabib (2004) this reflection process makes it possible for democratic sovereignties to be aware of the limitations that universal norms pose for democratic outcomes. Additionally, these democratic iterations, according to Benhabib, are necessary to justify borders of a political community. This is important for her since borders exclude people, therefore, a reflection process of who is excluded within a certain time and context is necessary. This is especially relevant for refugees at the external border. They are not included in the political community, however, they question the current borders and admission policies, which asks for a reflection on these borders and admissions policies. This reflection, according to Benhabib (2004), makes it possible to do justice to human rights within a democratic sovereignty. It asks a democratic sovereignty to reflect on the interplay of the commitment to universal rights and the local application of this.

Benhabib has a positive image of the incorporation of democratic iterations within the EU. The recent increasement of people with different cultural background in the EU calls for a reflection within the framework of EU's commitment to human rights on the one hand and democratic self-determination on the other (Benhabib, 2006). The EU has a liberal idea of democracy in which the power of a sovereign is already more limited by the EU norms and its commitment to human rights (Benhabib, 2006). Benhabib shows how the process of democratic iterations is already present within the EU by using three examples. For this thesis I use one of these examples, just to exemplify her point.

Benhabib's uses a process of democratic iterations of the France law as one of her examples. With the increasement of Muslims in the French community the values 'freedom of expression' and 'separation of religion and state' have been contested. Muslim girls were banned to wear their headscarves in the school, since the France law states that religious symbols are a private matter. This led the girls to protest for their right to freedom of expression. Several people raised their voice to stick up for the girls' rights. This created a



dilemma for France: should it revise its law due to the multicultural influences or should it protect its right of separation of religion and state. Eventually, France acknowledged the rights of these girls, stimulated by a reflection process where European regulations had to be considered. A process of democratic iteration made it possible to reflect on the law and to see it in the light of the current situation.

In this example the outcome of the process of democratic iteration is successful. But we must be critical about the outcome of such a process. Benhabib seems to assume that the outcome of a democratic iteration process leads to desired outcomes in which more people are included. But what if, as for this example, France decided that their separation of religion and state is valued higher? Would forbidding headscarves not also be a process of democratic iterations? If that would be the case, democratic iterations can also lead to more exclusion and less adherence to cosmopolitan rights. This is especially realistic due to the rise of the right wing within the EU. As we saw earlier, refugees are more often seen as a threat for the national identity and the security of the territory. It is often argued by politicians that refugees need to be kept out of the state to maintain the national identity that is required to maintain the political community. This raises opinions of people who want to enforce the borders and keep non-members out. A process of democratic iterations might therefore also lead to more exclusion.

Additionally, this example, and the other examples that Benhabib gives, are focussed on migrants that are already present within the EU. These girls were for example already settled in France. They were on the territorial ground of a nation in which they could claim their rights. The refugees at the external borders are neither on the territorial grounds of a member state that is responsible for their rights, nor on that of the EU. The refugees at the external borders ask the EU to offer them protection based on their human rights. The refugees at the external borders can hardly claim their rights at the EU when their admission is denied. As we saw in the example of the French Muslim girls, they raised their voices for their own rights, this was similar in the other examples given by Benhabib. Therefore, they stimulated themselves this process of democratic iterations. Refugees at the external borders have no ground to appeal to the EU to stimulate such a process of reflection.

I argue that this idea of democratic iteration in the EU is too optimistic and not realistic as a solution. It does not seem sufficient to leave the protection of human rights to a democratic

process of reflection. This reflection is subject to changes in society, it does not necessarily lead to complying to cosmopolitan rights and might even lead to more exclusion. Besides that, the process needs to be stimulated, but refugees at the external borders have no voice in the stimulation of such a process.

In the following section I explain that a first step towards an implementation of human rights for refugees at the external borders would be to take that the EU takes its commitment to human rights and the duties that follow from that seriously.

## 5.2 Towards a solution

Refusing refugees to ask for asylum, as could be seen at the Greek borders, is in a tense relationship with human rights of refugees at the external borders, especially in light of the commitment to human rights made by the EU. I explained that the adherence to cosmopolitan rights should not only be dependent on a process of democratic iterations. As we saw, this reflection is subject to changes in society and refugees at the external borders have no possibility to make their voices heard to stimulate such process. Besides that, is the outcome of a process of democratic iterations uncertain, it might even lead to more exclusion. Therefore, a solution within the EU as a political community is required.

I propose that the EU should take its human rights commitment seriously. With this I mean that from its commitment to human rights certain duties towards refugees explicitly follow. The EU cannot claim to commit itself to human rights when refugees at the external borders are deprived of the ability to claim these rights. The commitment to human rights of the EU is a cosmopolitan commitment. In line with Benhabib's definition, cosmopolitan norms are norms that ought to govern relations between individuals in a global civil society. Based on this definition, there does not seem to be a moral argument on why to limit cosmopolitan rights only to people present within the European territory. A cosmopolitan commitment should aim at transcending cosmopolitan rights to humanity in general. I would make the addition to Benhabib's argument that this aim would for the EU specifically include expanding cosmopolitan rights to refugees at the external borders. This does not mean that everyone should always be allowed to enter a political community. It should mean that refugees should be able to make their voices heard and that the EU at least should provide them with a fair asylum procedure to assess their refugee status.

As a consequence of a human rights commitment certain obligations are directly implied. Refusing refugees at the border, not giving them the ability to claim their human rights and not having a fair asylum procedure is against its own commitment to human rights. The EU should reevaluate the implications of its *prima facie* moral obligation with the urgency it deserves.

A first step to take its human rights commitment serious would be that the EU understands clearer what the political implications are of its commitment to human rights. This would mean that the EU has to adapt its policy in accordance to this, especially with regard to its borders policy and the admission of refugees at the external borders. This should not only depend on a democratic reflection process, as the democratic iterations proposed by Benhabib, but this should be something that should be incorporated in political processes of decision making. It is important that there is a clearer political vision within the EU of what the implication of their human rights commitment means. In doing this, the EU should be aware that its commitment to human rights is not restricted to Europeans. Universal values concern the whole 'human community', as is mentioned in the EU Charter of Fundamental Rights. This especially has to be clear when it comes to its treatment of non-Europeans or refugees at the external borders, to be even more precise. This is prerequisite for the EU to be able to adhere to its own cosmopolitan commitment to human rights.

The EU should take its commitment to human rights seriously by adhering to the implications of its cosmopolitan commitment in the normative self-understanding. This leaves open space for a political debate on what this exactly implies, but as this thesis has shown, certain things are directly implied in the EU's commitment to human rights. The further political implementation and concrete shaping of this commitment can be further explored.

## 6. Conclusion: human rights for refugees in the EU

With this thesis I have aimed to answer the question what the normative self-understanding of the EU entails regarding its moral duties towards refugees at the external borders. I have normatively reconstructed this self-understanding based on the EU Charter of Fundamental Rights. The interpretation of the values that I extracted from this document were analysed in light of the cosmopolitan perspective of Benhabib.

I have shown that, on the one hand, democratic political communities require borders. It needs to be clear who belongs to the *demos* that is subjected to the authority of the democratic sovereignty. However, as I have shown, on the other hand, the process of demarcating the political community involves a non-democratic process of excluding non-members. This exclusion brings the protection of the human rights of non-members, like refugees, in danger.

For refugees it is necessary that they can ask for their basic human rights at a political community of which they are non-member, since they cannot claim this in their own political community. Therefore, refugees dependent on cosmopolitan rights that protect their rights, based on being human and not on their nationality or citizenship. This presupposes that refugees can claim these rights at a political community, as was shown by Arendt (1951).

I have focussed on the example of refugees at the Greek border that appeal to the EU to provide them with protection. By transferring these refugees back to Turkey, human rights have been violated and continue to be violated. As I argued, this human rights violation refers to a normative problem, namely, that refugees are prevented from their right to ask for safety. This is in direct conflict with the commitment that the EU made to human rights.

In the normative self-understanding of the EU, a commitment is made to human rights implying the right to asylum. The EU interprets this moral commitment to universal values within the local community. However, this does not allow for any interpretation. I have shown that by committing itself to certain values, the EU recognizes from the start that there are limits to how it may carry out its sovereignty. A moral commitment to cosmopolitan rights requires that a legal claim to these rights is possible. This political commitment is from the start implied in the moral commitment to human rights.

I have discussed the potential that Benhabib sees for the EU to incorporate the reflective process of democratic iterations. According to Benhabib, this reflection process can do justice

to human rights within a democratic sovereignty. It asks a democratic sovereignty, in this case the EU, to reflect on the interplay of its commitment to universal rights and the local application of this. I have made critical footnotes to the possibility for democratic iterations in the EU: they might lead to more exclusion and refugees at the external borders have no voice to stimulate such a process.

I proposed that the EU should take the implication of their human rights commitment first more seriously. This means that the EU has to understand that as a consequence of its human rights commitment certain obligations are expressly undertaken. Refusing refugees at the border, not giving them the ability to claim their human rights and not having a fair asylum procedure is against its own commitment to human rights. A moral commitment to human rights implies a legal and political commitment to human rights. A first step towards a solution is that the EU must clearly define what the political implications are of its commitment to human rights and what this means for non-Europeans, especially refugees at the external borders.

In conclusion, it can be said that the EU has to uphold its moral duties towards the protection of the human rights of refugees at the external borders as an implication of its human rights commitment in the normative self-understanding. The EU cannot hold on to their normative self-understanding if they assess the border regime at the Greek borders to be legitimate, as they would have to reject their normative self-understanding. The EU fails to see that the consequences of their moral commitment is that certain duties towards refugees at the external borders follow: the EU should provide refugees with the ability to claim the human rights that the EU is committed to.

If the EU commits itself to its normative self-understanding, this should entail that the implications and consequences of their commitment to human rights are taken seriously. From a cosmopolitan perspective this means that, if there is a moral commitment to human rights this should also include a political commitment to human rights. It is the moral duty of the EU that refugees can claim their rights at the EU. Therefore, refugees need to be given access to the territory and to a fair procedure. The EU needs to implement what moral duties follow specifically from their commitment to human rights. This is required from EU's own commitments in the normative self-understanding as well as from a cosmopolitan perspective as described by Seyla Benhabib.

This conclusion of this thesis is reached based on a normative reconstruction of some aspects of the normative self-understanding of the EU. However, I am aware that there are many different ways to reconstruct the normative self-understanding of the EU. Additionally, the EU is committed to more values besides human rights. However, a reconstruction of values presented in the EU Charter of Fundamental Rights and a specific focus on human rights should be part of any reconstruction. The EU Charter of Fundamental Rights is the most complete and central document to extract the relevant values, as human rights form an important ground of the normative self-understanding of the EU, especially in relation to the duties towards non-Europeans as refugees.

Besides that, I focussed mainly on the cosmopolitan perspective of Benhabib. I am aware that there are many other cosmopolitan thinkers and different visions of how a political cosmopolitan perspective for the EU can be envisioned. Taking the perspective of Benhabib provided an important step in a normative reconstruction of the normative self-understanding of the EU. As I explained Benhabib's ideas were especially relevant since she applied her cosmopolitan ideas specifically to the EU and she provided a perspective that took both the human rights of refugees as the democratic sovereignty of the EU into account.

The final conclusion leaves open the question on how to provide the EU with political guidance on what the concrete political implication of its commitment to human rights implies. This is not something that is part of a normative reconstruction as provided in this thesis, but that would be an opening for further research. I would suggest for a further research to deepen the question what the political commitment to human rights for the EU entails and which concrete duties can follow from this. In a further research I would suggest that different disciplines will be involved. I think looking at this question from a law, political science and anthropological perspective might lead to the possibility of providing the EU with advice on the implications of its own normative self-understanding.

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