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Sovereignty, Borders and Refugees

The Crisis of Democracy and Human Rights in Europe

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Abstract

The thesis examines the current political situation of refugees at the European border, arguing that the refugee is herself to be understood as a consequence of the border control practices that are put in place in order to hold her back. Drawing on the method of ideology critique, I problematise our current imaginary of the border as being a hegemonic project that deeply pervades our understanding of the border as a self-evident and static idea. As a consequence, its dynamic, political and *productive* character becomes obscured. Migrants appear as a threat to the stability of the social order. In the ongoing process of their irregularisation, they are often deprived of their basic human rights. Drawing on these observations, I argue that even the normative concepts we commonly use to criticize institutional arrangements and social practices – namely democracy and human rights – reproduce the static imaginary of the border. Against this background, I critically evaluate the emancipatory power these concepts unfold regarding the moral and legal entitlements of refugees. Both democracy and human rights seem to have the potential of sustaining relations of domination *and* to transform them. In view of the contemporary developments, I conclude that instead of talking about a refugee crisis, we should talk about a crisis of democracy and human rights.

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Introduction

> The passport is the noblest part of a person. It isn't generated in the plain and simple way people are. A person can be begotten anywhere in the world, in the most frivolous of ways – but not a passport. That's why a passport, so long as it's a good one, is recognized – whereas a person can be ever so good yet still be denied recognition.[1]

Bertolt Brecht situates his *Conversations in Exile* (*"Flüchlingsgespräche"*) in a restaurant at the Central Railway Station in Helsinki. In the light of the on-going war, as German troops have just invaded Denmark and Norway and are moving forward in France, two escapees from Nazi Germany, the intellectual Ziffel and the labourer Kalle, while away their time in a series of laconic dialogues, reflecting about their lives and their current situation as refugees. Brecht himself spent fourteen years in exile, fleeing Germany in 1933 over Prague, Vienna and Zurich, subsequently spending longer periods in Denmark and Sweden, fleeing further to Finland, and finally via Russia to the United States. He started working on *Conversations in Exile* during his time in Finland, while he struggled to get a visa to the United States. The quotation above emphasises the great significance of passports in a world in which nation states distribute legal entitlements. It sheds light on the precariousness many people are confronted with when they are forced to leave their country. Whereas some escape successfully and are able to arrive at a safe haven, others who have a "bad" or no passport at all will be less lucky in finding a place of refuge. Brecht's cynical commentary highlights that in a world of rights it may not be sufficient to be a human being in need for shelter and a new home, but that what matters is a person's legal status, which rules out the "goodness", the "badness" but also the specific needs of a person. The basic question of who we are with or without a passport becomes tremendously virulent in every situation in which people are fleeing death, misery and devastation.

Over the course of the last year, we witnessed such a fatal situation in the Greek city of Idomeni. The border city between Greece and the Former Yugoslav Republic of

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[1] „Der Pass ist der edelste Teil von einem Menschen. Er kommt auch nicht auf so einfache Weise zustand wie ein Mensch. Ein Mensch kann überall zustandkommen, auf leichtsinnigste Art und ohne gescheiten Grund, aber ein Paß niemals. Dafür wird er auch anerkannt, wenn er gut ist, während ein Mensch noch so gut sein kann und doch nicht anerkannt wird." Brecht, B. (1967), *Flüchtlingsgespräche*, p. 1384, translation from Gregg, B. (2016), *The Human Rights State*. p. 1).

Macedonia had become a focal point for refugees who managed to reach Greek soil and who tried to make their way via the 'Balkan route' to one of the central European countries. Being confronted with a huge number of travellers, and due to the fact that several countries had closed their borders or had put daily limits on border crossings (Slovenia, Croatia, Serbia, Austria), Macedonian authorities introduced pass controls. These controls aimed at only allowing people with certain nationalities to cross the border, namely such nationalities that could be assumed to be more likely be able to successfully claim asylum in their aimed countries of destination. In December 2015, only holders of Syrian, Afghan or Iraqi passports were allowed to cross the border, while all the others stranded in Idomeni. This soon resulted in a chaotic situation with thousands of migrants arriving every day, while at times temperatures were falling under minus ten degrees celcius and volunteers tried to prevent a major humanitarian catastrophe by distributing the bare necessities of food and clothing. The authorities on both sides of the border seemed unprepared for this situation. In Greece barely any official assistance was provided for the stranded refugees. The organisation of the continuous border crossings by the Macedonian police was characterised by misinformation and arbitrariness. There are known instances of families being separated when appointed interpreters "declared" the nationalities of people without appropriate documents by testing their Arabic dialect, on this basis deciding who would pass.[2] Over time, fewer and fewer people were allowed to cross the border until it was ultimately closed in February 2016, depriving the inhabitants of "Europe's biggest favela"[3] of their last hopes. A poster was noticeably attached at the entrance of the provisional camp, giving new expression to Brecht's sad insights through the emancipatory slogan: "We are more than our passports".

The example of thousands of people stranding at the 'EU'ropean[4] borders explicitly shows how individuals are fundamentally reduced to an epiphenomenon of a formal

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[2] Smith, H. (2016), *Migration crisis: Idomeni, the train stop that became 'an insult to EU values'.*
[3] Smith, H. (2016), *Migration crisis: Idomeni, the train stop that became 'an insult to EU values'.*
[4] Bialasiewitcz uses this term in order to frame „the institutional incarnation" of Europe, Bialasiewicz, L. (2011), *Introduction*, p. 1.

document issued by a nation state.[5] It is the passport on which a decision about entry is made, defining who is worthy of a substantial legal status within the jurisdiction of a nation state. The passport bearer herself, her personal story, experiences of injustice as well as basic needs are not taken into consideration. In Brecht's words, only those people holding a "good" passport are granted the privilege to cross borders. The idea of passports that differ with regard to their "quality" has become ubiquitous to a point where they are not only considered a natural prerequisite for travel privileges but are also generally accepted as a part of today's world's structure. Passports are first and foremost an instrument of border control and in a world of nation states discretionary border controls are considered a legitimate act of a state's right to sovereignty. Despite the frequently invoked phenomenon of globalisation and the popular notion of a more and more interconnected world, borders have neither fully opened, nor are they vanishing. On the contrary: not only have their numbers increased, but also a general reinvigoration of border protection in connection to the narratives of war on terrorism and the refugee "crisis" can be observed. One could thus argue that globalisation has a rather ambivalent effect on the exercise of sovereignty. On the one hand, there is a perforation of sovereignty (e.g. in the field of trade). However, on the other hand, in terms of migration policies, there is a reinforcement of sovereignty.[6] The fact that during the last year, many EU countries closed their borders,[7] therewith consciously accepting to violate the Schengen Agreement, proves that states continue to consider the control of their borders as a fundamental right and valid expression of their sovereignty. "The new age of the wall has begun", wrote Guardian columnist Julian Borger already in 2007, "ramparts and stone fortifications, regarded until recently as national relicts and tourist attractions, are back with a vengeance."[8]

Apparently, transnational migration "is a phenomenon which causes considerable irritation", since it "affects the social meaning, the permeability, the spatial location or

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[5] Gregg, B. (2016), *The Human Rights State,* p. 8.
[6] Loick, D. (2010), *Kritik der Souveränität*, pp. 21-22.
[7] Currently there the border between Sweden and Denmark is closed, the border between Italy and Austria has also been closed for some time.
[8] Borger, J. (2007), *Security fences or barriers to peace?*.

the temporal stability […] of political boundaries.“[9] Disputes over immigration-related policy issues have proliferated and intensified over the last decade to that extent that the so-called refugee "crisis" became a predominant topic in European public discourse.[10] Everyday, newspaper headlines tell us about "flows" or "waves" of migrants trying to reach Europe; sometimes even words like "tsunami" or "avalanche" are invoked. While the latter notions are consciously used with a negative implication, the former are usually considered a neutral description of the state of affairs. Notwithstanding the intentions behind it, such metaphors, which refer to forces of nature, evidently indicate that the described phenomenon is perceived as something that comes without warning, as an exception that has no comprehensible causality with the given social order. Migration is perceived as something diverging from the norm, something that is irregular. The plight of the refugees is first and foremost perceived as an interruption of the given social arrangements; even more "they" appear as a threat, as a fundamental danger to this order.

As a consequence, there is an increase of border policing all over the affluent world, which can be exemplarily observed in the EU: while internal borders seemed to be nearly non-existent (at least until recently), the sealing off of the external borders has become a number-one priority over the last decades. The measures deployed on national and international level along the EU borders comprise the development of a European network on surveillance and information technology, visa regulation, a whole body of laws and informal regulations with the aim of preventing border crossings and even the set-up of an independent border control agency – with the result, that, in practice, there exists hardly any legal way for refugees to enter the EU's jurisdiction in order to claim asylum. Simultaneously, a general shift in perception regarding the moral worth of migrants appears to exist. The increasingly negatively charged sentiment towards immigration is underscored by the social processes of factual and rhetorical distinction between "legal" and "illegal" migration.[11] Yet, it is the banal finding of migration

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[9] Bauböck, R. (1998), *The Crossing and Blurring of Boundaries*, p. 17. In this context, Rainer Bauböck speaks of three different kinds of political boundaries that are constitutive for modern societies. First, the territorial border of the state; second, the boundary of membership as citizen and third, the boundary of cultural communities.
[10] Dauvergne, C. (2008), *Making People Illegal,* p. 2.
[11] Dauvergne, C. (2008), *Making People Illegal,* ch. 4.

research that people fleeing death and devastation will not be deterred.[12] All those who still think of crossing the border as their best shot to live a life in peace and dignity, now have to set off on an often expensive journey that also puts their lives in danger. The truly "deadly path"[13] over the Mediterranean Sea remains one of the last routes into the EU; only in May this year, seven hundred refugees died on their attempted passages within one single week.[14] The strategy applied by European authorities is to make it more difficult to reach the borders. Arguably, this poses a limit to the right to seek asylum. Moreover, even those whose asylum claims would most probably be successful according to contemporary doctrine are deterred from reaching the respective jurisdiction. As Amnesty International stated in 2014: "The EU is no more porous for them than it is for economic migrants. All are exposed to unacceptable risks to their lives and rights as a result of the EU's relentless drive to reduce the overall number of arriving migrants."[15] While the official rationale for securing the European borders is to reduce of what is categorized as irregular economic migration, EU's policies have enormous consequences for different categories of travellers. A great number of migrants have to endure severe violations of their human rights. Not only do the EU's border policies implicate the deaths of thousands of migrants; moreover, the EU and its member states are responsible for the violation of human rights in EU detention camps and involved in practices of deportation that are arguably "draconian in comparison to the alleged harm done by migrants subjected to them"[16]

Yet, despite these substantive concerns, the described practices are constantly being expanded: a remarkable array of restrictive measures to control migration has been put in place on the domestic level in nearly all EU member states over the last year, culminating in the EU-Turkey-deal this March.[17]

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[12] Betts, A. (2015), *Human migration will be a defining issue of this century*.

[13] Faigle, P., Frehse, L., Stahnke, J., Blickle, P. & Venohr, S. (2016), *The New Deadly Paths to Europe*.

[14] Kingsley, P. (2016), *More than 700 migrants feared dead in three Mediterranean sinkings*.

[15] Amnesty International (2014), *The Human Cost of Fortress Europe*.

[16] Amnesty 2014 In Detention in Europe. Facts and Figures, Couldrey, M. & Herson, M. (2014), *Detention, Alternatives to Detention and Deportation*.

[17] On the construction of the EU-Turkey deal see: Fotiadis, A. (2016), *How the EU-Turkey Deal Came to Be*.

My thesis investigates the current political situation of refugees alongside the European border, arguing that the refugee[18] is herself to be understood as a consequence of the border control practices that are put in place in order to hold her back. Taking the concept of the border as a starting point serves the purpose to reveal its productive nature. The concept of the state border underpins the arrangement and indeed the very condition of the possibility for both domestic and international legal and political systems. However, borders are a more complex phenomenon than they are commonly imagined to be. Borders do not only delimit states and societies territorially, but also produce different kinds of subjectivities and forms of knowledge. Above all else, refugees are the inevitable product and represent the most fundamental challenge of the bordered world scheme that – in a paradoxical manner – at the same time promises to hold out a solution to the refugee "crisis".

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[18] The decision about which passport is right or wrong, about who a society values and who it considers as deserving protection and humanity, depends crucially on political constellations. The border's migration filter provides legal form to the answers to these questions; however, the question who for instance counts as a refugee is not just regulated in legal texts, but interpreted at every point in time, when a decision about an asylum case is made (Schmalz, D. (2015), *Der Flüchtlingsbegriff*, p. 390); and it is in recent time more than anything bargained in broad public discussions. The term "refugee" is an "essentially contested concept" (Connolly, W. (1983), *The Terms of Political Discourse*, p. 28), being surrounded by an "impenetrable jungle" (Haddad, E. (2008), *The Refugee in International Society*, p. 24) of meanings. What makes the categorization so difficult is that the concept is at once descriptive and normative, legal and political (Haddad, E. (2008), *The Refugee in International Society*, p. 24-26). It leads to conceptual confusion essentially because the legal meaning – somebody who was successfully granted asylum– and the political interpretation – a person who is or was fleeing for some reason – are not consistent at all (Schmalz, D. (2015), *Der Flüchtlingsbegriff*, pp. 390-392). Even the juridical labels vary from state to state. In many states, individuals gain refuge not under the label „refugee" but other categories, for example „subsidiary protection". What is more, those who we call climate refugees will most likely not be able to successfully receive any legal status of refuge. At the same time, it becomes continually harder to distinguish between the different terms of economic migrants, illegal immigrants, asylum seeker, displaced person, political refugee and stateless person. All of them might *de facto* be or become refugees in the legal sense. The categories get mixed up, and they are used accordingly to the purpose of the respective discourse participants. In the following, I intend to use the terms refugee/migrant/traveller/protection seeker interchangeably for people who are or were fleeing death, hunger, prosecution or other forms of severe devastation. Maybe only some of them have a legitimate claim according to the current migration laws of a particular state where they will claim asylum but, as mentioned before, this is a political question; not to mention the brutal fact that many of them might never reach European soil. For the most parts, this project talks about irregular or illegal migration (other terms would be undocumented, clandestine etc.). This refers to those who have undertaken the journey to Europe (or elsewhere) in defying current migration laws or are under a state's jurisdiction without any legal status. They differ from regular migrants insofar as the latter are able to immigrate in a regular, orderly way (Schulze Wessel, J. (2016), *On Border Subjects*, p. 48).

Much research in the field of migration studies sets out to contribute to better policies. But the roots of the current developments to be grasped as well. Therefore it will be useful to step back from what is taken for granted and considered as normal. I seek to reveal the border as a social phenomenon that is highly ingrained in a great variety of our political and social practices, and therefore, as I frame it, subject to a hegemonic agenda. With its constituting role for the world system, the border impinges heavily on national and international politics, and this specific conceptual and historical arrangement has important implications for our understanding of contemporary responses to migration.

The suspicion that guides my thesis is that even the normative concepts that people refer to in order to strengthen the political and legal claims of refugees are deeply pervaded by the hegemonic perception of the border. Democracy, i.e. full citizenship status, and the proliferation of human rights norms are commonly considered to be the basic denominators of human entitlements.[19] However, that both these concepts are being spatially constructed and therefore delimited, raises the question of their emancipatory potential for the claims of refugees. Democracy's promise is the political and legal equality between people and the consolidated, legitimate way to create just law through procedures and institutions that guarantee the effective protection of human rights. In turn, human rights serve as door openers for the excluded and oppressed.[20] They function as the most general point of reference for different forms of official injustice and disrespect by reference to the equal moral worth of any human being. Turning the normative substance of such demands into legal rules is often seen as very important possibility for progressive social transformation towards a world where those claims are effectively protected. However, we are currently facing a situation in which democratic governments are implementing a whole range of violent practices that strip non-citizens of their most basic human rights. What can democracy and law, both playing an important role in shoring up the nation state's borders, do for the protection of those "outside"?

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[19] Sassen, S. (1996), *Losing Control? Sovereignty in an Age of Globalisation*, Columbia: CUP.
[20] Wingert, L. (1998), *Unpathetisches Ideal*.

Building on existing literature on the "productive and indeed world configuring dimensions"[21] of state borders, I seek to combine this approach with influential strands of political and legal theory. The first part of my thesis aims at shedding some light on the hegemonic contours of the border by trying to unfold and rethink the basic schemes through which we perceive and conceptualize migration and its regulation. I want to display how even the most extreme and violent forms taken by the state practices at the borders of Europe[22] appear to have become something natural and generally accepted, and show how migration is subject to the corresponding, ongoing process of irregularisation. In developing this argument, I draw on a distinctive analytical tool: with the theory of ideology critique I seek to reveal the border's hegemonic status. In the second part, I critically evaluate the emancipatory power of the two arguably most prominent normative concepts of our time regarding the rights claims of refugees. First, I ask in which ways democratic principles provide a valuable point of departure regarding the demands of non-citizens – and whether the presupposition of a political community that operates along the binary mechanism of exclusion and inclusion must constitute and stabilize the very political and social divisions in place, which the claims of refugees mean to challenge. Related to this I, secondly, scrutinise to what extent legal regulation, more specifically the increasing codification of human rights norms can "do" for the political situation of refugees. While the language of human rights is supposed to serve as a counter-hegemonic technique to articulate experiences of injustice and marginalization not yet accounted for, I will argue that processes of juridification are ambivalent with regard to this emancipatory potential, insofar they produce sets of fixed categories and institutional arrangements under which complaints

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[21] Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction*, p. xvi.
[22] While many accounts of migration studies analyse the EU or the US, it is important to annotate that unauthorized migration and illegal immigrants are in fact global trends. I will nevertheless focus on Europe; the examples I intend to scrutinize will be taken from the complex field of European discourses and practices of migration policy of the EU and its member states. However, several of the observations made here are part of global phenomena: questions of borders, violence and the regulation and irregulation of migration are at stake almost everywhere. The EU remains a specific case because a) it represents a overly complex structure of responsibility, b) because of its historically new type of borderland, which has become a zone of transition and c) because of its particular role in the postcolonial constellation. The EU has insofar "certainly become – and turned itself into – a space for experimentation, a laboratory for the theory and practice of the border, for better or worse." Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. xv; for a range of examples and literature in the global sphere see Dauvergne, C. (2008), *Making People Illegal*, p. 1-2.

must be subsumed in order to be heard and seen. Against the backdrop of a continuous readjustment of the European legal systems to regulate immigration and the corresponding transformation of social struggles into legal proceedings and juridical law-making, the discursive power of human rights is becoming more and more absorbed.

1 The Transformation of Borders and the Irregularisation of Migration

1.1 The Border's Deep Hegemony

State borders are commonly taken to be territorial markers of fixed units of sovereign political authority and jurisdiction, located at the geographical outer edge of the respective polity. Accordingly, the territorial state is imagined as a container of (national) society, encompassed by its border, which operates as the filter by the help of which political powers attempt to regulate flows of goods and services, money and capital, information and ideas, and – most importantly – people.[23] It is evident that this predominant understanding of the border has had and continues to have significant political and ethical influence on the practice and theory of global politics.[24] Nearly throughout all academic disciplines, borders are treated as if they were merely the "fixtures and fittings"[25] of the international system, to which there is no alternative. The concept of the border has predominantly been used in such a largely unreflective manner.[26] In more recent times, this static perception has been increasingly called into question and, especially in the growing field of border studies, a lot of conceptual work of remodelling of the modern border as well as analysis of their appearance has been done.[27] The main criticism that arises from these observations is that conventional approaches often overlook the "productive and world-configuring dimensions of borders",[28] and thus simultaneously reproduce them. The understanding of the border is caught in a "territorial trap"[29] and "its usage in all kinds of discourses must be seen as in part constituting the modern geopolitical imaginary it purports merely to describe."[30] In conceiving borders as being fundamentally socially construed, these constructivist approaches aim at unveiling that borders are neither natural nor neutral figures but,

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[23] Agnew, J. (1994), *The Territorrial Trap*, pp. 76/77; Bauböck p. 346
[24] Vaughan-Williams, N. (2009), *Border Politics*, p. 2; Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. x.
[25] Williams, J. (2003), *Territorial Borders,* p. 27.
[26] Vaughan-Williams, N. (2009), *Border Politics*, p. 4.
[27] See for an overview, Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. xvi.
[28] Ibid.
[29] Agnew, J. (1994), *The Territorrial Trap*.
[30] Vaughan-Williams, N. (2009), *Border Politics*, p. 2.

quite on the contrary, are historically contingent, dynamic and highly political phenomena that strongly affect everyone's lives, but especially the lives of those who try to trespass these borders without legal permission.

In order to illustrate the permeating impact of the border it will be useful to take the cue from the method of ideology critique. My analysis does not follow a systematic approach here. Instead, I intend to draw eclectically on writings of different authors of this "branch" of critical examination of contemporary social relations.[31] Ideology critique, in its most general sense, is a form of criticism that points out the non-existent conformity between thinking and existence and analyses the roots for this discrepancy.[32] Whereas one central lineage of the theory of ideology has been engaged with the matter of true and false cognition,[33] I want to take an alternative route that is rather sociological than epistemological, setting in motion a sort of inquiry, which aims at uncovering the function of ideas in social life.[34] To use the concept of ideology in that sense is analytically valuable inasmuch as it has explanatory power with regard to the general question of how specific ideas (the border being the relevant example here) support relations of power and domination.[35] Ideology critique serves as a specific technique to show how material and symbolic practices work to stabilize and constantly (re-)constitute the position of dominant social groups. The general modes of ideology operate along the lines of rationalization, legitimation, universalising, and naturalisation.[36] Through discursive strategies of normalisation, phenomena appear as "existing social arrangements [which] come to seem as obvious and self-evident, as if

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[31] See for a general introduction Žižek, S. (1995), *Introduction: The Spectre of Ideology;* Eagleton, T. (2007), *Ideology*; Thompson, J. (1991), *Ideology and Modern Culture*.

[32] Eagleton, T. (2007), *Ideology*, p. 2; Marks, S. (2000), *The Riddle of all Constitutions,* p. 8.
One should insert here that there are many different definitions of ideology, which are often not at all compatible with one another. In the definition above, the understanding of ideology is in stark contrast to the unambiguously pejorative sense in everyday interaction, where ideology serves as a polemic tool and refers to an unreflective usage of doctrine. This usage in everyday language, however, seriously underestimates the extent to which all thought proceeds from preconceptions. And it is exactly the obscuring of this derivation for some phenomena that ideology critique intends to reveal. Against this background, speaking of the "end of ideology" cannot be accepted and, indeed, instead confirms the persistence of ideology. Marks, S. (2000), *The Riddle of all Constitutions,* p. 8; *;* Eagleton, T. (2007), *Ideology*, p. 58.

[33] Eagleton, T. (2007), *Ideology,* p. 3.

[34] Marks, S. (2000), *The Riddle of all Constitutions*, p. 12.

[35] Ibid*,* p. 2.

[36] Thompson, J. (1991), *Ideology and Modern Culture*. p. 60; *;* Eagleton, T. (2007), *Ideology*, chapter 2.

they were natural phenomena belonging to a world 'out there'."[37] It is the aim of ideology critique to reveal the naturalisation of phenomena,[38] hence to disclose how phenomena are normalised, historicised and de-politicised, instead of being described as the historically and culturally specific projects that they are.

The process of naturalisation of state borders that I seek to describe here becomes particularly graspable by referring to the Gramscian theory of ideology critique.[39] For Gramsci, the key concept of analysis is not ideology as such, but hegemony.[40] Hegemony is understood as an inconsistent *process* of generalisation that encompasses all human activities so as to establish a particular conduct in all societal spheres.[41] According to Gramsci, obedience must be maintained with the help of the ideological proof of its "necessity" or "rationality".[42] Social domination is attained through asymmetrical consent, which is naturalised in the social texture in terms of general customs and spontaneous practices.[43] Thus, hegemony means much more than legitimacy in Weberian terms.[44] It is a permanent practice that establishes moral, political and intellectual leadership.[45] For theorists working in this tradition, in order to grasp the state as social construction, it becomes necessary to detach it from its subject-like status. The state is not a fixed substantial entity, but an inconsistent and fragmented variety of state apparatuses. This "integral state" at the same time explicitly includes civil society.[46] The state and its apparatuses have to be explained on the basis of societal

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[37] Marks, S. (2000), *The Riddle of all Constitutions,* p. 22.
[38] Thompson, J. (1991), *Ideology and Modern Culture,* p. 44; Marks p. 12.
I am aware that the concept of ideology (and its critique) has attracted a wide range of criticism from very different theoretical backgrounds. Often, however, these criticisms are fed with a different understanding of ideology. In the case of Foucault's criticism, Marks can show how the conception of ideology that is subject to his criticism, is informed by Marx's approach. As outlined above I seek to apply a concept that reframes ideology in terms of meaning, rather than specific ideas and thereby focus on relations of power, which is to be differentiated from simply the class domination that Marx understood. Arguably, focussing on meaning and relations of domination the approach has parallels with Foucault's own work. For an overview of different criticisms, see Marks, S. (2000), *The Riddle of all Constitutions,* pp. 15-18, see her assessment of Foucault's criticsm, ibid, p. 17.
[39] This approach is inspired by the work of the research project Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.*
[40] Eagleton, T. (2007), *Ideology*, p. 112.
[41] Buckel/Fischer-Lescano, p. 89
[42] Eagleton, T. (2007), *Ideology,* p. 114.
[43] Ibid, p. 115.
[44] Buckel, S., Fischer-Lescano, A. (2007), *Hegemonie im globalen Recht*, p. 89.
[45] Eagleton, T. (2007), *Ideology*, p. 115.
[46] Demirovic, A. (2007), *Theorie des integralen Staates bei Gramsci.*

battles. Thus, hegemony describes not just a successful form of ideology; the concept enriches and extends the notion of ideology inasmuch as it emphasises ideology as lived, habitual social practice.[47] Ideology as hegemony encompasses the unconscious, unarticulated dimensions of social experience as well as the operations of formal state institutions. Ideology, one could say, successfully regulates the relationship between the imaginable and non-imaginable;[48] the imaginable being that which is hegemonic, the given or self-evident. As Terry Eagleton puts it, "a ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable".[49] How ideology supports power is blurred especially because the tracks are covered (through the process of naturalisation etc.) and furthermore because there is a constitutive unawareness to what extent social practices (utterances, actions, texts, images) and the ideas expressed through them shape and perpetuate social reality.[50] As a result, specific concepts are taken for granted and we believe in the assumption of what would actually require demonstration. "Thus, for instance, concepts which are contested may be treated as predetermined; practices which are problematic may be treated as given; institutions which are open to debate may be treated as beyond question."[51] The task of ideology critique is to unveil the social as political construct that is defined through struggle and negotiation.

National borders and their control are arguably perceived as absolutely essential and are thus subject to a "*deep hegemony*", precisely in the sense of the Gramscian worldview. Their existence is not only taken for granted but, beyond that, also deeply embedded in the social texture, knowledge and everyday practices.[52]

This also explains the plain absence of critical research about the border until rather recently and the unreflective usage of the concept I was referring to above. Especially in daily interaction and political communication, borders are treated as if they have been

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[47] Eagleton, T. (2007), *Ideology*, p. 115.

[48] Žižek, S. (1995), *Introduction: The Spectre of Ideology,* p. 1.

[49] Eagleton, T. (2007), *Ideology,* p. 58.

[50] As Thompson explains, the symbolic forms through which meaning is generated do not simply "articulate or obscure social relations or interests which are constituted fundamentally and essentially at a pre-symbolic level; rather symbolic forms are continuously and creatively implicated in the constitution of social relations as such." Thompson 58; see also: *;* Eagleton, T. (2007), *Ideology*, p. 40.

[51] Marks, S. (2000), *The Riddle of all Constitutions,* p.22.

[52] Buckel, S. (2015), *The Rights of the Irregularized*, p. 142.

there forever. It is precisely this lacking historicity, which is central for the fact that their legitimacy is not questioned. A world without borders is simply unimaginable. Borders are perceived as a natural, given phenomenon and hence their control appears to be the consequence that logically results from the fact of their existence. The many deaths of refugees, as well as the human rights violations are all widely accepted because neither the existence of the border nor the control of migration that stems from it is called into question. The state's moral as well as political right to border control and the 'policy of foreigners' become the one-and-only alternative. Accordingly it is to a certain extent the "default" position that national boundaries have both moral significance and political legitimacy.[53]

However, the constant expansion of border policies still is in need for legitimation. Further below, we will see how it is precisely for this purpose that discursive strategies of normalisation and naturalisation are deployed. For example, when the complex interrelations of the refugee "crisis" are simplified in withholding the refugees' rights and demands from the discussion, or when the restrictive laws adopted in order to hold back travellers are introduced under the normative claim to protect refugees (strategy of inversion).[54]

Yet and again, it is not the idea of the border as such that is contested. Both defenders and critics of immigration control and its pervasive consequences share a crucial background assumption about the present world: the idea of territorial jurisdiction, i.e. the fact that in a particular place there can only be a single political authority whose laws apply and, following this, the widespread acceptance that to control immigration is essential to the exercise of sovereignty.[55] As Rainer Bauböck rightfully points out, these background assumptions are not more than contemporary realities, which at once serve as the grounding principles of a normative worldview in general, and normative reasoning regarding border practices in particular[56] – in the vocabulary of ideology critique: what is obscured is the possibility of a diverging imaginary.[57]

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[53] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.*
[54] See for a general overview of the different discursive strategies: Thompson, J. (1991), *Ideology and Modern Culture.*
[55] Bauböck, R. (2011), *Citizenship and Free Movement,* p. 345; Carens p. 271
[56] Bauböck, R. (2011), *Citizenship and Free Movement,* p. 345.
[57] Žižek, S. (1995), *Introduction: The Spectre of Ideology.*

1.2 The emergence of our contemporary understanding of the border

In the light of these observations of the border's on-going naturalisation, as well as its control, it seems reasonable to return for a moment to the border's past. Looking back at the emergence and consolidation of our current understanding of borders serves two points: it challenges the border's hegemonic construction as supratemporal and simultaneously reveals its social genealogy.

States have not always attempted to control their borders. The old empires had moving frontiers instead of stable territorial borders and free movement across external borders was hardly politically constrained at that time.[58] As a matter of fact, in the sixteenth and seventeenth century, several governments were restricting emigration rather than immigration for economic reasons.[59] While Westphalia is commonly regarded to mark the birth of the international system of modern sovereign states occupying a distinct territory and containing a distinct population, the idea that states have a general right to control immigration gained acceptance much later.[60] The state's attempts to monopolize "the legitimate means of movement"[61] are a surprisingly recent trend. The stringent requirements for identity documents and passports in the twentieth century stand in stark contrast to a generally liberal attitude towards freedom of movement during the nineteenth century.[62] Against the backdrop of the processes of national social integration, various kinds of identification documents spread at the end of the nineteenth century and sharpened the line between national and alien. For reasons of military security as well as social and political inclusion, states vastly enhanced the ability to identify citizen and distinguish them from non-citizens, thus constructing themselves as "nation states". Democratisation and the development of social welfare arguably led to a closer relationship between the individual members of national states and can be considered as central reason for states to establish the exclusive right to authorise and

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[58] Bauböck, R. (2011), *Citizenship and Free Movement*, p. 345.

[59] Zolberg, A. (2007), *The Exit Revolution.*

[60] Osiander, A. (2001), *Sovereignty, International Relations, and the Westphalian Myth*, Teschke, B. (2009), *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*, Nexon, D. (2003), *The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires, and International Change*, ch. 8.

[61] Torpey, J. (2000), *The Invention of the Passport*, p 5.

[62] Ibid.

regulate the movement of people.[63] The "invention of passports"[64] and other identity documents specifying citizenship (i.e. membership) were the primary means to this end, because they provided states with the actual power to control immigration in effectively distinguishing between their citizens and 'others'. This process of states "embracing"[65] their subjects (otherwise known as state penetration or surveillance and control) has been maintained up to the present day.[66] With the outbreak of World War I, when foreigners were viewed with mistrust and suspicion, numerous governments imposed temporary passport controls.[67] After the War, these temporary border controls became permanent[68] and the character of the nation-state as both a territorial and a membership organization consolidated.[69] Over time, aliens had increasingly come to be seen as lacking any prima facie claim to access a territory of a state other than their own. Hence, from a historical point of view, the alleged self-evidence of the border as necessary marker of sovereign authority can be problematized: The close association of citizenship and identity papers – and therewith also the establishment of the crucial interconnection between borders and their controls – that we take for granted today was not enforced until the early twentieth century. Nevertheless, citizenship is nowadays perceived as the *correct* mode of belonging in our imagined, territorially bound communities. It is merely the logical consequence of this imaginary that displaced persons embody the abnormality.[70] Refugees do not fit into the state-citizen-territory trilogy but, instead, are forced in the insecure space between the sovereigns and their borders. Considering the concept of sovereignty from this angle shows that the refugee became the living 'other' through the process of state nationalisation in which the

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[63] Torpey shows this process mainly for France, Germany and the USA; It is for a combination of reasons that nations-states document identities in the first place. Among them is the aim to mobilize economic resources through taxation, to redistribute resources to citizens in need through welfare programmes and also through health and education, an upcoming connection between military service and citizenship and to maintain peace and order. Lyon p. 23

[64] Torpey, J. (2000), *The Invention of the Passport*.

[65] Torpey uses embrace in the sense of registering citizens in both ways to include and exclude persons.

[66] Most inhabitants of contemporary liberal democracies naturally expect the state as part of benefits and responsibilities as citizen to give them excess to education and legal assistance and tax them using identification device. Lyon, D. (2009), *Identifying Citizen*, p. 5.

[67] Torpey, J. (2000), *The Invention of the Passport*, p. 20.

[68] This again is connected to the deepening of the welfare state, see the example of Britain, Lyon, D. (2009), *Identifying Citizen*, p. 34.

[69] Torpey, J. (2000), *The Invention of the Passport*, p. 1.

[70] Haddad, E. (2008), *The Refugee in International Society*, p. 48.

citizen became its only legitimate subject. Refugees are the inevitable, if unanticipated, result of today's international system of modern territorial states.[71] In the process of state building, the exclusion of the foreigner was necessary to forge the category of citizens; consequently, in a world of states and citizens, human displacement remains the unavoidable companion.[72]

1.3 The Legal Framework for Protection Seekers

Before further discussing the relationship of borders and refugees and dilemmas of protection that arise at the European borders, it makes sense to think about the legal framework refugees encounter when reaching (or trying to reach) the European Union.

The process of "legalising" migration in the outset of the twentieth century with the emergence of a robust passport system and the concomitant closing of borders has intensified over the past decades. It is by no means possible to fully depict this process as it is taking place on many levels. But for the purpose of this project it is helpful to be aware of the different layers of law that are involved, and that particularly in the context of regime of (international) human rights law, that has emerged over the past century.

In order to reach protection in the EU, protection seekers have to pass through several filters.[73] First of all it is essential to gain access to the territory of the EU, otherwise it is indeed most certainly the case to be excluded from any protection – a problem that will be further scrutinised in the following sub-chapter. When the territory and thus EU jurisdiction is reached, it is necessary to be able to gain access to the asylum procedure. The third step is to be granted protection through this procedure.[74] As soon as a migrant seeking protection enters the territory of the European Union, he or she triggers at least four different layers of law that are interconnected and overlap. To begin with, when entering one of the EU member states, the protection seeker becomes subject to the national law on aliens of the respective state. Secondly, his or her situation is addressed in international refugee law. What is commonly referred to as international refugee law

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[71] Ibid.

[72] Emma Haddad speaks about the „mutually constitutive relationship" between the international society of states and the refugee. Haddad, E. (2008), *The Refugee in International Society*, p. 57.

[73] Pirjola, J. (2009), *European Asylum Policy*, p. 354.

[74] Ibid.

is set out in the 1951 *Convention Relating to the Status of Refugees* and its protocol from 1967.[75] The key features of these documents are the refugee definition[76] and the principle of non-refoulment. The non-refoulment commitment tempers the state's prerogative to exclude.[77] It states that "no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[78] In tandem the two can be interpreted as an indirect commitment for the right to remain in the state where refugee status has been claimed.[79] Yet, there is nowhere specified any right to enter another country or an explicit right that guarantees to be granted asylum. However, it is widely understood that sending claimants away from a state party's borders is prohibited and in addition to this, the Refugee Convention explicitly prevents states from punishing refugees for entering a state illegally.[80]

At the same time, protection seekers fall under the jurisdiction of international human rights law. The Universal Declaration of Human Rights also contains a right to seek and enjoy asylum.[81] Among other things, international human rights law also guarantees that no one shall be sent back to torture and inhuman or degrading treatment. Sources

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[75] Convention relating to the Status of Refugees ("Refugee Convention"), adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 137.

[76] The term "refugee" shall apply to any person who "owing to 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.", Article 1 A(2) of the Refugee Convention.

[77] Goodwin-Gil, Guy S. & McAdam, Jane (2007), *The Refugee in International Law*, p. 117.

[78] Article 33 (1) of the Refugee Convention.

[79] Dauvergne, C. (2008), *Making People Illegal*, p. 55.

[80] Hathaway, J. C. (2005), *The Rights of Refugees under International Law,* pp. 385-406, Article 31 of the Refugee Convention: „The Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[81] Article 14 (1) of the Universal Declaration of Human Rights, adopted by the UN General Assembly Res. 217 A (III), 10 December 1948: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

are the European Convention on Human Rights[82] and the UN Convention against torture and Other Cruel, Inhuman or Degrading Treatment.[83]

Finally, upon entering the EU jurisdiction, the asylum seeker falls under EU law regarding asylum and international protection. The European Council Directive, for instance, defines minimum standards for the qualification of refugees as well as for the right to subsidiary protection. Article 21 of the directive states that member states shall respect the principle of *non-refoulment,* in accordance with their international obligations.[84] Another Council Directive sets out the minimum standards for procedures for granting and withdrawing asylum.[85]

In the following, we will see how the EU and its member states, despite the many ways they have committed themselves to protecting asylum seekers, have increasinglyy excluded refugees through their policy developments.

1.4 The Violent Policies at the European Borders

Despite the rhetoric of globalization, not only the number of borders increased since the 1980s, but they also have become more intensively policed all over the affluent world.[86] Indeed, whereas globalisation intuitively leads to an "underdetermination of the border",[87] as it represents a weakening of the border's identity, borders are, however, "no less troubled by the recent memory, the insistent afterimage of the inverse figure: that of the over-determination of borders."[88]

All Western states have implemented a remarkable array of restrictive measures over the last decades. Both external ones like visa regimes and internal ones like detention. A

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[82] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953, ETS 5: „No one shall be sent back to torture or inhman or degrading treatment."

[83] Article 3 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85: „No state Party shall expel, return (*refouler)* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[84] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. L 304/12, 30 September 2004.

[85] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326/13, 13 December 2005.

[86] Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. ix.

[87] Balibar, È. (1998), *The Borders of Europe*, p. 220.

[88] Ibid.

first wave of restricting policies started in the nineties.[89] Under the impression of the so-called refugee "crisis", this process has been reinforced and nearly all EU countries have engaged in restrictive measures and policies to control and fend off immigration.[90] Even states considered as especially refugee-friendly have adopted such procedures to protect their borders more rigorously over the last year.[91] Additionally, the harmonisation of EU asylum policies further restricted the rights of protection seekers. While in the process of European integration there emerged a region of non-restricted movement within the EU, the external borders were sealed off. The EU itself gained a state-like character in this process, inasmuch as the EU's external border took over the role of the state borders, and thus this process has been termed as "rebordering".[92] Now, European (quasi) state apparatuses and the national ones exist side by side.[93] In order to overcome the dualism between the EU and its member states the Common European Asylum System (CEAS) had already been introduced in 1999.[94] The abolition of internal frontiers had already given rise to concerns about secondary movements of asylum seekers between member states.[95] This led to the adoption of the Dublin Convention in 1990, which established a system for determining the member state responsible for examining the asylum application of an individual seeking protection.[96] For protection seekers, the Dublin Regulation (now Dublin III) means that the country in which they claim asylum can not be chosen freely. They are obliged to claim protection in the country of first arrival. Otherwise they might face detention and

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[89] Nearly all Western European countries implemented restrictive measures, for instance the Pasqua laws in France and changes of the German Basic Law, see Gibney, M. (2004), *The Ethics and Politics of Asylum.*

[90] Dauvergne, C. (2008), *Making People Illegal,* p. 14-15.

[91] The German grand coalition under "open-door"-Chancellor Angela Merkel has introduced a whole range of extremely restrictive laws against asylum seekers and Sweden's Deputy Prime Minister Asa Romson broke down in tears as she announced the measures on closing the country's borders last autumn.

[92] Rumford, C. (2006), Rethinking European Spaces, p. 131.

[93] Buckel, S. (2015), *The Rights of the Irregularized*, p. 138/139; see for the understanding of state apparatus (Gramsci) the chapter 1.1. The parallel existence becomes apparent in political conflicts between the member states about the maritime border and the attempt to harmonise it.

[94] See on the origins of CEAS the detailed elaboration in Bauloz, C., Ineli-Ciger, M., Singer, S. & Stoyanova, V. (2015), *Introducing the Second Phase of the Common European Asylum System*, pp. 1-19.

[95] Bauloz, C., Ineli-Ciger, M., Singer, S. & Stoyanova, V. (2015), *Introducing the Second Phase of the Common European Asylum System*, p. 2.

[96] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities ("Dublin Convention"), OJ C 254/1, adopted 15 June 1990, entered into force 1 September 1997.

deportation back to the country of entry. Additionally, there have been introduced a range of initiatives to control irregular migration. The EURODAC database serves the effective enactment of the Dublin Regulation as it enables fingerprints and data to be shared.[97] The failure in creating a fully harmonised common asylum system becomes apparent most concretely in view of the huge disparities concerning the recognition rates of refugee status between member states,[98] with an individual's chances for receiving protection "can vary nearly seventy-fold, depending on where he or she applies."[99] These variations in the outcome of asylum decision-making across EU countries are striking even for asylum seekers that have the same nationality.[100] Transfers under the Dublin Regulation are characterised by the underlying concept of "mutual trust" which, however, falls short in ensuring a full respect of international protection standards –"consequently asylum seekers face a protection lottery."[101] That the presumption of common standards in all member states is illusionary has also been shown by the ECtHR decision *M.S.S. v. Belgium and Greece*.[102]

The EU agency Frontex is another example for the enforcement of the European border regime. The purpose of Frontex is to support the border control of Schengen states in order to effectively prevent illegal entry. The EU agency does not only contribute physically to the EU's (re-)territorialisation, at the same time it enlarges the body of knowledge about people, who move inside or at the borders of the Union.[103] As agency it is only to a very limited extent subject to democratic control.[104] Frontex plays an important role in the coordination of the border control of the external EU borders. The Mediterranean becomes a locus of border controls long before refugees enter the shores of the EU. Many routes in the Mediterranean which used to be the main travel routes for migrants trying to enter the EU are nowadays so closely watched that boats have few

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[97] see, O'Nions, H. (2014), *Asylum – A Right Denied,* p. 78-79.
[98] Chetail, 2016, p. 16.
[99] Feller, 2008, p. 217.
[100] O'Nions, H. (2014), *Asylum – A Right Denied,* p. 93.
[101] Ibid.
[102] *M.S.S. v. Belgium and Greece* (Application no. 30696/09), ECtHR, Judgement of 21 January 2011, O'Nions, 2016, p. 93.
[103] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.*
[104] Fischer-Lecano, A., Tohiditipur T. (2007), *Europäisches Grenzkontrollregime,* p. 1220.

chances to make it to Europe undetected, therefore being at high risk to be intercepted and forced to return.[105]

A great part of the new policies implemented by the European countries and the EU can be subsumed under so-called non-entrée policies. The classical mechanism of non-entrée is to impose strong visa requirements. The Dublin System that built up a deportation chain among the EU states themselves ("first country of arrival") means a legal barrier for large numbers of protection seekers.[106] Another variant of non-entrée is the designation of entire countries as "safe countries of origin", which basically declares everyone from this country unworthy of serious protection.[107] Off-shore migration control policies in order to prevent the geographical precondition for a state's obligations towards refugees are combined with the concept of the "safe third country" instrument. It potentially affects all refugees who have transited a country declared as "safe" on their way to Europe and it is therefore another possibility to limit entry reactively to the procedural door of asylum processes in Europe.[108] Both latter strategies are enforced through bi- and multilateral agreements, for which the EU-Turkey deal is a good example and can be interpreted as the externalisation or extra-territorialisation of protection.[109] The cooperation with third countries leads to the emergence of a complicated regime of law, that for example allows 'playing' with the status of international waters: The question as to whether the non-refoulment principle was also valid in the high seas was the core of the case of *Hirsi Jamma and others v. Italy* at the European Court of Human Rights.[110] The applicants in this case were intercepted on their passage from Libya to Italy by the Italian Coastguard and were broad back to Libya and handed over to the Libyan authorities. The Court had found this practice illegal, and referred to the extraterritorial applicability of the European Convention of

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[105] Schulze Wessel, J. (2016), *On Border Subjects*, p. 50; for example the closure oft he crossings from Marocco to Spain or the route between the islands of Malta and Lampedusa.

[106] Hathaway, J. C. (2005), *The Rights of Refugees under International Law*, pp. 291-296.

[107] Pirjola, J. (2009), *European Asylum Policy*, p. 360.

[108] Gammeltoft-Hansen, T. (2011), *Outsourcing Asylum*, p. 134.

[109] Ibid, p. 129.

[110] *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), European Court of Human Rights, Judgement of 23 February 2012., for an extensive analysis, see Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.*

Human Rights.[111] This can be interpreted as a big success for the claimants and further human rights defenders. However, as Sonja Buckel points out, the problem remains that states intentionally try to avoid such international human rights law regulations by couching illegal practices such as push-backs in terms of an agreement with other non-democratic governments.[112] The desire to maintain organisational borders impel the EU and its member states to protect borders and to use the EU as an institutional venue to pursue external aspects of EU migration and asylum policy. As put by Bauloz et al., ""[c]oupled with the diverse EU measures put in place to prevent asylum seekers' access to the Union, the CEAS takes the form of a labyrinth; obscuring the path to protection, if not the ramparts of 'fortress Europe'."[113] Protection "is not guaranteed in a global homogenous juridical space but materializes as a patchwork of commitments undertaken by individual states, tied together by multilateral treaty agreements".[114] The externalisation and extra-territorialisation of European immigration policies indicates the complexity of today's borders and how they rarely, if at all, coincide with national borders any longer. Not only borders but also detention camps are now ubiquitous within and outside Europe and underline that the border's location is adjustable. When talking about the emergence of a "global regime" of migration regulation, "we do not refer to the emergence of an integrated global political government of migration. We rather refer to a contradictionary and fragmentary formation of a body of knowledge within disparate epistemic and political communities."[115]

Paradoxically, all the described restrictive policies aiming at making it impossible for refugees to reach the territory of the state where they could receive its protection have been announced in a context in which the responsible representatives still invoked the moral importance of a right to asylum and therefore continued to publicly acknowledge the state's legal responsibilities towards refugees.

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[111] *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), European Court of Human Rights, Judgement of 23 February 2012.
[112] Buckel, S. (2015), *The Rights of the Irregularized*.
[113] Bauloz, Ineli-Ciger, Singer, & Stoyanova (2015), pp. 7-8.
[114] Gammeltoft-Hansen, T. (2011), *Outsourcing Asylum*, p. 130.
[115] Cobarrubias, S., Casas-Cortes, M., Pickles, J. (2011), *An Interview With Sandro Mezzadra*, p. 592.

"A kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees […] never reach the territory of the state where they could receive its protection."[116]

Since more restrictive measures were introduced and since issues around migration became a dominant topic in public discourse, they have increasingly been discussed as a question of security. The uncertainty in world politics seems to have blurred all potential threats into one.[117] So-called "moral panics" can be viewed as the premise for the 'securitisation' of migration policies. Moral Panics are discursive events in which migrants and their (potential) presence emerge as a danger for the public safety and order.[118] Such discourses henceforth also support the idea that the border has to be "defended". Policy makers use different strategies to legitimate the practices at the EU borders. The official rationale for the securing of the borders is the reduction of what is called illegal economic migration. What is kept back is that these policies inevitably have a massive effect on people whose asylum claim is most likely to be successful. In a discourse where the key words are "illegal" and "flows of migrants", making anyone who helps these "illegal" migrants becomes a "trafficker" or "smuggler", people are conceived as dangerous and migrants become "crimigrants".[119] The tragedies in the Mediterranean Sea are a result from these shifts of attitude concerning the imaginary of borders and practices of surveillance as 'prevention' as well as strategies to modify the boundaries of international and national law to create a zone of undetermination.[120] Frontex and Eurosur for example operate with the declared aim of securing the borders as well as protecting the security of irregular migrants.[121] Managing the flow of people is combined with the narrative of "preventing the worst", for both the "civilisation in danger" and the people travelling.[122] It is, however, strongly contested as to whether these two goals can be combined.[123] With security being invoked, the process of legitimisation of migration takes a different spin: it also serves as a form of legitimation

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[116] Gibney, M. (2004), *The Ethics and Politics of Asylum,* p. 2.
[117] Haddad, E. (2008), *The Refugee in International Society*, 68.
[118] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.* p. 171.; Dauvergne, C. (2008), *Making People Illegal,*
[119] Bigo, D. (2015), *Death in the Mediterranean Sea*.
[120] Ibid.
[121] Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. xvi.
[122] Bigo, D. (2015), *Death in the Mediterranean Sea*.
[123] Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction* p. xvi.

for the individuals involved in "securing" the border. Border guards believe that they are fighting against human trafficking and for human rights.[124] The securitisation of borders intensifies the idea that they are in fact always insecure, therewith triggering the demand for even more securitisation.[125] Documentary controls and other bureaucratic defences against unwanted migration are constantly being strengthened and rationalized. Nowadays, due to the possibilities of technological progress, the strategies of identification are accelerated utilizing the whole range of advanced computing, including the searchable database,[126] with crucial effects on the function and meaning of borders and border control. [127] The ever-growing "identification-surveillance connection"[128] (more surveillance over both citizen and foreigners) leads to an enforcement of the border.

Three significant trends can be diagnosed in this regard: first, through the just mentioned technologies, the border significantly moves away from the geographical site it is imagined to be. Border checks are not only at entry points of physical frontiers, they form part of a much wider area of monitoring, admission requirements and administrative processes. The border is not only portable (identification documents), but also virtual (databases) and as a result, it is arguably omnipresent.[129] The borders of the EU are virtually connected through the screens of the police, border guards, visa offices etc.[130] A second trend concerns the fact that governments increasingly share the executing of the state's monopoly on the "legitimate means of movement" with other parties. By cooperating with medical professionals and private business, border control does not entirely remain in public hand.[131] Thirdly, border control increasingly targets the human body in forms of description, data files and actual imprints like fingerprints.[132] As a consequence, border control and mobility management have become part of a large comprehensive border surveillance regime that includes both

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[124] Jeandesboz, J., Pallister-Wilkins, P. (2014), *Crisis Enforcement and Control*.
[125] De Genova, N. (2015), *Extremities and Regularities*.
[126] Lyon, D. (2005), *The Border Is Everywhere*, p. 38.
[127] Dijstelbloem, H. (2015), Mediating the Mediterranean.
[128] Lyon, D. (2009), *Identifying Citizen*, p. 5.
[129] Dijstelbloem, H. (2015), *Mediating the Mediterranean*, p. 106.
[130] Lyon, D. (2005), *The Border Is Everywhere*; Zolberg, A. (2003), *The Archaeology of 'Remote Control'*.
[131] Dijstelbloem, H. (2015), *Mediating the Mediterranean*, p. 106.
[132] Walters, W. (2008), *Putting the Migration-Security Complex in Its Place*.

migrants and citizens.[133] The effect of these massive control policies is the illegalisation of parts of the population.

1.5 The Illegalisation of Migration

What became clear on the previous pages: modern subjects are just as bordered as the juridical-political order. The border of the state is central to the production of its citizens, and likewise it produces those who are excluded. Borders do not only delimit states, they also produce 'personhood'.[134] As I have argued there is a close conceptual relationship between states, borders, citizens and migrants. Thus, borders affect everyone, but in particular they affect the lives of migrants, especially poor migrants. For that reason, it is instructive to understand migrants as premier instance of a bordered identity. "A 'migrant' identity is literally triggered, or activated, through the enactment of the border across which an act of 'migration' is said to take place."[135] While borders seem to be given, migrants provoke irritation inasmuch as they seem to challenge the border. The law plays an important role in this process – both as triggering and resulting component.

In the following, I build on Dauvergne's study "Making People Illegal" in order to show the regressive potential of law that was actualized in the last decades with respect to migration. I use this provocative term in order to highlight the unintended consequences that an increasing legalization of an issue can have – contrary to the idea of legalization as a quasi-automatic 'progress'.[136]

The notions of "illegal" people and "illegal" migration have been continuously increasing in their usage; to the point where they are drawing no special attention anymore.[137] The rhetoric of calling human beings "illegal" has transformed from what

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[133] Dijstelbloem, H. (2015), *Mediating the Mediterranean*, p. 106.

[134] Vaughan-Williams 3; In terms of autonomy before the law the modern political subject is conceived of as being bordered, see Butler 2004, Precarious Life, ch. 2.

[135] De Genova, N. (2015), *Extremities and Regularities*, p. 3.

[136] See for example: Zangl, B.; Zürn, M. (2011): *Make Law, not War. Internationale und transnationale Verrechtlichung als Baustein für global governance.*

[137] Dauvergne, C. (2008), *Making People Illegal*, p. 10.

used to be considered a linguistic perversity towards a commonplace today.[138] Nowadays, it is widely accepted that humans themselves can be illegal. In fact, we can talk about a "new discursive turn in contemporary migration talk."[139] Highlighting the term "illegal" at this point instead of other terms used in scientific literature like "irregular", "clandestine" or "undocumented" serves the purpose to underline the direct relation with the law: illegality is essentially a creation of the law.[140] The current crackdown of extra-legal migration makes the rhetoric of illegal human beings as resonating as never before. In fact, each extension of law regulating migration enhances illegal migration by defining increasingly larger categories as being outside the law. What is more, through new technologies of surveillance such laws became considerably easier to enforce.[141] In the absence of law, there can be no illegal migration. Even though the term "illegal" is a creation of the law, it is mostly empty of content inasmuch as it has less meaning than other notions that capture non-citizens for instance "refugee", "resident" and "visitor".[142] Illegal solely describes the fact that law has been broken; however, in the discourse about migration it gains further meaning, above all it gains a pejorative connotation.[143] A businessperson or a backpacker who failed to prolong their visa are usually not perceived as illegals. Illegals are envisaged as destitute, brown and poor.[144] The increasing illegalisation of people through the law and as discursive act demonstrates several crucial developments.

The process of making people illegal reflects an increasingly coherent view according to which there are proper and improper reasons to migrate. Seeking for a better life is not considered a legitimate reason to travel.[145] Furthermore, the predominance of the term "illegal" also underscores a shift in perception regarding the general moral worthiness of those who are labelled as illegal. Arguably, the process of illegalisation

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[138] Ibid, p. 190. Moreover, the fight against the notion has been lost. As Dauvergne states, the „No One Is Illegal" resistance campaigns in many different languages are at once a capitulation. p. 10
[139] Ibid., p. 15.
[140] Ibid., p. 10.
[141] Ibid., p. 15.
[142] Ibid., p. 16.
[143] Ibid.
[144] Ibid.
[145] That is for example expressed through the widely spread distinction between "political refugees" and "economic migrants"; Ibid., p. 18.

coincides with a shift towards a criminalisation of migration.[146] The whole trend of the irregularisation of migration seems to facilitate political and public acceptance of the broad range of restricting policies being implemented, leading to a deprivation of procedural and substantive rights of these individuals.

According to Dauvergne, the latest round of regulation against illegal migrants can be seen as a new facet of the law-nation relationship. Migration laws make national borders meaningful to people. Due to these laws, the community of those living inside the border is constituted. Migration laws have long been the central expression of national assertion. The term "illegal" migrant functions as one aspect of this identity-stabilizing move. The "naturalization and even 'ontological' fixation of migrants' illegality has its counterpart in the naturalization and 'ontological fixation of citizenship'."[147] It further essentialises an us-them line, hence keeping the notion of "nation-ness" alive under the impression of globalisation.[148] At the same time, globalisation allows to construe the idea that illegal migration is a global phenomenon, notwithstanding the fact that the Indonesians trying to reach Australia have little or nothing to do with the Eritreans who cross the Mediterranean Sea. The idea that both are part of the exact same phenomenon enables to talk about "illegals" in transnational discourses and give the term a fixed meaning beyond its legal descriptiveness.[149]

These tendencies of language have profound effects, not only for the affected subjects but also for research practice. The above-outlined development of categorisation from irregular to illegal that I provocatively framed as a 'regressive' tendency in the lagalisation of concepts is hence meant as a warning not to take over categories as they are currently being used in mainstream political discourse. Making policy categories like the "illegal" migrant (as well as demarcations between 'asylum seeker' and 'economic migrant') a starting point of research should be considered problematic because, firstly, the pejorative connotation is deeply inscribed in these terms and is therefore easily re-produced.[150] Secondly, the analytical value of these categories is

[146] Bigo, D. (2015), *Death in the Mediterranean Sea*, p. 67.
[147] Mezzadra, S. (2015), *The Proliferation of Borders and the Right to Escape*, p. 124.
[148] Dauvergne, C. (2008), *Making People Illegal*, p. 17.
[149] Ibid., p. 19
[150] Lindley, A. (2014), *Exploring Crisis and Migration*, p. 8.

severely limited by the political programs feeding into them, as I briefly suggested with the two groups of people that are lumped together in one category ("illegals"). Since their circumstances may vary dramatically, applying one category is at least questionable from a sociological perspective. Migration studies are challenged not to become entrapped in the reification of the "illegality" of migrants as an allegedly self-evident "natural" fact.[151]

1.6 The Transformation of the Border

The border's hegemony as central resource for the legitimacy of migration control describes the condition that the legitimacy of state borders is nearly not unaddressed in public societal discourse.[152] The imaginary of the border is a pattern of deeply anchored orientations and to think of borders is to think as if they were walls, fences, 'enclosures' organising clear-cut differences between the inside and outside of the 'container' that entails society. Irrespective of the missing conceptual and historical accuracy, this narrative has had, and still has, a big legacy for the political imagination.[153] This consensus does not obstruct dispute about the general level of liberality and restriction of the controlling policies – on the contrary, the arrangement of the border is fiercely contested, the consensus itself, however, is not.[154]

As the historical perspective above revealed, the phenomenon of borders as filters for humans – and passports as the corresponding tool to "embrace" citizens and distinguish them from the 'others' – is actually only about one hundred years old. The emergence and hegemonic enforcement of the nation state, the essentialisation of the categories of citizenship and foreigner mutually influenced their formation processes. The long time gap between the emergence of the norm of state sovereignty (Westphalia) and the introduction of generalized immigration control (World War I) highlights a theoretical

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[151] De Genova, N. (2002), *Migrant, 'Illegality' and Deportability in Everyday Life*, p. 420.
[152] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.* p. 171.
[153] Bigo, D. (2015), *Death in the Mediterranean Sea*, p. 58.
[154] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.* p. 171; the only exception being the *Noborder* movement, Ibid.

distinction between two quite separate functions of political borders.[155] From a theoretical perspective, state sovereignty and migration control are not mutually dependant. Only the border and migration as such necessarily appear in a referential context. If there were no borders there would simply be no migration, conceptually speaking.[156] However, the fact that we perceive the border as consisting of these two components – sovereignty and border control – highly informs our understanding of migration.

What has long been excluded from the debate was the possibility that the phenomenon of the border has undergone transformation in contemporary political life[157] – a fact that again expresses the border's hegemony. The cohesive worldview around the border hampers the imagination of borders as subject to change. However, borders changed enormously. On the previous pages, I described how borders are subject to intensification, proliferation and heterogenisation. It has become increasingly difficult to grasp what borders are, but also where they are. Both the nature and location of borders have undergone transformation, "first and foremost [borders] are no longer at the border, an institutional site that can be materialized on the ground and inscribed on the map, where one sovereignty ends and another begins"[158], but, as David Lyon argued "the border is everywhere".[159] It is anywhere where selective controls are to be found, for instance health and security checks. The border and its consequences cross the migrants long before they have the possibility to cross the physical border. These transformations are accompanied by a shift of perception: borders are securitised and migration is irregularised. We have seen the extensive consequences of this shift with the example of the EU. Above all, state policies responding to displacement have been informed by concerns of re-securing of international stability, of geopolitical logics rather than by notions of human rights.[160] Even more, regarding the current practices there is no mediation between moral and law but instead we face a political practice of tactical obfuscation within the overly complex discourse.

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[155] Bauböck, R. (2011) Citizenship and Free Movement, p. 345.
[156] De Genova, N. (2015), *Extremities and Regularities*.
[157] Vaughan-Williams, N. (2009), *Border Politics,* p. 4.
[158] Balibar, È. (1998), *The Borders of Europe*, p. 217/218.
[159] Lyon, D. (2005), *The Border Is Everywhere.*
[160] Haddad, E. (2008), *The Refugee in International Society*, chapter 1.

The EU borders are a highly complex phenomenon, profoundly heterogeneous in their appearance,[161] as well as in the way they are constituted, they operate and in the way they are justified. Regarding European migration control, we can speak of a practice of invisibilisation through two-fold externalisation.[162] "Everything somehow seems less sensitive when it takes place in another country."[163] First off, the northern member states shift responsibility towards the southern member states, whereupon those outsource the means of border control to the North- and West African countries (alongside these bilateral agreements there is an increasing number of agreements between the EU and third countries). In general, looking at the European migration regime, one faces a complicated coexistence of different layers of law, which makes the notion of multilevel governance misleading. Many authors have therefore suggested to call it "assembled" or "superimposed".[164] There is no dualism EU vs. national states, instead, it is a highly heterogeneous but closely intertwined ensemble of national and European apparatuses that emerged.[165] It is a regime that produces violence and death, while all actors strongly deny responsibility for these actions and often engage in counter-discourse according to which they are trying to protect others.[166] While these transformations of borders is a global process, the EU remains a specific case inasmuch as it represents a "fragmented and syncopic process of constitutionalisation",[167] a system where policies are concurrently organised in the domestic and transnational sphere and therefore occur in an overly complex structure of responsibility.[168] The EU's specifity lies despite the parallels to the global sphere in its historically new type of borderland, which is a zone of transition.[169] The EU has insofar "certainly become – and turned itself into – a space for experimentation, a laboratory for the theory and practice

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[161] Even the NGO narratives reproduce the imaginary of solid borders as containers and therewith simplify the complex comglomeration on which the border and the according actions are justified. Bigo, D. (2015), *Death in the Mediterranean Sea*, p. 59.
[162] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik.*
[163] Lavenex, S. (2006), *Shifting Up and Out*, p. 329.
[164] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik*, Bigo
[165] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik*
[166] Bigo, D. (2015), *Death in the Mediterranean Sea*, p. 60.
[167] Buckel, S. (2015), "The Rights of the Irregularized, p. 151.
[168] Another specifity: historical: postcolinial etc.
[169] Balibar, È. (2003), *We the People of Europe*.

of the border, for better or worse."[170] Europe has thus become a crucial example of how irregularisation of migration correlates to the immaterialisation and proliferation of the border.[171] Human rights standards and protection intermingle with concerns of security and economic calculations in the European border zones.[172]

The immense crackdown of restrictive immigration regulation has led to the emergence of the "illegal", both as subject and as object of these laws. The meaning, however, moved well beyond its legal definition and paradigmatically stands for the process of the demonisation of migration. The discursive usage makes an accurate social and political understanding of this type of migration nearly impossible.[173] For extra-legal migrants seeking protection the status as "illegal" is almost insurmountable and "will eventually prove to be one of the most important tests of the global spread of human rights".[174]

It is important to grasp what borders are, and to understand their highly pervasive nature. The border's complex composition is not explicable by binary explanations such as inclusion-exclusion and open-closed, inside-outside. The multiplication and heterogenisaton of borders in the contemporary world challenges the clear-cut distinction of outside and inside that is one of the central assumptions of international law and politics.[175] In order to depict the dynamic process and flexibility of border zones and their control, Brambilla suggested to not talk about "borders", but about "bordering".[176]

There is a real danger of a growing disjuncture between the increasing complexity and differentiation of borders in global politics on the one hand, and yet apparent simplicity

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[170] Jansen, Y., Celikates, R., de Bloois, J. (2015), *Introduction*, p. xv.
[171] Bialasiewicz, L. (2011), *Introduction: Europe in the World?;* Bialasiewicz, L. (2012), *Off-Shoring and Out-Sourcing the Borders of Europe.*
[172] Mezzadra, S. (2015), *The Proliferation of Borders and the Right to Escape*, p. 129.
[173] Dauvergne, C. (2008), *Making People Illegal*, p. 19.
[174] Ibid.
[175] Mezzadra, S. (2015), *The Proliferation of Borders and the Right to Escape*; De Genova, N. (2015), *Extremities and Regularities.*
[176] Brambilla, C. (2010), *Borders still Exist! What are Borders?*, p. 75.

and lack of imagination with which borders and bordering practices continue to be treated on the other hand.[177]

The aim of this chapter was to critically question both the logic and practice of borders in a general sense. Attention was drawn to their production as supposedly singular entities and the power relations that derive from that. Today, the multiplication of borders goes hand in hand with the normalisation of the idea that migration is an irregular phenomenon and should be managed strictly. We have seen that responsibility is at crucial stake throughout the whole discussion. The imaginary of the border plays an important part in this process. "The border has become a privileged signifier: it operates as a sort of meta-concept that condenses a whole set of negative meanings, including illegal migration […] At the same time, the border holds out the promise of a solution to these hazards".[178] As long as the border is subject to such a hegemonic agenda, it seems very unlikely that there will be a change in the future. To which extent can our normative concepts of democracy and human rights unfold emancipatory potential towards the situation of refugees under such circumstances? Theoretical potential of these concepts, themselves deeply pervaded by the hegemonic default of the border, will be discussed in the following chapter.

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[177] Vaughan-Williams, N. (2009), *Border Politics,* p. 6.
[178] Walters, W. (2008), *Putting the Migration-Security Complex in Its Place*, p. 174.

2 Critical Perspectives

2.1 Democracy

The border and its stability have long been taken for granted as a precondition of both modern political concepts and institutions. As we have seen above, processes of proliferation, heterogenisation and intensification led to the border moving from the outer edge of the polity to the centre of the political space – a process that largely went unnoticed due to the border's 'deep hegemony'.

> Whereas traditionally, and in conformity with both their juridical definition and „cartographical" representation as incorporated in national memory, they should be *at the edge of the territory*, marking the point where it ends, it seems that borders and the institutional practices corresponding to them have been transported *into the middle of political space*.[179]

Borders produce institutions and they shape multifarious bordered socio-political identities: the citizen and, contemporaneously, the refugees.[180] In one way or the other, borders do cross everyone, including those who never cross borders.[181]

From the viewpoint of sovereignty, it becomes clear that as the state became nationalised, so the refugee became the vital 'other'. Citizenship is thus intimately related to the political space of a territorially defined state and whoever falls out of this space becomes a migrant.[182] Just as the illegal migrant is the citizen configured from its juridical status inside a particular state.[183] When talking about migration and the legitimacy of immigration policies, it is crucial to keep this relationship in mind and not to perceive the refugee as a pre-existing figure.[184]

In this chapter, I want to examine the relationship between democracy and the (negatively) affected of an increasingly bordered world. Democracy can be considered as *the* emancipatory project for the people to exercise the rights they (supposedly) have. Democracy as a concept as such is itself dedicated to the project of human rights. Constitutive of democratic institutional arrangements is the idea that every act of state

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[179] Balibar, È. (2003), *We the People of Europe*, p. 9.
[180] De Genova, N. (2015), *Extremities and Regularities*, p. 3.
[181] Ibid., p. 5.
[182] Haddad, E. (2008), *The Refugee in International Society*, chapter 2.
[183] De Genova, N. (2015), *Extremities and Regularities*, p. 3.
[184] As Campbell writes: "[…] in considering the issue of where we go from here there is a tendency to uncritically accept a particular story of how we got there." Campbell, D. (1998), *Writing Security,* p. 17.

coercion must be justifiable in the lights of the political community's norms and values.[185] Accordingly, every legal act of a democratic constitutional state that constrains the rights of people must meet certain criteria of democratic legitimacy and comply with human rights – and must be justified according to the standards these concepts set. Just as citizenship, democracy is not a stand-alone concept, both these interconnected concepts are highly produced by – and themselves continuously reproduce – a world of borders, whose inevitable effect is the creation of refugees and the political struggles surrounding them. It is therefore the question to what extent democracy can unfold its emancipatory potential with regard to the precarious situation of migrants.

There is a general debate in political theory about whether a politics of immigration is under most circumstances *morally* justifiable at all.[186] The first to address problems of membership and exclusion was Michael Walzer, providing a justification for an unlimited autonomy for the democratic sovereign to regulate immigration.[187] Such an absolute right of self-determination of political communities has been more and more called into question.[188] There is a growing subfield of research addressing the referential context of borders, citizenship and migration through exploring citizenship in terms of the citizen-alien-relationship.[189] In the following, I want to introduce two of these positions. A critical comparison of the works of Seyla Benhabib and Joseph Carens shall serve a mainly heuristic purpose. To discuss the issue of rights of immigrants from both their perspectives will help to understand what is at stake when states exercise their national sovereignty through regimes of strict immigration control. This includes not only moral reflections, but a distinct understanding of what democracy requires.

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[185] Carens, J. (2013), *The Ethics of Immigration*, p. 271.
[186] This debate starts with the two contrasting statements of Michael Walzer and Joseph Carens in the 1980s, see Bader, V. (2005), *Ethics of Immigration*, p. 331.
[187] Walzer, M. (1983), *Spheres of Justice,* chapter 2.
[188] Today the debate ranges, among others, between "weak cosmopolitanism" (D. Miller), "fairly open borders" (V. Bader); "porous borders" (S. Benhabib), open borders (J. Carens).
[189] Walters, W. (2010), *Deportation, Expulsion, and the International Police of Aliens*, p. 71.

Seyla Benhabib's work is dedicated to the search for mediation between the pervasive tensions of universalism and particularism. For Benhabib, the phenomenon of transnational migration brings to the fore the crucial dilemma of a state-centred international order as a contradiction between "sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other."[190] In her understanding, this is indeed *the* constitutive tension of the modern democratic constitutional state. The insight that democratic governance is unavoidably particular leads, on the basis of the Habermasian idea that basic human rights and popular sovereignty are co-original and, conceptually speaking, mutually dependant,[191] to the question of how popular sovereignty and human rights can be reconciled with one another after all. Human rights only acquire definite content, and only become enforceable to the extent that they are enacted through the governing will of the particular demos. However, this will can only count as being legitimate as long as the universal character of these rights is incorporated. Based on the diagnosis, that "[n]ew modalities of membership have emerged with the result that the boundaries of the political community, as defined by the nation state system, are no longer adequate to regulate membership"[192], Benhabib aims to identify "principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers, into existing polities"[193] She thereupon suggest a theory of 'just membership' following Hannah Arendt's notion of "the right to have rights". In

> recognizing the moral claim of refugees and asylees to *first admittance*; a regime of *porous* borders for immigrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the right of every human being 'to have rights', that is, to be a *legal person*, entitled to certain inalienable rights, regardless of the status of their political membership.[194]

The "paradox of democratic legitimacy" remains unsolvable and it is therefore not Benhabib's central claim to give preference to one of the moral alternatives (democracy or human rights), but to conceive the dilemma as constitutive for any democratic constitutional state and to claim that universal norms have to be resituated in a particular context. Whatever the conceptual problems of the territorial nation-state

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[190] Benhabib, S. (2004), *The Rights of Others*, p. 2.
[191] Habermas, J. (1999), *Between Facts and Norms*.
[192] Benhabib, S. (2004), *The Rights of Others*, p. 1.
[193] Ibid.
[194] Ibid., p. 3.

system might be, discussions about the moral adequacy of immigration policies have to be located in the democratic community itself. But at the same time the moral, universal dimension has to be taken into account by those who participate in public normative discourse. Benhabib states: "From a universalist and cosmopolitan point of view, boundaries, including state borders and frontiers, require justification. Practices of inclusion and exclusion are always subject to questioning from the standpoint of the infinitely open moral conversation".[195] Hence, the paradox of democratic legitimacy has to be renegotiated through deliberation in the public sphere, a process that Benhabib terms as "democratic iterations". These are defined as "complex processes of public argument, deliberation, and exchange through invoked and revoked, posited and positioned, throughout legal and political institutions, as well as in associations and civil society."[196] She links this idea to the by Frank Michelmann introduced concept of "jurisgenerative politics": it is by means of a public sphere where the "others" are actually present and have the possibility to participate that the paradox of democratic legitimacy is meaningfully confronted. Only after "new groups claim that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation […] we come to understand the fundamental limitedness of every rights claim within a constitutional tradition s well as its context-transcending validity."[197]

Three basic assumptions serve as fundament of Joseph Carens' theory: first, that there is no naturally given social order; second, that every human being is of equal moral worth and third, that restrictions on any freedoms and human rights require a moral justification.[198] This is, as Carens puts it, the "shared understanding"[199] of the "democratic principle"[200] and can therefore be assumed as the basis of any discourse within "every contemporary democratic regime".[201]

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[195] Benhabib, S. (2007), *Democratic Exclusions and Democratic Iterations*, p. 451.
[196] Benhabib, S. (2004), *The Rights of Others*, p. 179.
[197] Benhabib, S. (2004), *The Rights of Others*, p. 197.
[198] Carens, J. (2013), *The Ethics of Immigration*, p. 226.
[199] Ibid., p. 5.
[200] Ibid., p. 2.
[201] Ibid., p. 227.

Starting from this, Carens presents us in his book *The Ethics of Immigration* with a two-tier-approach. In the first part of the book, he focuses on the existing immigration control practices, thereby assuming the factual state's right to discretionary exclusion and, on this basis, examines the normative justification of such practices. In the second part, respectively in the last two chapters, he develops his widely known 'utopian'[202] argument for open borders through challenging the general assumption, that sovereign states should have the right to practice exclusion. With his 'theory of social membership', Carens points out that social membership has to be distinguished from citizenship. A person does not become a member of society by means of legal citizenship, but through living in the society's context for an extended period of time, forming an identity and personal attachments in that society. Carens convincingly shows that this in fact is the situation of different groups of migrants currently living inside democratic societies, including legal permanent citizens, temporary workers, asylum seekers and illegal migrants. He argues that social membership constitutes moral claims to a row of rights, such as access to public education, security of residence and limited welfare benefits. These "membership-specific" rights surpass the minimal protection of human rights, but are not as comprehensive as the privileges of legal citizens. In evaluating the scope of the different types of rights, Carens is able to identify some normative problems with which democratic states are confronted. For instance with the case of irregular migrants constantly being in fear of making use of their basic human rights, Carens unveils the state's moral obligation to make the enjoyment of such formally guaranteed rights possible. He suggests concrete measures for the improvement of such situations.[203] Already in the first part of the book, Carens shows, that there can be no convincing justification to denying rights to members of their respective society: "The fact that irregular migrants are entitled to general human rights shows that democratic norms and standards limit the means that may be used to achieve immigration control, even though these limitations make it more difficult to pursue the goal of immigration control."[204] This is underlined by the important observation that democratic constitutional states generally acknowledge that some of

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[202] Ibid., p. 255.
[203] Carens, J. (2013), *The Ethics of Immigration*, p. 129-147.
[204] Ibid., p. 132.

their practices of sovereignty as located in a grey area. It is for example a general democratic rule that violators of immigration law are not treated as criminals.[205] Subsequently, Carens addresses the question as to whether and how democratic states ought to practice their sovereignty. Here, he aims to challenge the "conventional view, that states are morally entitled to control admissions".[206] Carens claims that open borders facilitate the right to free movement, which all individuals possess because of their self-directing autonomy and their equal moral worth.[207] The rationale becomes especially vivid through the reference to medieval feudalism that Carens presents as comparable to the modern birth right privileges protected by democratic states.[208]

What is more, Carens also directly responds to the theories, which justify closed borders by locating the issues he raises only within the democratic community; Carens unmasks this widely held presupposition of the significance of borders as nothing more than a controversial assumption. In chapter 1, we have seen that the all-pervasive character of the border leads to the situation where the unquestioned background assumption about allegedly given borders are built into normative arguments.[209] As Carens puts it:

> There is nothing in the nature of sovereignty that prevents a democratic state from recognizing that outsiders are morally entitled to enter and settle on its territory and that it has an obligation to permit them to do so, at least under normal circumstances. It may be unlikely that democratic states will agree to recognize such a claim, but that does not make the idea intrinsically incompatible with sovereignty.[210]

As shown above, both Seyla Benhabib and Joseph Carens challenge the widely held presupposition of the intrinsic moral significance and legitimacy of national boundaries. The vague substance of Benhabib's theory of just membership has provoked various criticisms. Angelia Means declares: "The difference between her [Benhabib's] principle of closure and the principles of closure provided by political liberalism and left communitarism […] remains ambivalent."[211] This argument is also supported by Michael Walzer who was heavily criticized by Benhabib for not taking into account the

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[205] Ibid., p. 131,132.

[206] Ibid., p..

[207] Ibid., p. 227.

[208] Ibid., p. 226.

[209] see, chapter 1.1 and 1.2, as well as Bauböck, R. (2011), *Citizenship and Free Movement,* p. 344.

[210] Carens, J. (2013), *The Ethics of Immigration*, p. 271.

[211] Means, A. (2007), *The Rights of Others,* p. 410.

demands of the excluded thoroughly enough. Walzer postulates: "If 'porous' means not 'open', then it must be the case that, at some level of political organization, there exists a right 'to control and sometimes restrain the flow of immigrants'. But that is my position, which she [Benhabib] quotes in order to illustrate the 'civic republican' position she means to dispute."[212] Indeed, especially when contrasted with Carens' clearly formulated moral imperative of open borders and concrete ideas of political reform, Benhabib's idea of democratic iterations and porous borders may leave the reader unsatisfied. She problematizes borders and their control, but in the end, she has to reaffirm their significance and thus the status quo. Carens, with his concrete policy oriented approach on the other hand, provides the reader with valuable practical arguments. "By assuming the state's right to exclude through most of the discussion, he shows that his views on the rights of resident migrants can be persuasive *even* in the presence of regulated borders."[213] Hereby he brings together "concrete policy and abstract theory in a powerful form of political criticism."[214] With the help of his two-tier approach, he escapes the possible problem of theories that abstract from the character of the state and loose explanatory power.[215] In his theory of social membership Carens, however, could profit from more clarification. With Benhabib's claim of political membership in mind, one could ask whether this makes enough of a difference: even if the gap between citizen and non-citizen membership is not morally as significant as commonly thought, political membership still remains the central category for an access to rights. Seyla Benhabib thus succeeds in capturing the problem as one of democratic theory. She locates the perhaps central dilemma of democracy. In order to organise *popular* sovereignty, i.e. produce legitimate laws in a democratic process, a defined demos is needed, which on the other hand necessarily leads to the exclusion of "others".[216] In his "political theory from the ground up"[217], Carens explicitly does not construct his ideas on the basis of a theory of democracy and precisely because of that, he seems to be able to solve the dilemma, well-diagnosed by Benhabib, between human

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[212] Walzer, M. (2001), *In Response: Support for Modesty and the Nation-State*, p. 30.
[213] Lim, D. (2014), *Is membership always social?*, p. 448.
[214] Whitt, M. (2014), Book Review. *The Ethics of Immigration*, p. 140.
[215] Gibney, M. (2004), *The Ethics and Politics of Asylum,* p. 16.
[216] Habermas, J. (1999), *Between Facts and Norms*; Benhabib, S. (2004), *The Rights of Others*.
[217] Carens, J. (2013), *The Ethics of Immigration*, p. 9.

rights and democracy, universalism and particularism. As Carens makes clear, he is not at all concerned with the immediate feasibility of open borders, but rather with their status as a moral idea or a requirement of justice.[218] This, however, makes him miss out on addressing the crucial question on how to maintain democracy in an open-bordered world.

Thus, both approaches serve as a crucial reminder that our responsibilities as theorists, but also as members of multicultural democratic societies and welfare states is to confront rather than flee from the tensions and paradoxes inherent in our socially, politically and culturally complex world – the "deep hegemony" of the assumption of legitimate borders is at least to be questioned and therefore ought to be challenged in democratic discourse. The theories examined here not only illustrate the contingent character of borders, but provide us with the illuminating insight that it is a normative requirement of democracy itself to call the right to exclusion into question. In doing that, their theories are directing our attention to a crucial issue of global justice. Both Carens and Benhabib, remind us of the important fact that individuals rather than peoples should be the subject of moral considerations, inasmuch as "peoplehood is an aspiration, […] not a fact."[219] With their sophisticated approaches, the two authors make visible the normatively and historically contingent character of our bordered world and the effects that stem from it. Against the deep hegemony, the authors reclaim the open and controversial character of national boundaries and empower people to address informed criticism to the question of the normative significance of borders.

On the basis of the insights gained in chapter 1, namely that conceptually speaking there is a reciprocal relationship between the state, borders and migrants, there is arguably an added moral obligation imposed on states by the existence of refugees,[220] that is taken seriously by Carens and Benhabib. The moral claims of refugees are grounded in their loss of citizenship. Even when they are not stateless in the legal sense, they can no longer avail themselves of the protection of their basic rights as citizens. Countries whose political system derives its legitimacy from turning subjects into citizens have a

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[218] Carens, J. (2013), *The Ethics of Immigration*, p. 255.
[219] Benhabib, S. (2004), *The Rights of Others*, p. 82.
[220] Haddad, E. (2008), *The Refugee in International Society*, p. 60.

moral obligation to help those who have effectively been deprived of their citizenship.[221] This obligation becomes notably important for democratic states, as the idea of human rights, i.e. rights that belong to any person in the world, is inherent to the democratic principle. Irregular, illegalised, migrants being entitled to human rights like any other person, together with the fact that democratic norms and standards are necessarily devoted to these human rights do constrain the possibilities in practicing immigration control. This perspective also allows criticising the particular practices that are currently occurring at the frontiers of the European Union. In the following, I illustrate this argument with an example. The EU agency Frontex illustrates well how democracy and human rights are undermined not only by specific practices at the border but by its expanding character itself. Frontex' structure is extremely opaque. With several hundred staff it is not only a policing institution but strategic think tank and organizational platform at the same time. While the operations are officially operated by member states, they are planned in Warsaw, where Frontex has its headquarter. For this, Frontex analyses and coordinates operations, preventive and responsive. This organizational setup leads to a staggering lack of democratic control.[222] Firstly, the necessary transparency for citizens is not given. Secondly, there is hardly any accountability, since the responsibility is share between the implementing member states and the strategists in Warsaw, the latter increasingly having their own staff at their disposal.[223]

The protection of European borders has furthermore been increasingly militarised over the last years. Frontex uses helicopters, robots, airplanes, and other high-tech features in order to patrol the sea. Additionally, Frontex assists deportations, a practice that could be used as an additional example for the absolute denial of democracy and human rights to specific groups of people. Instead of using public and transparent procedures, they often take place in the middle of the night and are kept away from the public sphere

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[221] Baubök, R. (2011), *Citizenship and Free Movement*, p. 366, "Asylum is a substitute for citizenship, and it must include an offer of future citizenship in the host country if a refugee has no return option or has become a long-term citizen."
[222] Fischer-Lescano, A., Tohiditipur T. (2007), *Europäisches Grenzkontrollregime*, p. 1220.
[223] Ibid.

without further legitimation.[224] Not only their violent character needs justification in a democratic system. Through such acts, the border is being defined and produced and likewise it is a defining predicate of citizenship itself.[225] The necessary public scrutiny and discourse is unavailable in the case of Frontex not only because of the intransparent and unaccountable organizational structure and some questionable practices, but also because of the fact that many key aspects of migration law are rather subjected to the executive than to the democratic law-making process.[226] The lack of democratic control has also to do with the incremental expansion of its mandate. Since it was founded in 2004 when it was only designed to guard the physical European borders, the organization has received more and more authority, without a growth in institutional control.[227]

Looking at this agency at a glance already shows the big problems of border politics in current Europe and their inconsistency with basic democratic principles and human rights. Practices outside every law such as "push-backs" in foreign territories constitute their extrajudicial branch. Lastly, the outright avoidance of being a target for asylum-seekers undermines the fundamental principles of the EU as a law-based community: If there is an asylum-law, then there must be a free and fair trial and a serious possibility to claim asylum. The externalisation, avoidance and illegalisation that I described before are thus outright undemocratic for they de facto abolish the right to asylum. I hope to have shown that this is not only a problem of current policy but that these policies are an extreme form of a system that is generated by a unquestioned (hegemonic) border agenda. "Borders are the *absolutely nondemocratic*, or „discretionary", *condition of democratic institutions*. And it is as such that they are, most often, accepted, sanctified, and interiorized."[228]

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[224] Scherr, A. (2015), *Abschiebungen. Verdeckungsversuche und Legitimationsprobleme eines Gewaltakts*,; Even upon request, it is usually not possible to get access to information about who and when deportations take place.

[225] Deportations are a "technology of citizenship", Walters, W. (2010), *Deportation, Expulsion, and the International Police of Aliens*, p. 100. because they are "membership defining" act. Bridget, A., Gibney, M. J. & Paoletti, E. (eds.) (2013), *The Social, Political and Historical Contours of Deportation*, p. 2; De Genova, N. (2010), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*,

[226] Dauvergne, C. (2008), *Making People Illegal*, p. 58.

[227] Forschungsgruppe Staatsprojekt Europa (2014), *Kämpfe um Migrationspolitik,* p. 152.

[228] Balibar, È. (2003), *We the People of Europe*, p. 109.

2.2 Human Rights

As I outlined above, refugees and migrants are, structurally speaking, effects that crucially result from the establishment of the modern system of sovereign nations states, among which a great number fails to guarantee the protection of all of their citizens. Caught in-between different border regimes that reproduce them as a category fundamentally alien to our current state-centred (and thus bordered) world, irregular migrants are effectively deprived of their place in the world, being "without access to any of the rights or entitlements that constitute the prerogatives of citizenship".[229]

Precisely against this background, human rights have historically evolved to limit the infinite and potentially destructive power of state sovereignty and the particularities of national legislative acts. Conceptually, human rights most often express urgent moral concerns that must be respected in any part of the globe and are supposed to protect the basic needs and interests of everyone. In today's predominant understanding, they are conceived as a special class of weighty moral demands that are unrestricted as well as broadly sharable[230] – human rights are rights that one is entitled to solely by virtue of being born human. From this perspective of ethical justification, human rights are thus universally valid with respect to both space and time. It was first and foremost with the Universal Declaration of 1948 that human rights became the primary political idea and most significant language of struggles for political emancipation and social justice.[231] Since then, the absence of human rights violations has served as the essential public standard of political legitimacy. After the end of the Cold War, increasing legal codification expressed a considerable expansion both in the normative scope and the political vitality of human rights practice and advocacy.[232] There is for example persuasive evidence that domestic courts extend human rights protection to immigrants and nationals equally.[233] Of course, human rights today are far from being a coercive

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[229] Butler, J. & Spivak, G. C. (2007), *Who Sings the Nation-State: Language, Politics, Belonging*, p. 46.
[230] E.g. Pogge, T. (2002), *World Poverty and Human Rights*, pp. 52-70.
[231] Menke & Pollmann 2007, pp. 9-22. According to Samuel Moyn (2010), however, international human rights as we know them are an even more recent phenomenon, having emerged not until the mid-1970s.
[232] See for example Beitz, C. (2009), *The Idea of Human Rights*.
[233] Sassen, S. (1996), *Losing Control? Sovereignty in an Age of Globalisation*.

system of law. Speaking of the formalization, proliferation and legal codification of human rights points to the emerging normative authority of the conventions and international human rights courts and other treaty bodies that are today, by means of the dynamic interpretation,[234] dealing with the various demands for human rights. In this regard, the proliferation of human rights in the form of legal norms has become an important marker of the contemporary era of globalization.

However, Catherine Dauvergne reminds us that the the contemporary crackdown on extra-legal migration discloses that under the impression of things' and states' liquefaction, "immigration laws and there enforcement are increasingly understood as the last bastion of sovereignty"[235], being closely linked up with the nation state's identity.[236] Again, the border and its sovereign control is perceived as something self-evident, and as something indispensable to protect the culture and the respective values of the own political community: a means to preserve stability, one could say, in the times of globalization. Democratic legislation thus plays a key role in the on-going process of the (re-) creation of a bordered world, put into use in order to police the community's frontiers.[237] In this process, and with regard to the devastating consequences on the side of those who are often forcefully excluded, the border's 'deep hegemony' helps to de-politicize the matters in question: migrants drowned while trying to cross the Mediterranean Sea are treated as 'tragic' incidents, but rarely viewed as a result of distinct political action (and the offer of better help and observation on the spot rather restores faith in the normal order of national, international and supranational legislation than to profoundly challenge it). At the same time, policies regulating migration are usually justified as basically legitimate when they comply with current international human rights law.

[234] Follesdal, A. (2013), *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*; Zysset, A. (2016), *Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society'*.
[235] Dauvergne, C. (2008), *Making People Illegal. What Globalization Means for Migration and Law*, p. 2.
[236] Ibid, p. 47.
[237] Ibid, p. 48.

In the face of these developments, the central question is as to whether human rights law is effectively protecting the interests of those outside, while democratic legislation that governs migration through a variety of institutional frameworks simultaneously shores up existing borders, constantly re-producing these very outsiders by means of legal rationality. What is at stake is nothing less than law's emancipatory potential.[238] As was illustrated, the contemporary international order is still and first and foremost a territorial order of states, which regulates their duties and rights accordingly. It was only after the Second World War that the ways a state treated its own citizens became a matter of legitimate concern for all other states. The United Nations Charter individualised the system of rights under international law.[239] States do not exist apart from people, thus international relations cannot be divorced from questions of human morality. The moral rights of individuals against the political community they belonged were subsequently legally enshrined in national constitutions as well as international declarations, covenants and treaties.[240]

Furthermore, international law is becoming increasingly important and more authoritative.[241] In the case of migration, however, it has rather little to say,[242] the exception from the rule being the Refugee Convention. Under the auspices of international law, individual states are by large free to open and close their border, determining who may enter their territory (migration law) and who may become full members (citizen law), whereas refugee law neither does provide a right to enter, nor a right to membership in the full sense of the word. Ever since the system of nation states arose in its modern form, states have retained the right to discretionary regulate entry and membership as a fundamental part of their sovereignty. Emigration continues to be a matter of human rights, whilst immigration (that includes the right to actually be granted asylum) remains a matter of national sovereignty; the refugee has the right to leave her state to seek protection, yet nowhere is the right to enter another state and be granted such protection entirely guaranteed. In this regard and from the viewpoint of the

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[238] Ibid, p. 31.
[239] Haddad, E. (2008), *The Refugee in International Society*, p. 31.
[240] Sassen, S. (1996), *Losing Control? Sovereignty in an Age of Globalisation.*
[241] Dauvergne, C. (2008), *Making People Illegal. What Globalization Means for Migration and Law*, p. 35.
[242] Ibid., p. 50; See a general discussion regarding this question, Chapter 3.

relationship between immigration politics and human rights, the constraints of the Geneva Convention of 1951 are rather minimal. It is often overlooked that the rights listed by the Convention are only granted once the status of being a refugee has been determined – the asylum seeker whose application is processed is not protected (the non-refoulment principle being the exception to this rule). One important concern is thus the tendency of researchers and policy-makers to reify the Convention "as if this marked the beginning of both the contemporary refugee flows and any kind of formal international protection regime".[243] Even though migration policies are to comply with current international human rights law, "the banner of sovereignty still waves ominously over all human rights issues […]. Sovereign states accept international human rights standards, if they wish to, to the extent they wish to."[244] Migration law thus brings to the fore the pivotal tension between the particularism of a sovereign, self-interested state, and the claimed universality of human rights commitments.[245] In order to function as counter-hegemonic techniques that allow to articulate concrete experiences of injustice in the first place, human rights have to be inscribed *somewhere*, that is they have to take on a particular, i.e. a legal form from which political action can take off. In her remarks on the 'Aporias of Human Rights', Hannah Arendt shows with great intellectual rigor how precisely those who are deprived of a place in the world which would make opinions significant and actions effective do not who have the rights they have qua being a human being. Rather, the effective protection of human rights depends crucially on the membership in a political community, and thus upon legal recognition. To loose one's political status becomes identical with the expulsion from humanity altogether. There is a vital link between state, citizenship (or, dangerously, nationality) and having a right. In her precarious position of being in-between sovereign states, the refugee or the stateless does not belong to a particular political community and thus does not have the legal and often the political, performative means of claiming the rights associated with membership in a specific community. Since Arendt's original problematization, of course many changes in the global political architecture have been put in place. With the European Court of Human Rights or the International Criminal

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[243] Haddad, E. (2008), *The Refugee in International Society*, p. 4.
[244] Henkin 1999: 5
[245] Noll, G., Hansen, J. (1999), *Non-Cumminitarians*, p. 360.

Court as the most significant contours of the emerging post-national order, a powerful regulation and prevention system is being implemented. Nevertheless, Arendt's insights as well as her famous declaration of a fundamental human right to political membership does not suggest a new institutional model. Even in a cosmopolitan framework of international law, the aporias that arise from the constitutive tensions between human rights and their institutional protection would not be fully resolved, since a 'right to have rights' cannot be understood as resulting from legislative acts. The law's capacity is intrinsically limited in this regard – even in (or because of?) the "hyper-legalized times" we live in.[246] In the concluding remarks to the British edition of the *Origins of Totalitarianism*, she writes:

> The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself, which depends upon belonging to some human community […]. The Rights of Man can be implemented only if they become the prepolitical foundation of a new polity, the prelegal basis of a new legal structure, the, so to speak, prehistorical fundament from which the history of mankind will derive its essential meaning in much the same way Western civilization did from its own fundamental origin myths.[247]

Arendt's insistence on a "prepolitical foundation", a "prelegal basis", and a "prehistorical fundament" points to the dual nature of human rights as moral *and* legal entitlements. In the context of their increasing legal codification and formalization, there seems to be a strong tendency of conceiving human rights as legal rights, that is a positive enactments of a political sovereign, as concrete and verifiable rules. But, as for example Jürgen Habermas reminds us, human rights are endowed with a "Janus-faced" nature, "looking simultaneously toward morality and the law".[248] Human rights belong to a coercive legal order. At the same, human rights are moral rights insofar they claim strict universal validity (cf. Flynn); they hold an intangible universal promise that is not reducible to the institutional arrangements of a particular community and its political and social order. And it is precisely this dual nature [that] makes human rights strong and accounts for their extraordinary appeal.

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[246] Dauvergne, C. (2008), *Making People Illegal. What Globalization Means for Migration and Law*, p. 92.
[247] Arendt, H. (1951), *The Burden of Our Time*, p. 439.
[248] Habermas, J. (2001), *Remarks on Legitimation through Human Rights*, p. 118. See also Flynn, J. (2003), *Habermas on Human Rights: Law, Morality, and Intercultural Dialogue.*

The recourse to Arendt helps us to link the moral dimension of human rights to their political function. On this view – and in contrast to the presupposition of some sort of objective "moral reality" of genuine human rights, which provides normatively salient standards by which the legitimacy of any political regime at any time can be evaluated[249] – the discursive power of human rights and their alleged critical potential becomes of great importance. Human rights are the outcome of social struggles and function as placeholders for the public thematisation of forms of oppression and exclusion that are permitted by various systems of rule. At the same time, human rights are themselves subject to new interpretation and constant reappropriation.[250] In this conception of human rights, practices of marginalization are brought to light through the invocation of the language of human rights and its emphasis on political self-determination; human rights thus provide a fundamental standard of internal as well as external legitimacy "that stems from political discourse itself".[251] From the perspective of their dual nature according to which human right initiate a normatively substantive process that challenges and eventually reconfigures given social and political divisions, the question arises how increasing legal codification relates to this performative force of human rights. Does the formalization and proliferation of international human rights norms enhance the legitimacy of the claims of the vulnerable and the prospects for realizing their interests, or is the moral-political dimension of human rights increasingly absorbed by the types of subjectivity and the forms of knowledge these legal norms secure?

In what follows, I want to argue that in the field of migration, human rights claims are often effectively countered with reference to the legality of the state's actions. With regard to the EU, all member states are in general obliged to protect migrants fleeing serious human rights violations. The non-refoulment principle is definitive not only of the Refugee Convention, but also of the European Convention of Human Rights and other EU policy documents. However, and despite a strong human rights rhetoric in the

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[249] E.g. Tasioulas, J. (2007), *The Moral Reality of Human Rights*.
[250] Kreide, R. (2015), *Between Morality and Law: In Defense of a Political Conception of Human Rights*.
[251] Ibid., p. 12.

implementation process of the Common European Asylum System (CEAS),[252] the specific policies adopted under its umbrella have been mainly hostile towards refugees.[253] Pirjola observes that with the establishment of CEAS, the EU "tries to ensure universal normativity of the refugee law standards, but at the same time it attempts to ensure the law's concreteness by distancing it from the human rights law."[254] In practice, the EU and its member states more and more revoke the human rights obligations they officially acknowledged. The diverse strategies of non-entrée are a crucial example here. These initial acts of hindering refugees from entering the sovereign territory is not addressed explicitly by the Refugee Convention or other documents, but is arguably covered, since refoulment is prohibited in "[…] any manner whatsoever."[255] Push-backs can be seen as a resonant chapter in the decline of refugee law. States repeatedly used and continue to use the lawless space on the high seas[256] to forcefully hinder the boats of refugees from reaching European soil. As we saw earlier, this kind of human rights violation was successfully countered in the case of *Hirsi Jamma and others v. Italy*. The European Court of Human Rights granted the applicants with effective legal protection through the extraterritorial enforcement of the refoulment ban.[257] This case can be seen as a paramount example of the legal system helping to establish the robustness of rights of migrants, countering illegal state practices. However, as a response, the respective actors seem to continuously readjust the legal systems in place. With the EU responsible planning further agreements with African countries, they create new systems of rule that transform social struggles into legal proceedings and organize them in legal argumentation that acts as stopping rule for

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[252] See, Pirjola, J. (2009), *European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language.*
[253] Guild, E. (2006), *The Europeanisation of Europe's Asylum Policy.*
[254] Pirjola, J. (2009), *European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language*, p. 357.
[255] Article 33 of the Refugee Convention.
[256] These spheres of lawlessness appear despite the unprecedented degree of (normative) legalisation, like the Refugee Convention, the ECHR, the UN Convention against Torture, the International Convention for the Safety of Life at Sea, the Law of the Sea Convention, the International Convention on Maritime Search and Rescue, the Schengen Agreement and of course domestic and EU directives. See also Buckel, S. (2015), *The Rights of the Irregularized. Constitutional Struggles at the Southern Border of the Europan Union*, p. 114.
[257] See for an extensive analysis of the case and its context: Staatsprojekt Europa, Chapter 2.

justification-seeking argument.[258] Of course, it would be too quick to dismiss law as a simple tool of domination, but is better characterized by its relational autonomy that both empowers and restricts government action.

Again, it turns out to be helpful to make use of the explanatory power and analytical insight of ideology critique, this time regarding the mechanisms of legal regulation. With the observation of Jürgen Habermas on its "normative self-will"[259], the law becomes a paramount example of hegemony. The self-will represents the additional value of the law in the hegemonic controversies as it makes the immediate, reflexive representation of social power relations impossible.[260] Due to its autonomy and the steady differentiation, the legal order is constituted in a self-referential manner:[261] the law itself does determine what law is (this is most obvious in the cases of judicial law making).[262] Hegemonic (or political) conflicts take place within the legal framework, under the conditions the law sets itself, and "legal subjects are thus locked in the house of the law."[263]

At the same time, agreements with other states make it possible to "outsource" certain practices of migration control that came to be forbidden under EU law. Such agreements de facto circumvent the international regime for human rights already in place.[264] Simultaneously, in some cases, these agreements not only enhance the actual capacity of state action, but also strengthen their discursive power. This seemed to happen in the context of the recent deal on immigration between the EU and Turkey. While the agreement was highly criticised by human rights organisations, EU representatives constantly pointed out that this was a somehow natural act of regulating irregular migration, necessary in order to prevent migrants to further enter the EU

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[258] Cf. Buckel, S. & Fischer-Lescano, A. (2009), *Gramsci Reconsidered: Hegemony in Global Law*.

[259] Habermas, J., in: Habermas, J. (2004), *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, p. 130, own translation.

[260] Buckel, S. & Fischer-Lescano, A. (2007), *Hegemonie im globalen Recht – Zur Aktualität der Gramscianischen Rechtstheorie*, p. 92.

[261] Buckel, S. & Fischer-Lescano, A. (2009), *Gramsci Reconsidered: Hegemony in Global Law*, p. 445.

[262] Ibid.

[263] Hunter, R. (2006), *Law's (Masculine) Violence: Reshaping Jurisprudence*, p. 40.

[264] This is why judge Pinto de Albuquerque claimed in *Hirsi Jamaa and Others v. Italy* in his concurring opinion that all measures deployed by third countries, for example Libyan authorities, on behest of EU member states should be bound to the Convention.

illegally. Insisting that the individual must cross a border in order to claim refugee status effectively reinforces the border's political legitimacy. Regarding the deportation from Greece to Turkey of people who did not have the chance to claim for asylum in Greece was likewise legitimised with the legal character of the deal with Turkey. The human rights claims of migrants are thus being effectively constrained by creating new international law in other areas, following the plain logic that what is legal is also legitimate. In the case of migration law, legalization apparently turns out to be a governmental tactics to disempower and silence. It is crucial to note that both states and migrants engage in a rhetoric of rights. Whereas non-citizens invoke human rights to articulate fundamental demands of justice, officials successfully reference the legal character of their actions. We can speak of an "epistemic crisis"[265] in this regard, where human rights standards and the effective protection of the vulnerable mash up with security concerns and economic calculations, permeating the categories and classifications that are at once deployed and reproduced in confronting the refugee "crisis"[266] with a broad range of illegalizing mechanisms to restrain the "flow" of migrants – made illegal, the refugee has no means of using her rights.[267] Again, the 'deep hegemony' of the border is evidently at work in these discourses of European immigration control: once the argument is shifted to the terrain of rights, the right to discretionary border control tends to overshadow the human rights demands of the individuals negatively affected. Regarding the question posed by Catherine Dauvergne if "law [can] do anything to alleviate the harms of illegality" or whether "its deployment merely endlessly reproduce categories of illegal at its boundaries"[268][269] I argue that any attempt to open up a space for effective political contestation with the help of human rights demands is at least hemmed by the sovereign power illegalising migration in the broader context of the self-evidence of a bordered world. Processes of increasing legalization produce sets of fixed categories and institutional arrangements under which

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[265] Mezzadra, S. (2015), *The Proliferation of Borders and the Right to Escape*, p. 122.
[266] Ibid.
[267] Carens, J. (2013), The Ethics of Immigration, p. 158.
[268] Dauvergne, C. (2008), *Making People Illegal. What Globalization Means for Migration and Law*, p. 37.
[269] The stark contrast between legal and illegal migration in Europe is of course structured along a series of beliefs about economic benefits.

complaints must be subsumed in order to be heard and seen. This obviously has crucial effects on the side of those who not only lack legal protection in the form of basic constitutional rights, but as a result of their alien position, lose their discursive resources altogether. Social conflicts around the rights of migrants and refugees thus become de-politicised as well as de-contextualised.[270] Trapped in the modern, territorial logic of nation states, it is not at all evident to what extent, human rights law – rhetorically as well as in the form of material legal entitlements – can unfold emancipatory potential without the exclusion of others.[271] On the one hand, and especially with regard to those marginalized and excluded, the tyranny of jurisdiction is still of utmost importance, preventing effective protection (or remedy) promised by international human rights law. Only a handful of individuals have ever used the complaints procedures available in broad international human rights documents (like ICCPR or CEDAW).[272] On the other hand, securing a rightful entitlement before the court does not necessarily mean that this leads to meaningful change of circumstances. The policy responses towards illegal migration showed how the nation-state preserves its status of a sovereign entity by adaption new modes of power. The main exclusionary lines appear at new locations, both within and beyond the geographical boundaries of the political community. Human rights arguments poorly support those without a legal right pass nation-state borders. Moreover, rights arguments have tended to trigger rights-based responses from states, thereby drawing on states right to exclude as intrinsic part of the exercise of sovereignty. This is not to simply echo "a growing scepticism that the world's idealists have thrown too much law at the problems of human rights".[273] Rather, and inspired by the impetus of Arendt's declaration of a single human right, what is required is a transformation of the meaning of the legal commitments already established, or, alternatively, the creation of new sources of protection for all "humans".

But even the human rights standards as that are established in favour of the individual might be the reason that certain groups cannot enjoy rights they should have. The legal

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270 De Genova, N. (2015), *Extremities and Regularities*.
271 Dauvergne, C. (2008), *Making People Illegal. What Globalization Means for Migration and Law*, p. 20.
272 Ibid., p. 22.
273 Simmons, B. (2009), *Mobilizing for Human Rights: International Law in Domestic Politics*, p. 6.

definition of the Geneva Convention forms the corner stone of the current refugee policy.[274] The Convention describes the refugee as any person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable of, owing such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[275]

This definition from the year 1951 arguably restricts the moral claims of individuals fleeing from other threats then "political" ones. They cannot refer to their claim as refugee, because they are per definitionem excluded from this legal status.[276]

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[274] Haddad, E. (2008), *The Refugee in International Society*, p. 29.
[275] Article 1(A) (2) of the Refugee Convention.
[276] Betts, A. (2013), *Survival Migration, Failed Governance and the Crisis of Displacement*.

Conclusion

Borders have been historically developed for military purposes and have played an important part in modern state-, nation- and identity-building. They geographically demarcated state sovereignty and (re-)produced the ideas of national belonging and identity within a particular polity. The idea of spatial, static boundaries created an illusion of impenetrable borders. The historical and conceptual analysis highlighted the fact that sovereignty has never been absolute. Yet, under the border's hegemony this illusion was transported into our century, notwithstanding that the border has undergone transformation. Today, immigration control and counter-terrorism diversify and produce borders. Both terrorism and immigration are constructed as border related threats.[277] The border has become a filter that is no longer at the border,[278] but can be everywhere,[279] and is continuously re-producing new categories of belonging and exclusion. It is "one irony of late modern walling" that the new walls, as a response to contested and eroding state sovereignty, "project an image of sovereign jurisdictional power and an aura of the bounded and secure nation that are at the same time undercut by their existence and also by their functional inefficacy."[280] The refugee emphasises the power of the imagined geographical space that is congruent with the ethical borders of identity. Forced outside her own community, the refugee finds herself in the paradigmatic situation of being "between sovereigns".[281]

The situation of the refugee brings to the fore the very tension between the state prerogative to exclude and the human rights imperative to include. Despite an emerging regime of human rights, states still possess the final right to set threshold for entry and decide upon their own criteria of granting protection (or entry). The claim of sovereignty usually trumps the claim of human rights. This leads to a situation in which there is not only a "decreasing availability of asylum"[282], but migrants are also constantly stripped of other basic rights.

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[277] Papoutsi, A. (2016), *The hegemonic powers of the EU.*
[278] Balibar, È. (1998), *The Borders of Europe*
[279] Lyon, D. (2005), *The Border Is Everywhere.*
[280] Brown, W. (2010), *Walled States, Waning Sovereignty*, p. 25.
[281] Haddad, E. (2008), *The Refugee in International Society. Between Sovereigns.*
[282] Dauvergne, C. (2008), *Making People Illegal.* p. 50.

Democracy and human rights law are the contemporary normative concepts that promise to secure the rights of every individual. Under the impression of the current crackdown of restrictive measures against migration and the process of illegalisation of migration implemented by democratic governments through law-making, the great normative narratives of our time have done little for the refugees so far.

With Seyla Benhabib and Joseph Carens, I presented two theorists who address this problem from a democratic perspective. Both approaches take the situation of the individual "outside" into account by raising the question, on the basis of a substantive evaluation of the normative premises of democracy, what states owe to those individuals. From such a perspective, the relation of immigration and human rights appears at least to be the central dilemma of democratic constitutional states. And both authors provide us with a series of explicitly democratic arguments to attack the current violent practices against migrants executed by democratic governments. The critical evaluation of the emancipatory potential of human rights law results in a similar conclusion. Human rights provide us with moral arguments in the context of this discourse, however, the processes of juridification are ambivalent in this regard and even threat to absorb the discursive power of human rights.

After all, both concepts, democracy and human rights, have the potential of sustaining relations of domination *and* to transform them. Taking seriously the moment of conceptual instability that follows from the contemporary proliferation and heterogenisation of borders requires to impel the de-naturalisation of the static imaginary of the border.[283] A reflective, contextualised usage of the concepts I put forward here, reveals new arguments in the discourse. Understanding and reimagining borders as social institutions that have consequences is a first step. The productive nature of the border for instance revealed that the refugee is a counterpart of the citizen – an insight from which we should derive certain responsibilities.

This leads us to Hannah Arendt, who was the first to address and reflect about the deliberate provocation that emanates from the figure of the protection seeker.[284] „The conception of human rights, based upon the assumed existence of a human being as

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[283] Mezzadra, S. (2015), *The Proliferation of Borders and the Right to Escape*, p. 131.
[284] Menke, C. (2016), *Zurück zu Hannah Arendt*.

such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human."[285] Later, Giorgio Agamben readopted this thought: his notion of bare life is symbolised by the figure of *homo sacer*, who in a juridico-political sense, represents the paradoxical space in which „sovereign violence opens a zone of indistinction between law and nature, outside and inside, violence and law."[286] With the notion of the "right to have rights", Arendt tried to strengthen the rights of the refugee vis-à-vis the community she is not part of. The right to have rights is not granted by a community, but invoked because there is no community guaranteeing rights. The refugee is in a situation in which she has no rights, but she can claim this one right, to have rights, because she is human, because she belongs to the social entity of humanity. When the refugees are standing with their naked (Arendt), bare (Agamben) lives at Europe's door step and are denied their basic right to have rights, this does not only exclude the refugee from their entitlement. At the same time, as the refugee is said to not belong to humanity, we, the members of the European community are precisely only that: not humans belonging to humanity, but Europeans belonging to the EU.[287]

What the current events around the European borders mean to the emancipatory promise human rights and democracy once offered is dramatic. Instead of talking about a refugee crisis we should rather talk about a crisis of human rights and democracy – and reclaim their emancipatory potential as universal norms that apply to everyone.

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[285] Arendt, H. (1968) [1951], *The Origins of Totalitarianism*, p. 299.
[286] Agamben, G. (1998) [1995], *Homo Sacer. Sovereign Power and Bare Life*, p. 64.
 According to Agamben, all politics on the modern era are biopolitics, and „one of the essential characteristics of modern biopolitcs ... is its constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside." (Agamben, G. (1998) [1995], *Homo Sacer. Sovereign Power and Bare Life, p.* 131) This ongoing negotiation results in the exclusion of certain groups and individuals who are abandoned by the sovereign to the abject, depoliticised, vulnerable status of „bare life", in contrast with citizens' „politicised life", or *bios.*
[287] "Der Flüchtling sagt jetzt: Ich bin (bloß als Mensch) ein Mitglied, ein sozialer Teil, ein Teil des Sozialen. Die Antwort, die ihm entgegenschallt, ist bekannt; sie ist laut genug. Die Antwort lautet: Nicht hier und nicht jetzt; kein Mitglied oder Teil von uns! Aber das sagt in Wahrheit nur etwas über uns, über das Gemeinwesen, das so spricht. Indem unser Gemeinwesen dem Flüchtling sagt, dass er als Mensch kein Mitglied unseres Gemeinwesens ist, sagt es über uns, dass wir als Mitglieder unseres Gemeinwesens keine Menschen sind: bloß Deutsche, keine Menschen." Menke, C. (2016), *Zurück zu Hannah Arendt.*

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1984   Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

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