

# Migrants' human rights and their vulnerabilities

Presentation by

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at the

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# Overview of the issues

1. Three illustrative examples
2. The root problem: the system of nationality
3. The next self-inflicted problem: borders, exit and entry conditionality
4. The conceptual (and historic) solution: the right to move and settle freely
5. Present they compromise: admission of asylum seekers
6. The matrix of rights of the four main categories of migrants
7. Vulnerabilities under the present conditions – a narrow selection
  - regular migrants
  - A. Migrants
    - asylum seekers and refugees
    - persons with no right to enter/stay
  - B. Helpers
  - C. Neighbouring states (first countries of asylum, safe third countries)

## Three illustrative examples

1. Saudi families travel increasingly to Germany as France, Belgium and regions of other countries ban burqa and niqab in public if the face is covered - Saudi Arabia to open the country to tourists, without a religious motive (pilgrimage)



2. Asylum seekers in Hungary for whom Serbia is the declared to be the responsible state to hear their application are starved in the Hungarian transit zones
3. Immigration officials arrested college professor Syed Ahmed Jamal in his Lawrence (Kansas) front yard on Jan. 24 while he was taking his daughter to school. He has lived in the US for 30 years, has three US national children and a wife and four US national siblings. He was on the plane when the deportation order was suspended, after two month in jail

# Nationality as the core problem

Hannah Arendt is not forgotten (right to have rights),  
but:

Nationality is **birthright lottery** - having a “good” nationality is like having **a feudal privilege** (Ayelet Sachar, Joseph Carens)

**Bounded communities** “nation states” are built on the distinction between nationals and foreigners (“aliens”), and members of the community, the nationals, claim the right to exclude the foreigner

**There is no “natural unit” of those bounded communities** (UK? Great Britain? England? Czechoslovakia? Slovakia?) **nor are there morally legitimised physical borders**, there is **no “ontological” correspondence** between a group and the territory it claims to control in 2019. (Whom should Lviv, Strasbourg, Dacca, Ogaden or New Mexico belong?) (Few exceptions exist)

## Escalating the problem: borders as barriers

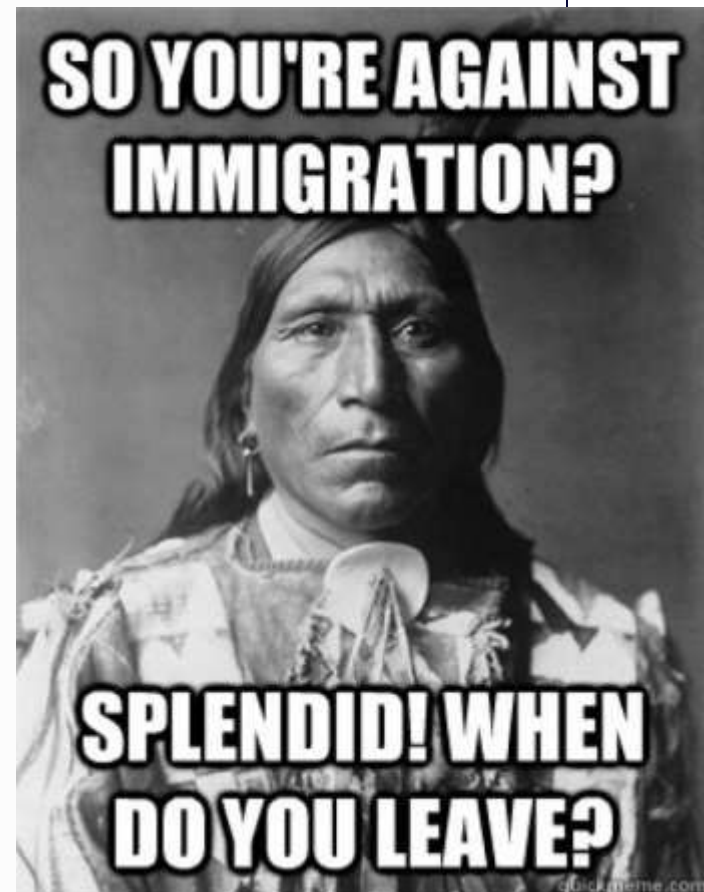
**Title to territory is based** on accidental historic events/facts, usually **on violence, use of force, coercion, occupation, annexation.**

**The fundament of the claim** to have the right **to exclude** others is **brute force** – it is **morally indefensible**

**The right to migrate was the standard** (for those who were not serfs) **in Europe**

Cities and states where **Amos Comenius** (1592-1670) lived:

Přerov – Herborn – Heidelberg - then exiled from Bohemia as a refugee for his protestant belief – Leszno in Poland-Lithuania, England, Sweden, Hungary and Amsterdam.



Borders as barriers – formal immigration controls directed at all (not just vagabunds, enemy nationals etc.)  
– late 19th - early 20th century

Except for the Asian empires, migration in the 19th century – generally – was free.

At the present day the right of admission and sojourn on the part of unobjectionable aliens is almost universally recognized. Qualifications of the right, which are to be found in the possibilities of exclusion, expulsion and the fixing of conditions of sojourn by the state, must in practice be based upon reasonable grounds.

Edwin M. Borchard: The Diplomatic protection of Citizens Abroad, New York, 1916, 37. old.,  
<http://www.archive.org/stream/diplomaticprotec00borc#page/36/mode/2up/search/36>

Travelling book (Wandrownická knizka)  
of a furrier. [https://commons.wikimedia.org/wiki/File:Wanderbuch\\_journeyman\\_Wobrausky\\_from\\_Daschitz\\_01.jpg](https://commons.wikimedia.org/wiki/File:Wanderbuch_journeyman_Wobrausky_from_Daschitz_01.jpg)

State boundaries became obstacles to migration in the US in the late 19th century, in Europe after WWI. – passports and visas started to be required. (Torpey)



# Borders as tools to prevent emigration

Historically: main goal: **to keep the population at home** – mercantilist philosophy – source of wealth

Emigration (not immigration) was the main concern during the large emigration wave from Europe **between 1870 – 1914**

**Cold war** period: the **West promotes the right to emigrate**, the Socialist and much of the developing world deny it

**21st century: departure is still not an available right to many** – borders are tools to lock persons in their own country or in a transit country.  
**(Libya, Turkey!)**

## ICCPR 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 [but not limited to – BN] his own.**

# OPEN BORDERS – THE FUNDAMENTAL QUESTION – AT LEAST IN LIBERAL STATES

Joseph Carens, 1987:

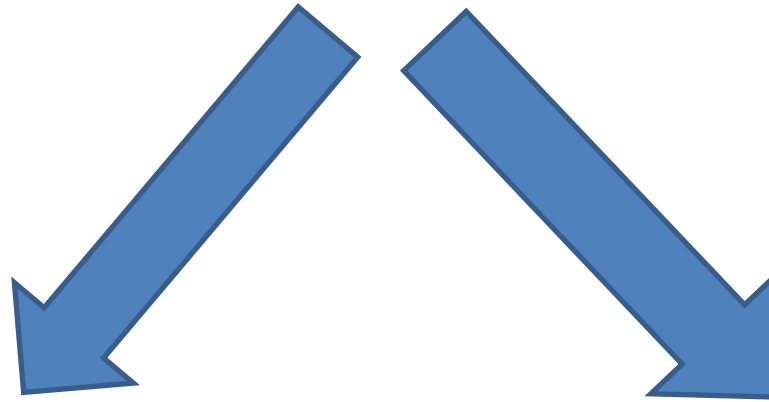
"Borders have guards and guards have guns"

"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."



# TWO ALTERNATIVE ARGUMENTATIVE ROUTES



**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**

Migration without borders (or open borders) 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 conceptual solution: global freedom of movement and settlement

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.

Does not exclude border controls, passports and check of identity, criminal record, etc.

As the EU was before Schengen, but not limited to certain categories

Conditionality/graduality/exceptions (suspension) would apply

# Global freedom of movement

## In favour

- Free movement as right, as an independent moral principle - **liberty** is the core right (McAdam, 2011)
- **Intra-state analogy** (free movement in federal states)
- Free movement as **a reduction of political social and economic inequalities**
  - poverty and aid
  - global redistribution
- Automatic **protection for refugees**

# 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)”

World Bank Report, 2018:

**[I]mmigration has little—positive or negative— wage impact for a substantial majority of natives.** However, even if relative wage effects are small, **the dislocation** experienced by some groups of workers (or the fear of such dislocation) because of immigration **can explain much of the resentment** that many natives exhibit toward immigrants.

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

# The present day compromise: the exceptional right to enter in order to seek asylum

UDHR, Article 14, CFR, Art. 18 „ The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [and the TEU and TFEU]”

1) Why to protect refugees?

2) What sets them apart from migrants and other groups of foreigners in need of assistance?

Ad 1) See my earlier presentation here in Bratislava.

## Summary of the reasons of protecting refugees

Identity-related

Other

commonality

contrast

1 humankind

2 religious, ethnic, etc group

3 „bank of history”

4. host – guest

5. rich – poor

6. democratic – persecutory

7. reciprocity

8. opportunism

9. historic

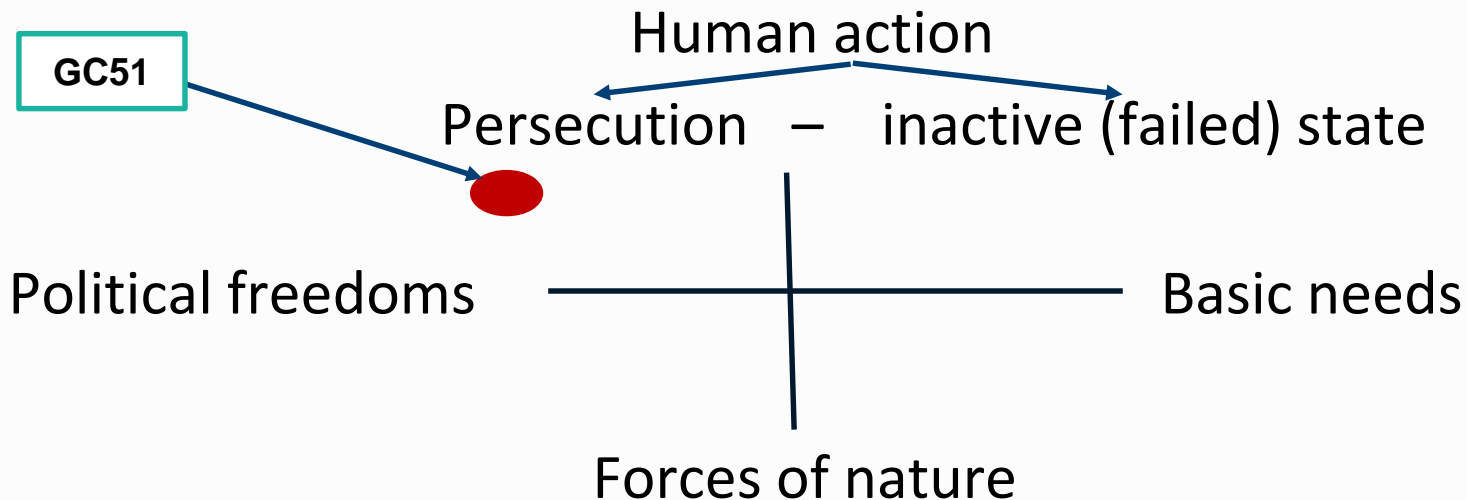
responsibility

10. non-refoulement



# Why protect and assist refugees and not others?

- **Refugee definitions** (definitions of those entitled to international protection) **are** arbitrary (**politically determined**) – compare Geneva 51 and the AU convention + QD of the EU
- It is an indeterminate and historically changing group
- **Debates about the use of the term(s)**: Shacknove, Betts, Crawley-Skleparis



# Why protect and assist refugees and not others?

The **duty to assist extends beyond refugees** - alleviation of poverty and other vulnerabilities is the duty of the international community – see e.g. **2030 UN Sustainable development goals**, and the **human security approach**

## **Specificities** of international protection

**Historic:** political struggle of the liberal states with the regimes committing horrific acts of persecution (Bolshevik Russia, Turkey after WWI, then Germany and other fascist powers and after 1945 Stalin's Soviet Union and the Communist states)

**Structural:** the need for a specific entry right is necessitated by the exclusion regime based on borders and sovereignty. **Admission is the only remedy against locking in the person** to a persecutory environment (state, society, geographic area)

# The essential matrix of rights

Regular migrants	Refugees (and asylum seekers)	Persons without the right to enter/stay
<p style="text-align: center;"><b>Fundamental (core) human rights</b> Inalienable, non-derogable, possessed by every person, irrespective of (im)migration status</p>		
<p><b>Politically</b> (unilaterally, bilaterally or multilaterally) <b>determined set of additional rights.</b></p>	<p><b>Specific additional rights</b> related to the flight and the vulnerability of the asylum-seeker and the refugee – <b>limitations on (core) rights</b> of the asylum seekers</p>	<p><b>Severe limitations</b> on human rights and freedoms – <b>permanent threat of coercion</b></p>

## Four counterarguments against (automatically) preferring citizens over others

- The **relationship** of preference ought to 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 ethn  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.

# Vulnerabilities of migrants (selection)

Regular migrants and refugees	Asylum seekers	Persons without the right to enter/stay
Xenophobia/Racism		
Discrimination		
Privacy		
	Detention	
Right to leave	Non-access to territory	Exploitation
Insecurity of residence	Non-access to procedure	Trafficking
Collective expulsion	Threefold trauma a) harm at home b) flight	Coercive removal
Aculturation / assimilation	c) aculturation / assimilation	
Remittance difficulties		
Family reunification		

# Vulnerabilities of helpers and of neighbouring countries

Increasing pressure on human rights advocates and helpers of migrants

- **Criminal proceedings against NGO ships** and their masters exercising search and rescue functions
- **Criminal and fiscal measures against NGO-s** offering support to irregular migrants (e.g. Hungary)

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**The unfair allocation of the responsibility** to protect refugees

**There is no moral principle according to which geographic proximity entails a higher duty and responsibility**

Why would Lebanon (let alone Libya) be more responsible for Syrian or Eritrean refugees than Italy or Norway?

François Crépeau  
United Nations Special Rapporteur on the human rights of  
migrants (2011-2017)

„European countries need a much more principled approach to human mobility and migration, an approach that treats migrants, not as packages to be dispatched, but as human beings, each worthy of individualised assessments and solutions according to their needs. Only then will Europe be able to lift the air of illegitimacy which clouds a good part of its action on migration policies. Only then will Europe be able to see that regular, safe, accessible and affordable mobility solutions for most migrants is the only way to ensure regulated mobility at borders and considerably reduce the need for rescue at sea.”

Foreword by François Crépeau

United Nations Special Rapporteur on the human rights of migrants (2011-2017) Oppenheimer Professor in Public International Law, McGill University Director, McGill Centre for Human Rights and Legal Pluralism to: BLAMING THE RESCUERS CRIMINALISING SOLIDARITY, RE-ENFORCING DETERRENCE at: <https://blamingtherescuers.org>

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**Thanks for the attention!**

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