

JUSTICE AND RESPONSIBILITY SHARING GLOBALLY AND WITHIN THE EU

Presentation by
Boldizsár Nagy
at the conference:

Contestation between forms of global justice

Organized by Karl Polanyi Research Center for Global Social Studies In
cooperation with Rosa Luxemburg Foundation and Institute of Political History

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Motto:

Orbán in the UN general Assembly, 2015

„I urge you, Secretary-General, to initiate negotiations on sharing this burden at a global level.

All major stakeholders of international politics will have to take some of the migrants to their countries as part of a global quota system.”

Statement by H.E. Mr. Viktor Orbán Prime Minister of Hungary at the High Level Side Event on “Strengthening cooperation on migration and refugee movements in the perspective of the new development agenda” 30 September 2015 United Nations New York at

<http://www.un.org/en/development/desa/population/migration/events/ga/2015/docs/statements/HUNGARY.pdf> (Accessed: 20181108)

The text was removed from the Permanent Representations website, but traces remain there

Prime Minister proposed global solution for a global challenge at the migration summit



In his intervention, Viktor Orbán urged the Secretary-General to initiate

negotiations on sharing this burden on a global level. The Prime Minister emphasized that Hungary considers the migration crisis a global challenge that needs a global solution based on global participation, by addressing the root causes. He called it a moral responsibility of the international community to give back to these people their homes and their country and invited everyone to join in the Hungarian efforts to avoid the spread of anti-Muslim sentiments.

“We live in extraordinary times!” - statement by Speaker of the Hungarian National Assembly at the 4th World Conference of Speakers of Parliament

Bulletin of the permanent Mission of Hungary, 2015, <https://ensz-newyork.mfa.gov.hu/news/end-of-year-bulletin-2015>
Accessed 20181108

Péter Szijjártó, reported on 7 November 2018

“The reason for the attack against Hungary is that the country’s position on migration is at odds with the European mainstream”, the Minister continued, confirming that Hungary will not be an “immigrant country” and does not support the changing of the make-up of the population of the European continent, and accordingly the Government rejects the system of mandatory quotas.”

(MTI/Ministry of Foreign Affairs and Trade)

<http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-the-betrayal-of-europe> Accessed on 8 November 2018

The danger of reducing „migration” to the mixed flows of asylum seekers and other irregular migrants.

By submitting our scholarly work to the dominant discourse pursued by the hegemonic, xenophobic forces, we hide many beneficial faces of migration and reinforce the image of migration = problem/challenge/threat = securitising discourse

Of the 258 million migrants (in 2017) roughly 10% were refugees and asylum seekers.

(Any content/discourse analysis ought to take into account this latent splitting of migration into the „problematic” and the „business as normal”, frequently re-baptized as mobility)

The message of the Tampere European Council Conclusions (1999)

2. ... The challenge of the Amsterdam Treaty is now to ensure that **freedom**, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice **accessible to all**. ...

3. This freedom **should not, however, be regarded as the exclusive preserve of the Union's own citizens**. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be **in contradiction with Europe's traditions to deny such freedom** to those whose circumstances lead them **justifiably to seek access** to our territory.

This in turn requires the Union to develop **common policies on asylum and immigration**, while taking into account the need for a consistent **control of external borders to stop illegal immigration** and to combat those who organise it and commit related international crimes.....

My questions

Should the **starting point of the analysis** (the **present state system** and entitlement to migration control) **not be challenged** on moral (justice) basis?

Who should provide protection to refugees and others in need of international protection?

A RIGHT TO MIGRATE?

A RIGHT TO ASYLUM?

TERRITORIALITY AS INJUSTICE

State **sovereignty** – claim/**title to territory** – jurisdiction –
right to exclude

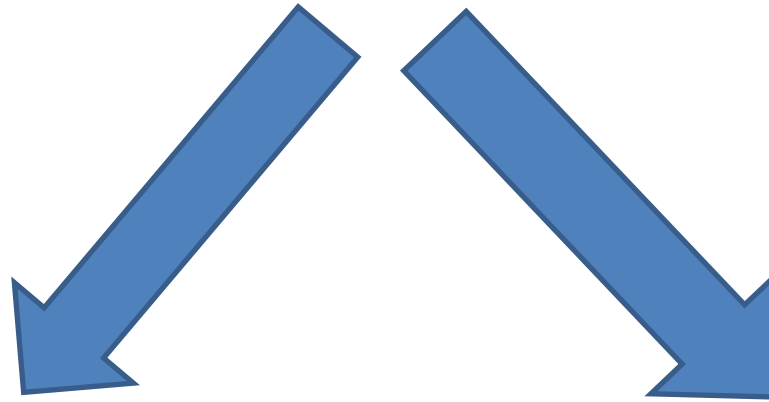
Territorial power is based on facts **unrelated to** conceptions of
justice

Title in most cases based on **violence or purchase** – none fit
into any justice conception

Status quo after 1945/decolonisation – largely accepted as
starting line/guarantee of peace

The **ordering of people to territory**/nationality is by definition
a **quasi feudal order**, **nationality** and the accruing mobility
rights – or lack of them function as **privilege /stigma**

TWO ALTERNATIVE ARGUMENTATIVE ROUTES TO CORRECT INJUSTICE



A right to enter for everyone including asylum seekers and refugees		An exceptional right - against the general ban to enter if entry conditions not met
Open borders/freedom of movement and settlement scenario		The right to exclude foreigners curtailed by the right of the asylum seeker/refugee to enter even if general immigration criteria not met

THE FREEDOM OF MIGRATION (OPEN BORDERS) SCENARIO

Meaning: a right to **enter and settle** on the territory of a state **irrespective of the nationality** of the migrant and without the requirement to meet any specific condition. **Border controls may exist**

Adjustments/refinements to the scenario:

Conditionality/graduality/exceptions (suspension)

MWB / OPEN BORDERS

Carens, 1987

"Borders have guards and guards have guns"

"on what moral grounds can ...people be kept out?"

What gives anyone the right to **point a gun at *them***?"

"Liberal theories focus attention on the **need to justify the use of force by the state**. Questions about the exclusion of aliens arise naturally from that context."

MWB /Open borders

In favour

- Free movement **as right**, as an independent **moral principle**
- Intra-state **analogy** (free movement in federal states)
- Free movement as **a reduction of** political social and economic **inequalities**
 - poverty and aid
 - global redistribution
- Free movement offers **protection** to refugees
- Free movement was **predominant in history** – **sovereignty does not require closure**

THE ARGUMENT AGAINST THE (COMMUNITARIAN) AND OTHER CRITICISM DIFFERENTIATION BETWEEN NATIONAL AND FOREIGNER

A **bounded community is entitled to keep itself closed** in order to protect democracy, security, culture, welfare. (See e.g. Walzer, 1983)

Communitarian assumption: **citizens are to be preferred** over others / foreigners. The community is made up of citizens only (long term foreign residents are not accounted for)

But: is the bounded community a reality or an imagined one?

What empowers **that set of people** to consider themselves as entitled to **exercise exclusive control** over the resources of a territory?

(Communitarism **ignores the question of title to territory**)

THE ARGUMENT AGAINST THE (COMMUNITARIAN) AND OTHER CRITICISM DIFFERENTIATION BETWEEN NATIONAL AND FOREIGNER

Five counterarguments against (automatically) preferring citizens over others

- The relationship must be of **moral value** (No duty to prefer **a fellow national fascist** over a foreign social democrat!)
- **Loyalty: not necessarily concentric** circles where nation comes after locality. Think of **ethnic/national minorities** who prefer their ethné over the fellow nationals
- Preferring nationals may **run counter to the overall duty to alleviate poverty**. (Welfare chauvinism)
- The **community of citizens is a fiction**. The society consists of nationals and (**resident**) **foreigners**. The **state must serve both** groups forming the society.
- If a community must accept the right to **emigrate (affecting the integrity of the community)** then it **should also accept that immigration is permissible**.

The argument against the (communitarian) and other criticism

Protection of democracy from its enemies

- Communitarianism: political **community of citizens** is entitled to **self determination**
↓
 - either migration allowed but no access to citizenship (denizens)
 - or:
 - no access (but those nevertheless allowed in can naturalise)
- Bauböck: to preserve democratic institutions for the benefit **of citizens and residents**

- Question of **title to territory** (again)
- → **No democratic entitlement** (of the majority) **to exclude – question of secession** – who is to decide, the Catalonia or Spain?
- **Sheer numbers won't destroy.** Migration has feed-back loops and migrants are rational decision makers + graduality (transitional phases)
- Enemies are inside („Weimar”)
 - „Jihadist attacks are committed primarily by homegrown terrorists, radicalised in their country of residence without having travelled to join a terrorist group abroad”

Europol, Te-Sat report 2018, p. 5

→ **Most of the enemies of democracy grew up in it.**

Failed, foiled or completed terrorist acts, 2017, EU
Source: Te-Sat, p. 9



THE ARGUMENT AGAINST THE (COMMUNITARIAN) AND OTHER CRITICISM
THE FATE OF THE CULTURE (OF THE BOUNDED COMMUNITY)

Communitarian thesis:

“The **distinctiveness of cultures** and groups **depends upon closure** and, without it, cannot be conceived as a stable feature of human life. **If this distinctiveness is a value**, as most people (though some of are global pluralists, and other only local loyalists) seem to believe, **then closure must be permitted somewhere**. At some level of political organisation, something like the **sovereign state must take shape and claim the authority to make its own admission policy**, to control and sometimes restrain the flow of immigrants.”

Walzer (1983), 39

That „**somewhere**” is the question! Quebec? Canada?

Three questions on culture

A

Do states have (a single) own culture?

B

Does a culture only survive within a relatively closed (bounded) community?

C

Is the stability (immutability) of a culture a value itself?

THE ARGUMENT AGAINST THE (COMMUNITARIAN) AND OTHER CRITICISM
THE FATE OF THE CULTURE (OF THE BOUNDED COMMUNITY)

Ad A) Culture (whether understood as **behavioural patterns** or as **normative prescriptions** or as **self image of the identity** of the individual) is normally **not an attribute of a state**. (Even if states occasionally are engaged in creating a „national culture” – or groups are imagining such in the course of state-building)

Most states are home for many cultures, occasionally to hundreds. (E.g. India)

Ad B) **May be that cultures need relative closure, but not legal borders**. (Think of the **Amish** in the US!) True, migration **may threaten their survival if out of proportion and seeking dominance**.

Ad C) **The stability of a culture s not a value in itself**. (Think of the **open racism** of the US or of the **Fascism, Stalinism** in Europe, let alone the **situation of women** in preceding centuries).

Cultures of states/societies/cultural groups have immensely changed since 1945 **even if they were hermeneutically closed** (in migration terms)

CONCLUSION ON CULTURE

„States effectively lost any legal possibility to imagine themselves as rooted in homogeneous monocultural societies, unable to ask of their own nationals and of the growing numbers of new-comers anything more than mere respect for the liberal ideology...” Kochenov, 2011, p. 10

“Cultural continuity is perfectly compatible with cultural pluralism and cultural stability includes cultural change. The core issue is not the preservation of an existing culture or an existing ‘plurality of nomoi,’ but the rate of cultural change or, more precisely, the avoidance of externally enforced, excessive cultural disruption. Bader, 2005, p. 22

THE ARGUMENT AGAINST THE (COMMUNITARIAN) AND OTHER CRITICISM THE ECONOMIC IMPACTS ON THE RECEIVING AND ON THE SENDING COUNTRY)

Destination state: first assumption: citizens (or citizens and residents) may be preferred over foreigners.

If accepted → the role of the state in organising the economy. Assumption: enhance GDP growth/labour security/welfare

Economic studies:

Free global migration would increase global GDP by 50- 200 %! Harris, p.38

World Bank report on labour migration, 2011:

„...in general, over the period **1990-2000** immigration had **zero to small positive long-run effect** on the average wages of non-migrant natives **in the rich OECD countries** (Western Europe plus the US, Canada, Australia)”

Docquier - Özden – Peri, p. 3-4

An **average immigrant** (during her stay) is a net contributor to the state budget in the range of **50 000 euros in Germany** Ugur, p. 82.

+

Migration: **global redistribution of wealth for the benefit of the less developed** – a matter of **justice**

HOW TO GET TO THE OPEN BORDERS SCENARIO?

Ugur identifies five **steps of transition**:

- Changed role of state **from gate keeper to regulator**
- **Multilateral governance** is needed
- **Non-discrimination** between migrants and locals (and among migrants)
- **A new universal organisation** to be established
- A **multilateral readmission agreement** ought to be concluded

Increasing number of regions with free migration – step-by step extending these areas

(See next slides!)

Gradual introduction, feed-back loops, exclusion of persons constituting danger to national security or public order (public policy)

(SUB) REGIONAL ORGANISATIONS, POTENTIAL CANDIDATES FOR FREE OR FACILITATED MIGRATION

Macro-Region	Regional Arrangements
Africa	African Union (AU), Common Market for Eastern and Southern Africa (COMESA), Economic and Monetary Community of Central Africa (CEMAC), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC), Community of Sahel-Saharan States (CEN-SAD), Arab-Maghreb Union (AMU)
The Americas and Caribbean	Andean Community (CAN), Caribbean Community (CARICOM), Central American Common Market (CACM), North American Free Trade Agreement (NAFTA) and Southern Common Market (MERCOSUR)
Asia-Pacific	Association of Southeast Asian Nations (ASEAN), Pacific Island Forum (PIF), South Asian Association for Regional Cooperation (SAARC)
Europe	Black Sea Cooperation (BSEC), Benelux, Community of Independent States (CIS), Council of Europe (COE), European Free Trade Agreement (EFTA), Nordic Common Labour Market (NORDIC), European Union (EU), Eurasian Economic Community (EURASEC), Organisation for Democracy and Economic Development (GUAM), Economic Cooperation Organisation (ECO)
Middle-East and Northern Africa	Gulf Cooperation Council (GCC), League of Arab States (LAS)

	Regional arrangement	Categories of persons	Period of stay	Other remarks
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Table 1.5 Rights of residence – legal provisions

Residency Rights	BENELUX	All categories of persons		
	CACM (CA-4) Central American Common Market	Pensioner, annuitant or investor; spouse of a national of the country in which the residence is requested (minimum period of their marriage); children of national or nationalized, minors or unmarried; parents of children with the nationality of the host country; temporary residents with at least two years of stay in the country; religious or featured in art, science or sports people. ¹	Temporary residence granted for a period of 2 years renewable; permanent residence must be renewed every five years. ¹	
	EFTA	Employed and self-employed persons as well as to persons not pursuing an economic activity as long as they have sufficient financial means/health insurance	Not specified	Self-sufficiency required in case of non-economic activities
	EU	Right to reside up to three months for all categories of persons; for more than 3 months for workers, self-employed, student or self-sufficient person	Unlimited but different conditions apply	Residence permit required after three months
	NORDIC	All categories of persons	unlimited	No residence permit needed
	COMESA Common Market for Eastern and Southern	COMESA citizens	n/a	MS shall endeavour to harmonise their national laws, rules and regulations having regard to the need to grant the

**FREEDOM OF
MOVEMENT (RIGHT
OF RESIDENCE)
WITHIN REGIONAL
ARRANGEMENTS**

FREEDOM OF MOVEMENT (RIGHT OF RESIDENCE) WITHIN REGIONAL ARRANGEMENTS CONT'D

	Regional arrangement	Categories of persons	Period of stay	Other remarks
Residency Rights / Economic Activity	EURASEC Eurasian Economic Community	EURASEC citizens	Not specified	Permanent citizens enjoy the same rights and freedoms and have the same obligations as compared to nationals of that country
	GCC Gulf Cooperation Council	GCC citizens	Not specified	Non-discrimination of GCC nationals
	EAC East-African Community	Workers or self-employed, spouses and children of migrant workers	Duration of work permit	Right of residence on the basis of a work permit, residence permit or dependant's pass
	MERCOSUR Southern Common Market	MERCOSUR citizens (plus Bolivia and Chile)	Temporary residence for two years; possibility of permanent residence	Temporary or permanent residence guarantees equal civil, social, cultural and economic rights (including labour rights) as compared to nationals
	CARICOM Caribbean Community	Person must be involved in economic activity and not be a charge on public funds	Right of residence after being granted indefinite entry	
	ECOWAS Economic Community of West African States	Right of residence for the purpose of seeking and carrying out income earning employment	Not specified	Conditions entitlement to residence on possession of an ECOWAS Residence Card or Permit
	SADC Southern African Development Community		Temporary residence	Application for residence permit in host country
	CAN Andean Community	Migrant workers	Temporary residence?	
NONE	NAFTA	No regional rules	n/a	No permanent residence envisaged
	AU	No regional agreement	n/a	Framework agreement for RECs
	CIS, COE, BSEC, ASEAN, CEMAC, CEN-SAD, ECCAS, IGAD, PIF, SAARC, AMU	No regional agreement		

Macro-Region	Regional Arrangements
Africa	African Union (AU), Common Market for Eastern and Southern Africa (COMESA), Economic and Monetary Community of Central Africa (CEMAC), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC), Community of Sahel-Saharan States (CEN-SAD), Arab-Maghreb Union (AMU)
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**IS THERE A RIGHT TO MIGRATE
IN INTERNATIONAL LAW?**

IS THERE A RIGHT TO MIGRATE?

UNIVERSAL DECLARATION OF HUMAN RIGHTS (Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948)

Whereas recognition of the **inherent dignity and of the equal and inalienable rights of all members of the human family** is the foundation of freedom, justice and peace in the world,

Article 13

1. Everyone has the **right to freedom of movement** and residence **within the borders** of each state.
2. Everyone has the **right to leave any country, including his own, and to return to his country.**

IS THERE A RIGHT TO MIGRATE?

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,...

..Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,...

.Article 12

1. **Everyone lawfully within the territory** of a State **shall**, within that territory, **have the right to liberty of movement and freedom to choose his residence.**
2. **Everyone shall be free to leave any country, including his own.**

IS THERE A RIGHT TO MIGRATE?

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

LEGAL FRAME

Migrants are - beyond immigration law - subject to

Human rights

Conventions combating irregular migrations (**smuggling, trafficking**)

International **Labour Law**

Global Compact, draft

*We acknowledge **our shared responsibilities to one another as Member States of the United Nations** to address each other's needs and concerns over migration, and an overarching obligation to **respect, protect and fulfil the human rights of all migrants, regardless of their migration status**, while promoting the security and prosperity of all our communities*

HOW TO APPROACH SOLIDARITY RESPONSIBILITY SHARING

**CONCERNING FORCED MIGRANTS, UNDER CIRCUMSTANCES
WHEN THEIR ENTRY IS THE EXCEPTION FROM THE RULE OF
EXCLUSION**

**WHOSE RESPONSIBILITY IS THEIR
PROTECTION?**

Concepts



Responsibility sharing - distributing affected persons

Burden sharing – contributing to the material reception conditions, with finances, equipment, services



Thielemann, JCMS, 2018/1

	Sharing of		
Voluntarily	Norms	Resources	People
Compulsorily	(Harmonising laws)	(Money)	Responsibility sharing



THE MATRIX OF FIELDS AND LEVELS OF ANALYSIS

Field /  Discipline Level of analysis 	Moral and Political Philosophy	Practical, Political	Legal, (legal) justice-oriented	Social, Sociological, Psychological
State / Community	Responsibility sharing or shifting? Allocation of „burdens”	What is „in the interest of the state?” <ul style="list-style-type: none"> • ever fewer asylum seekers? • Minimum expenses? • Avoidance of social tensions? 	<ul style="list-style-type: none"> • Compatibility with Geneva 51? • Criteria of fairness: <ul style="list-style-type: none"> ○ Procedural rights ○ Substantive interpretation of definition ○ Material reception conditions 	<ul style="list-style-type: none"> • Social identity construction of receiving society : why to protect refugees, (or why not) • Selectivity according to country of origin
Individual / Family	<ul style="list-style-type: none"> • Freedom of movement (choice of residence) • Decresing vulnerability 	<ul style="list-style-type: none"> • Can she reach her preferred destination? • Where is social integration the smoothest? 	<ul style="list-style-type: none"> • ECHR, Article 3, 8, 13 issues (Torture, inhuman degrading teatment or punishment, right to privacy and family, effective remedies) 	<ul style="list-style-type: none"> • Extended trauma • Loss of trust in democracy (and its superiority over authoritarian regimes)

Possible criteria of responsibility sharing/solidarity

Applied by  Criterion 	Commission COM (2015) 450 final Crisis relocation mechanism	EU Council Relocation decision	Commission Dublin recast COM(2016) 270 final Corrective allocation mechanism	Germany Königsteini key
Total GDP	Yes	Yes	Yes	No
GDP/fperson	(Yes)	(Yes)	No	No
Tax income	No	No	No	Yes
Population (size)	Yes	Yes	Yes	Yes
Territory	No	No	No	No
Population density	No	No	No	No
Unemployment	Yes	Yes	No	No
Number of earlier applicants	Yes	Yes	No	No
Physical proximity to country of origin (Neighbour, same region)	No	No	No	No
Cultural proximity	No	No	No	No

Possible criteria of responsibility sharing/solidarity

Applied by Criterion  	Schmuck 1997	Hathaway & Neve, 1997	Schneider; Engler; Angevendt 2013
Total GDP	Yes (wealth")	No (Yes – external supporter)	Yes (five years average –within EU average)
GDP/fperson	(Yes)	No (Yes – external supporter)	No
Tax income	No	No	No
Population (size)	No	No	Yes
Territory	No	No	Yes (Compared to EU total)
Population density	No	No	No
Unemployment	No	No	Yes
Number of earlier applicants	No	No	No
Physical proximity to country of origin (neighbour, same region)	Yes	Yes	No
Cultural proximity	No	Yes	No

THE PROPOSED CHANGES AFFECTING INTER-STATE SOLIDARITY IN DUBLIN IV.

- In take back situations – only notification – no request – duty to take back. (Responsibility does not expire with time)
- Chapter VII: **Corrective allocation mechanism**
 - Disproportionate number of applications (after eligibility)
 - Exceeds **150 %** of reference key (including resettled refugees)
 - **Reference key** = total of application in EU – share by MS based on
 - population size
 - total GDP

50 -50 % weight

If unwilling to participate **250 000 Euros/per each applicant**, who would have been allocated

Automated system

See A8-0345/2017 for the EP position, adopted on 6.11.2017!

THE PROPOSED CHANGES AFFECTING INTER-STATE SOLIDARITY IN DUBLIN

IV. – EP RESPONSE (214 PROPOSALS FOR AMENDMENT)

- **Eliminate external border**, waived visa and presence in transit zone as a coupling principle
- **Not based on exceeding 150%** of the reference key – not corrective but fundamental allocation system
- **New allocation criteria**
 - Any family member legally residing to unite with (not only refugee)
 - Academic qualification acquired in the Member State
- **Allocation** of asylum seekers – **from the outset**
- **Choice of four countries**
- **Groups, max 30** may wish to move together

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Thanks!

Boldizsár Nagy
Central European University

nagyb@ceu.hu
www.nagyboldizsar.hu