

im Nahen Osten, die Kriege erzeugen Flüchtlinge. Flüchtlinge kommen hierher, Staaten bezahlen die Hilfe oder die Zäune, um sie abzuwehren, das Kapital aus den Waffenkäufen geht zu den Investoren. Das nennt man Umverteilung 2016.

Und so sind wir Medien heute wie damals Legendenweber/innen. Wir konzentrieren uns auf die Schrecken und nicht auf die Macher. Nicht auf die Köch/innen, wie Alexis gesagt hat. Wir singen heute die Lieder von damals.

„Blutig zerstampfen die Rosse die Schilde und Blut entspritzte den Leibern sodass die Deichseln des Streitwagens rot sich färbten....“

Und so wie Homer damals 800 vor unserer Zeitrechnung mit dem Blutbad des Achilles den Handelskrieg in der Ägäis verhüllte, verhüllen wir heute medial durch religiöse Trugbilder die Gründe für die Überlebenskraft des Krieges im Nahen Osten. Ohne Geld gibt es keinen IS, ohne Unterstützung mächtiger Strukturen hätte es keinen IS geben können. Und woher dieses Geld kam ist eine höchst interessante Frage.

#### Nächster Akt: Die Selbstschenkung

Aber dieser Krieg, und alles was damit zu tun hat, ist nur ein Beispiel. Die Medien werden an Vertrauen nicht gewinnen. Am Ende wird es ein Aufwachen geben müssen und verschiedene Informationskooperativen, die sich in die Nischen der Globalisierung zurückziehen müssen. Aber in den Nischen wohnen dann neue wagemutige Held/innen, und dort wohnt ja dann auch das Vertrauen und Aufklärung: nicht Objektivität, aber Rationalität und eine wiedergewonnene Substanz, die Vertrauen schenkt. Die Zeit, den Dingen nachzugehen und ihnen nachzudenken.

Es wird eine Gesellschaft sein in der sich der Vertrauensraum von gesellschaftlichen Überlich-Strukturen wieder in die Gruppe hinunter deklinieren wird, um von dort aus in neuer Kraft Vertrauen zu erarbeiten und zu verdienen. Dazu braucht es nur die Selbsterkenntnis und den Willen, den Wert der Selbstschenkung wieder zu entdecken und dafür Vertrauen zu gewinnen. Das der anderen und unser eigenes.

## Boldizsár Nagy

*The EU member states and the refugee: who should (not) trust the other?*

*A view from the shadow of the razor-fence.<sup>1</sup>*

### The applied concepts of trust and the levels of analysis

Ladies and gentlemen, friends, colleagues!

Happily, I could come without border controls at the Hungarian-Austrian border. This might have been the last time. So it is good to be here!

The themes I'm going to touch upon will be in line with topics addressed in the previous presentations. This talk is also about the loss of mutual trust and about distorted communication in the refugee and asylum field. I will offer you a fairly complicated scheme. We start out from the idea that trust may have three relational aspects: a) interpersonal, b) between the individual and the institution and finally c) between institutions. Of course I will show this within the sphere of refugee law and the refugee experience, going beyond the law.

As I was reading through the literature on trust I came to the conclusion that one ought to think of it in two different ways. The first meaning of trust could be this: *The (rational) expectation that the other (person, institution) will act as (s)he/it promised, as (s)he/it is supposed to act due to social norms/customs, professional instructions or merely due to the reasonability of reciprocity.*

The second meaning of the same term, what one could call "blind trust", could be phrased in the following way: *"A reliance on the other without the social guarantees or the potential of sanctioning/punishing the abuser. A reliance based on non-verifiable, not rational-calculus-based components."* We will encounter both forms of trust in the field of the refugee context.

So, I will address the relationships between states, relationships between the individual and the state and relationships between individuals.

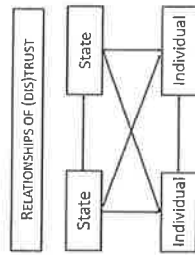


Figure 1. Relationships of (dis)trust?

Now that's where it becomes more complicated. I will proceed by discussing trust between states, then trust between the state and the individual and finally between individuals. Altogether 15 relationships will be scrutinised. The numbers in the six-angles next to the relations in the figures designate a specific type of relation, which will be the unit of analysis revealing the type of trust and factors influencing it.

<sup>1</sup> Überarbeitetes Manuskript zum Vortrag in Dürnstein  
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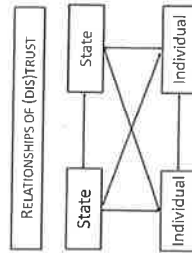


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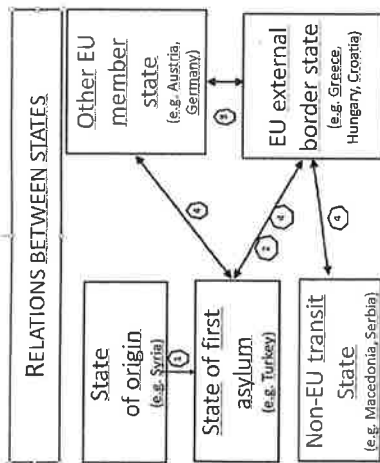


Figure 2. (Dis)trust relationships between states

**Relationship number 1: The state of origin and the state of first asylum**

The state of first asylum can be used in two senses, strictly legally or de facto. Now, de facto means that persons can have a rest there, it's relatively safe there. And in the context of Syria, Turkey is that, as are Lebanon and Jordan. At the moment in March 2016 at least 2.6 million Syrians are staying in Turkey, more than a million in Lebanon and around 700,000 in Jordan. So, where can be the tension between the state of origin and the state of first asylum? Of course I mean there is a lot of trust and distrust between Turkey and Syria or whatever it is now in the place of Syria. Turkey sometimes opens the borders, at other times closes the border. These days it closes more than it opens them. It is of course confronted with this duality of whether it sees the person arriving as a refugee in need of protection or at least refuge or it sees her/him as a Kurdish fighter and as a threat, as an infiltrator. In the light of the Ankara attacks of course this concern doubtlessly should be taken seriously. The Kurdish problem influences the trust/distrust between Turkey and Syria. And it's not by chance that Turkey tries to establish safe zones within Syria so it could be freed from the task of receiving Syrians. But then some of us are old enough to remember Srebrenica, which was built up as a safe zone and led to devastating consequences. So Turkey is caught, and all neighbouring states next to the country of origin are caught by this tension, between the duty to protect those who escape, the duty to not refole, not to return or reject at the border and the state mission to minimize impact on their own society, for example by the sheer numbers of those arriving.

Whenever I hear the discourse in Europe about the large-scale influx of one million people that have come to Germany and "oh good Lord, what should we do now?", I repeatedly remind my audience of the fact that Lebanon, a country of 4.5 million, is hosting now more than one million people. And they have been doing that for four to five years, plus the Palestinian refugees, who lived there for decades. We have to keep this in mind whenever we believe that we are taking unbearable burdens. The relationship with Syria is complicated by the fact that Turkey still maintains what we call in the legal language "a geographic limitation or geographic reservation", meaning that Turkey only undertook to apply the Geneva Convention related to the status of refugees to victims of European events. Neither the Syrians nor the Afghans are to be protected by Turkey according to the Geneva Convention. Turkey never undertook that obligation. To alleviate the situa-

tion, in respect of the Syrians, Turkey has adopted specific legislation giving the Syrians a kind of temporary protection, but that does not extend to others fleeing non-European events and sojourning in Turkey.

**Relationship number 2: The state of first asylum and the EU member states**

De jure – that is: when can we speak of the country of first asylum in legal terms? Because de facto Turkey does protect the Syrians in the sense of letting them live there. Not a very high standard, with a lot of limitations, but very few of them are refouled/returned to Syria from Turkey. But here in the context of the country of first asylum, the question arises: Can Europe rely on that and say "Oh, you are safe in Turkey, don't come to Europe – you are already in a country of asylum". Then it becomes a legal term, because Europe has entitled itself to consider applications as inadmissible if the person comes already from a country of first asylum. But in order to do that, Turkey ought to meet certain criteria, and this is very important these days when we negotiate with Turkey, to take people back and to grant them protection on a durable basis.

The Procedures Directive<sup>3</sup> - which had to be transposed into domestic law by Summer 2015 in all Member States - in its Article 35 defines the concept of the first country of asylum:

"A country can be considered to be a first country of asylum for a particular applicant if:

- (a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or
- (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*, provided that he or she will be readmitted to that country."

The directive clearly describes what would qualify in law as a country of first asylum, entitling other EU member states not to grant protection to the persons, but to return them to Turkey. So first of all the people ought to have been recognized as refugees in that country, in our case Turkey, Lebanon or Jordan. Or, at least, if not formally recognized because of the huge numbers, they should enjoy sufficient protection in that country, including benefiting from the principle of non-refoulement – not being returned to the country of persecution. They must also be readmitted to that country. Now the problem with Jordan and Lebanon, for example, is that if anyone has left Jordan or Lebanon as a Syrian refugee, that person will not be allowed to return. So, they certainly do not qualify legally as countries of first asylum and it's very dubious if you can return to Turkey once you have left Turkey.

Then we encounter the question of protection. A country of first asylum would mean the refugee has genuine protection there. When is protection adequate? We should go through physical safety, freedom of movement, housing, access to healthcare, access to the labour market, freedom to establish – that is to establish business, self-employment, access to schools and we could go on. If Europe wants to accomplish a deal with Turkey, it should only do it on the precondition that protection is genuine, so freedom of movement, access to labour market, access to self-establishment are guaranteed, kids can go to school, healthcare is provided, and so on and so forth. If you are envisaging a long-term perspective of the refugees staying there, decent health care has to be provided. It's not enough to provide emergency health care as it is at the moment. Even the access to

<sup>3</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60–95)

free market is very complicated in Turkey – it's better than it was last year, but still it is very nasciturus.

Relationship number 3: External border state and another Member State  
Here we tackle the infamous Dublin regime. We are now dealing with the second Dublin regulation<sup>4</sup> and it's the third set of rules in a row going back to the 1990 Dublin Convention<sup>5</sup>. The Dublin regime is fundamentally unfair. It has no element of fairness built into it, and it practically broke down. The trouble is that the Dublin mechanism identifying the state which ought to conduct the refugee status determination procedure (the responsible state) was based on the idea of mutual trust. The drafters assumed that it shouldn't matter whether a case is decided in Bulgaria, Greece, Luxembourg or Finland – that the Chechen person who claims to be a freedom fighter would be confronted with the same assessment based on the same substantive law, based on the same procedural law and having the same guarantees. None of that is true. Plus, the condition that most frequently determines the responsible state which has to conduct the refugee's status determination is the irregularly crossed external border of the EU. True enough, family is first, visa and residents permit are second, but they apply in very few cases, and then comes the external border. So obviously, by definition, Dublin invites the external border states to bear the brunt of the arrivals. Now, I believe that Dublin is virtually dead and the official death announcement is to come this spring. The agony started with two cases. One of them was a European Court of Human Rights case<sup>6</sup>, the other one was a Court of Justice of European Union - Luxembourg case<sup>7</sup>. In both cases, the message basically was that you cannot return someone to Greece because the asylum seeker is confronted with inhuman treatment in Greece. So the lesson was learned in the new Dublin regulation. According to the new Article 3(2)<sup>8</sup> it is conceivable that a person may not be returned to one of the EU member states, because it's unreliable and because the sending state cannot trust that the other Member State will observe human rights, that it will provide the required reception conditions. And so now the states are obliged not to return asylum seekers to those countries which do threaten with systemic flaws, either in the asylum procedure, or in (not) providing the necessary reception conditions.

As we see the pattern of Greece is spreading. There are more and more countries to which people are not returned under Dublin, my country, Hungary, being one of them. The most recent news was that Sweden stopped returning to Hungary in March 2016. Bulgaria was subject to a return ban in 2014. Moreover, the death announcement is also due because quite a number of countries, including also this lovely country, intentionally decided to break the law, to not apply Dublin. Because Dublin together with Eurodac<sup>9</sup>

would envisage a certain procedure, not waving through, not establishing humanitarian corridors. So all those countries that allowed people to travel through in large numbers without registering them and without starting their refugee recognition procedure (Greece, Hungary, Croatia, Slovenia, Austria) violated EU law.

Still within the external border states and other member states relationship we have to address another issue, namely – Schengen. Just like money is based on trust, Schengen is based on the first (rational) type of trust. It is assumed there is a certain set of norms which the affected players have to obey. In the case of Schengen Member States trust that other Member States will implement the norms and they will survey and protect the external borders at any kilometre section with the same level of (high) security. So, at the Norwegian – Russian border – because Norway is part of the Schengen regime – at Christ-mas midnight the level of security should be same as at the border these days between Hungary and Romania. (Romania is not yet within the borderless Schengen area).

By now that expectation has crumbled. Of course it has crumbled (first) in Greece. But the rational expectation of controlling the movement of migrants and stopping those without a right to enter or to stay could no longer be upheld vis-à-vis all the Member States en route to Germany. In principle if a person of a third country nationality arrives at the external border, that person has to be checked against the record of more than 700 000 other persons whether this person is one of those, who has to be stopped<sup>10</sup>. Nothing like that was done. All the “waving through” EU Member States decidedly ignored Schengen. So it is no surprise that the others do not want to trust them any longer.

Relationship number 4: An EU Member State and a third state

EU law incorporates a category called “a safe third country”<sup>11</sup>. That's again classically built on trust, namely on believing that a non-EU state will conduct a decent refugee status

States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (OJ L 180, 29.6.2013, p. 1–30)

<sup>10</sup> For the most recent statistics, see: eu/isa: SIS II – 2015 Statistics at

<https://www.europa.eu/publications/report/sis/sis2015-2020public%2015%20stats.pdf>

<sup>11</sup> The formal rules are to be found in the Procedures Directive: Article 38 The concept of safe third country  
1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:  
(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:  
(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

3. When implementing a decision solely based on this Article, Member States shall:  
(a) inform the applicant accordingly; and

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

<sup>4</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013, p. 31–59)

<sup>5</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990) OJ 1997 C 254/1

<sup>6</sup> M.S.S. v. Belgium and Greece (Application no. 30698/09), Judgment, 2011

<sup>7</sup> NS contra Secretary of State /UK/ C-411/10 joined with M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform (Ireland) - CJEU judgment of 21 December 2011

<sup>8</sup> „Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, ... the MS may seek another responsible state, but if none found must proceed itself.”

<sup>9</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of “Eurodac” for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member

determination procedure and if the person is found to be in need of international protection, that person will get decent protection in that country – in Serbia, in Macedonia, in Ukraine, or, to go further, in Iran – in the case of the Afghans. Not only should there be the hard guarantees of not returning to torture, observing the human rights and getting access to refugee status determination procedure, but the person should also have a meaningful link to that country and that country should be informed that the application has not been investigated on the merit. So, if Hungary wants to return someone to Serbia, that doesn't mean that the person is not refugee, even though the application is inadmissible. It only means that Hungary believes that Serbia should conduct the refugee status determination. Now the absurdity of that becomes very clear. 850.000 people came to the EU (mainly to Austria, Germany and Sweden) through Serbia, before entering either Hungary or Croatia. Both of them could claim that Serbia was safe if it was safe and then it would mean that Serbia ought to process 850.000 applications. That's totally nonsense, even if legally that was tenable. But it's not tenable. Serbia does not meet the criteria, even the legal criteria, of a safe third country because there is no meaningful access to a genuine refugee status determination procedure neither there is access to genuine protection once that very few whose cases are determined are recognised as in need of international protection.

#### Trust between the state and the individual

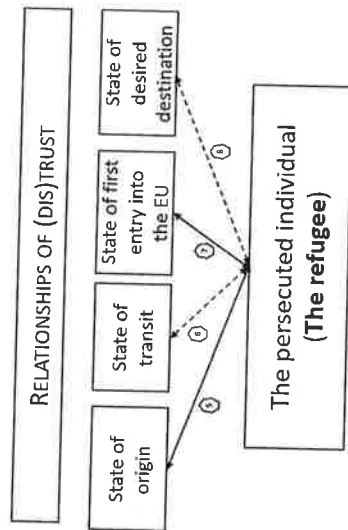


Figure 3. (Dis)trust relationships between the states and the refugee

Relationships number 5, 7 and 8: The persecuting state – the asylum state and the individual. Loss of and access to protection  
 The relationships involving the persecution – protection dichotomy (number 5, 7 and 8 in the above figure) may be drafted with the help of another chart, which concentrates on the country of persecution and on the asylum state. Then we will return to the further connections, namely to the role of the transit state and the difference between the desired destination and the first EU Member State reached. But first, the scheme visualising the persecution – protection nexus, making a difference between the situation when the state itself is the persecutor (any totalitarian state, e.g.) and when the state is unwilling or incapable to protect its population from the non-state persecutor (paramilitary units, infights in imploded states, e.g. the threats by DAESH/ISIS).

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

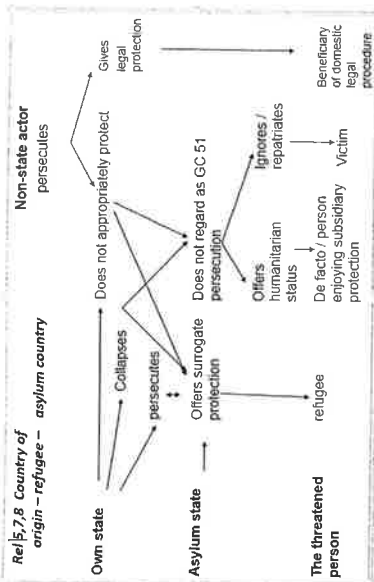


Figure 4. The nexus between the state as persecutor, the non-state persecutor and the asylum state

This figure depicts the scheme of the relationship between the possible persecutor (state, non-state actor) and the asylum state which may recognise the person as a refugee or may provide another type of protection. Frequently it's not the state which persecutes. The asylum state may decide to give a convention status (based on the Geneva Convention) or it may decide to acknowledge the person as a beneficiary of subsidiary protection or humanitarian status. For a long period people were not acknowledged to be in need of protection if they simply came from a civil war. That view was adopted in several EU Member States until 2003. People, who had not been personally singled out for persecution didn't have a right to enjoy international protection in many countries like in Germany. Germany was denying protection, if the individual was escaping a Somali clan, not the Somali state, for example.

That entailed a huge protection gap as in the late twentieth century normally the state shouldn't persecute. The attack on a segment of the population usually comes from a subset of the society. Roma are persecuted by the skinheads, homosexuals are persecuted by the homophobes. Human rights are violated in every decent society, but in the normal setup it is the state which protects the victim of human rights violation: One may trust her own state because the state is there to defend the victim's human rights. If one is beaten up, one goes to the police and the perpetrator will be punished. This is the elementary trust between the persons – not only the citizens, anyone (human rights are for everyone, anyone who is in the territory) – and the government of the country. When that protection is missing, when the victim can no longer trust in the protective (and punishing) force of the state, or in still existing cases the state itself becomes the persecutor, then the application of refugee law starts. So, those who cannot avail themselves of the protection of the government may enjoy refugee status, or they may enjoy subsidiary protection status according to the EU law.

Who are the ones, who are in need of international protection? In the EU two broad categories exist. The first embraces the traditional definition of the 1951 Geneva Convention as amended by the 1967 protocol. Accordingly, a person fleeing her/his home country qualifies as a refugee (and therefore must be recognised as a refugee) if that person „owing to 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 protect-



tion 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." In light of the changed nature of persecution the EU followed the footsteps of Africa and Latin-America and adopted its own regional definition of another group of persons, who do not qualify as refugees, but nevertheless should be entitled to protection. That appears in the Qualification directive.<sup>12</sup> Article 2 (f) and article 15 contain the core rules. Accordingly: a „person eligible for subsidiary protection“ [means someone], „who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15. ... [and] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country“. Serious harm consists of „(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.“

The last sentence of Article 15 is obviously contradictory. The Court of Justice of the European Union resolved it by stating that if mere presence exposes the person to the risk of serious harm, then the requirement of subparagraph c) is met<sup>13</sup>. Of course, all Syrians fall under that provision, no doubt about that. All Syrians are exposed to serious and individual threat as civilians, to indiscriminate violence, international or internal armed conflict and now we don't have to discuss whether it's international or internal, even though it's international.

So, summarising the above, one can say that the flight from one's own country is the consequence of the loss of both kinds of trust in the country of origin. The inhabitants (mostly citizens) would blindly and rationally trust the state expecting it to protect them from other wrongdoers and also rationally trust their own government and not expect to persecute them

#### Relationships number 6: The refugee and the transit country

„We don't want them, but we also do not understand why they don't want to stay“. That's a heading in a recent book<sup>14</sup> describing Slovenia's reaction to the 2015 movements. That's characteristic for Serbia, Hungary and for many other countries on the road. The question is why refugees don't want to stay in those countries, what is the aim to transit them as fast as possible and move towards the desired destination? The answer is firstly because of the deterring conditions of reception, secondly because many countries like Serbia, Hungary or Slovenia and to a large extent Austria don't want to deal with the merit of the claim. If I am correct, Austria intends to deal with 80 applications per day<sup>15</sup>. And is it 3200 with which it doesn't want to deal, waving the people through to Germany,

without hearing their claim? Understandably those, who have no chance to be heard and are declared undesirable, won't wish to stay beyond transit. Finally the better life chances in the desired destination countries (Germany, Sweden, or UK for others) limit the role of these transit countries too. Refugees are rational beings. They are forced to leave home, but that does not deprive them from their own agency. They are entitled to seek optimal life chances and in fact, if people were allowed to go where they wanted to, that would be most cost efficient for every state, because they would go where they can be self sufficient – they do not go there for the subsidies of the state.

The next trouble is that the states don't believe that these people have genuine claims. What was new in the behaviour was not the large numbers – in 1992 the 15 member European Community had 672 thousand applications<sup>16</sup>, so it's not simply the numbers. Part of it is the totally unequal or unfair distribution of the applications. Britain has one third of what it used to have ten years ago in terms of applications. Do you know the number of applications in Poland? It's below 15.000. People came to Austria and then to Germany, Denmark and Sweden having crossed Hungary, or Croatia and Slovenia. The novelty is, that these affected states gave up acting as sovereign states.

What did Hungary do as a first EU country entered (ignore now Greece)? It did not offer genuine, real protection. Hungary's reactions can be summarized in the four terms of denial, deterrence, obstruction and punishment. Denial means here that the governmental communication consistently denied that the overwhelming majority of these people were in need of international protection. Instead, the government spoke and is still speaking of either immigrants or illegal immigrants. Deterrence means that the government did everything to deter people from coming and applying, not last by building the fence and using communicative tools, like billboards generating xenophobia by suggesting that „immigrants“ threaten the Hungarian culture, do not observe the law and take away jobs. Systemic detention, the unpredictable permission or denial to move on to Austria were also tools of deterrence. The government announced and then extended „a crisis situation caused by mass immigration“ without the factual basis, prescribed by law. Obstruction is used here to describe tactics that hinder access to a full refugee status determination procedure. Of course, the fence also features in this context (as some manage to overcome it, i.e. are not deterred). Instead of expanding reception conditions, 2015 saw the closure of the largest reception centre in Debrecen. So called „transit zones“ were created in the wall of the fence as legal entry points, but with a capacity limited to 100, when on average more than 1000 persons arrived day by day. The Hungarian government declared Serbia as safe third country<sup>17</sup>, when it could know that neither UNHCR nor Amnesty international nor competent Hungarian NGOs with vast experience with Serbia considered it a safe third country. It attacked the relocation scheme of the EU, first politically and in December legally<sup>18</sup>. Punishment entails rules according to which crossing the external border by crossing the fence is a crime, in principle punishable by imprisonment, in practice „only“ with a criminal law expulsion and return ban. It also tightened rules on people smugglers and arrested even Austrians who simply tried to assist people continue their journey. That is really frustrating if one considers that later the administration itself was transporting more than two hundred thousand migrants by

<sup>16</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics) (20160507)

<sup>17</sup> Government decree 197/2015. (VII. 21.)

<sup>18</sup> On the process see: <http://euimmigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cie-up-front-attack-or-rear-guard-battle/>

<sup>12</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, p. 9–26)

<sup>13</sup> Elgafelji v. Staatssecretaris van Justitie (Case C-465/07). — [T]he word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place ... reaches such a high level that substantial grounds are shown for believing that a civilian, returned to ... would, solely on account of his presence on the territory ... face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive' (115 §)

<sup>14</sup> Neža Kogovšek-Salamon and Veronika Balt (eds.): *Razon-wired. Reflections on Migration Movements Through Slovenia, 2015* Peace Institute, Institute for Contemporary Social and Political Studies, Ljubljana, 2016, p. 15

<sup>15</sup> Status March 2016

trains and buses first from the Serbian border, then from the Croatian border to the Austrian border – not crossing it, just dropping them 200 meters off the border. That was not people smuggling, if you as a private person did the same, it was. That undermines the trust in the government.

Relationships number 8: The refugee and the desired destination country

Now, let's talk about Germany and Sweden and other countries of the desired destination. It's very interesting that people frequently speak about the desired destination based on fragments of information, very shallow knowledge. So they throw the essentially blind trust on a country which may or may not perform according to the expectations. (Believe it or not, there are minors who have returned from Germany to Hungary because they were disappointed with what they experienced in Germany and decided that the treatment of minor asylum seekers was still better in Hungary.)

Now, in more general terms one may argue that some of the refugees are like Odysseus<sup>19</sup> – no matter how long they are away, they want to return. Chileans were like that, the Iranians are like that very frequently. Even in a long exile they have their mind set on the home country. They want to improve the situation at home and they long for the moment to return. Other refugees are like the ones who crossed the Rubicon – they change their name, get rid of their nationality and naturalise in the new country of asylum, they don't want to speak about their home country, they don't want to revive stories of their youth. And, of course, that influences what will happen to them.

There are four basic models describing the relationship between the refugee and the asylum country's society.

Integration	Isolation
Assimilation	Segregation

Figure 5. The refugee and the (desired) asylum country

Integration reflects mutual trust. The refugee retains her/his identity and at the same time develops meaningful relationship to the receiving society. The core of the person's identity may relate to ethnicity, religion, culture or other factors. The essence is that when integration occurs, that core remains unharmed. The receiving society trusts in the goodwill and integrity of the refugee, does not intend to force upon her/him a new ethnic loyalty, religion or set of values and behavioural patterns, but expects the refugee to become an integral part of the society, speak (one of) its language(s), respect its constitutional values.

Assimilation entails an acculturation process, through which the refugee loses/gives up much of the elements constituting her/his (former) identity and takes on those of the surrounding society. Caution is advised: assimilation may be voluntary (think of the Rubicon type refugee) and then it should not be hindered. However, assimilation forced on the refugee by societal (or even worse: governmental) forces is to be avoided.

Isolation is when the refugees themselves choose not to create a meaningful link to the receiving society and segregation is when the society does that.

<sup>19</sup> The distinction between Odyssean and Rubicon type refugees was suggested by Daniele Joly, *Odyssean and Rubicon Refugees: toward a typology of refugees in the land of exile*, *International Migration Vol. 40*, No. 6, pp. 3-25

## Trust between individuals

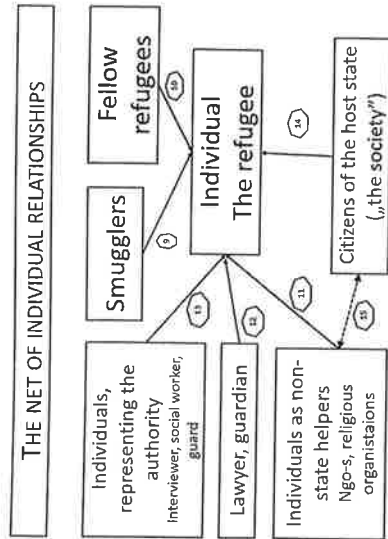


Figure 6. (Dis)trust relationships between the refugee and other individuals

Relationship Number 9: The refugee and the smuggler

Blind trust prevails in the relationship to the smuggler. The smuggler promises the refugee to deliver her/him to the Promised Land. The refugee has no alternative – as regular, legal access to the territory of the EU is not available – but to deposit her/his life into the hands of the smuggler. Cheating is frequent. People pay with their life, e.g. when the smuggler overloads the boats in order to increase her/his profit. The promise of safe crossing of the sea becomes the last journey for thousands. Others become victims of sexual and other type of violence, or simply are said to have arrived in Germany, when in reality they are still in Serbia or Hungary.

Relationship Number 10: The refugee and the fellow refugee

Refugees have to trust other refugees whom they meet on the way. That blind trust leads to sharing confidential information with that other person, to the deposit of money in order to avoid having it confiscated by the smuggler or by other elements, including the authorities. Refugees send messages to their beloved just like war prisoners used to do when one of them was freed and could get home. Or, take the Hawala System! Did you ever ask yourself how does money go back to Syria or Afghanistan? There is no banking system, there are no functioning banks in many parts of the country. So the Hawala System is the system of paying money. A who wants to pay B gives the money to X in the same country, X talks with M in that other country and instructs M to pay out the money to B on condition that B knows a password. So no money is actually sent. The capital is staying in one country and the other capital is staying in the other country and then there is a clearing in the end, but it's all based on trust, there is no single piece of written paper. How else could smugglers operate, how else could one send money home to the family there? It's a well-developed business scheme, all based on trust in terms of paying at both locations.

Relationship Number 11: – The refugee and the helper

There's the refugee and the helper NGO or church organisation. The refugee arrives in the transit country or in the first country of asylum (here I will concentrate on Hungary) and needs information, material assistance, emotional support. It was really impressive how the NGO sector sort of sprang up, not from nothing, but from a very small base. There were quite a number of actual cooperations, in other words spontaneously forming

groups which acquired important roles. The Hungarian Helsinki Committee or Menedék Association have long been serving the refugees in Hungary but Migros or Migration Aid had no substantive presence in Hungary before. And Austrian and Hungarian volunteers by hundreds, if not thousands, actually assisted the people stranded at the railway stations. Of course, this again presumes enormous trust between the mutually stranger persons. Just think of the idea that you eat food which was cooked by someone who you don't know at all and behind whom there are no institutions or guaranties like in a restaurant. And the vitality of these organisations is shown by the fact that some of them are active in Greece as the instant need in Hungary subsided.

Relationships Number 12 and 13: The refugee, the lawyer and the asylum officer  
The asylum seeker must trust the lawyer, so it matters a lot whether the asylum seeker could choose the lawyer, whether the asylum seeker has to pay services or it's a free/voluntary assistance, because the lawyer translates between the natural word of the asylum seeker and the language of the law, the legal constraints, schemes and requirements of the country. The lawyer plays a vitally important role, because if the lawyer is not conscientious, doesn't take the case seriously, then in a non-obvious case the person might end up being refouled to the country of persecution.

Let us turn now to the link between the officer and the refugee (or asylum seeker). The person seeking asylum frequently is a traumatized person. Either there was a first trauma back in the country of origin or, if the person is lucky, she/he was not traumatized in the country of origin before the decision to depart. But the flight itself is inevitably a trauma. Being forced to flee, having to leave home behind is always extremely painful as is the pressure to pack one's life into a 20 kilos or 5 kilos suitcase, or one single backpack. That's a trauma by definition.

And people come from countries where one does not trust law enforcement agents or state agents in general, so they have to overcome this instinctive resistance towards any person in uniform or representing state power. Allow me to recall in this context the personal memories of crossing the border when there was border control between Austria and Hungary and trust me, seeing a Hungarian policeman for decades was seeing a potential enemy whom you fear, with whom you try to avoid encounter whatsoever, and it took me years after the system changed to genuinely believe they are here to serve us, as the American police say. And then you have instances – like it happened last summer – that the people were told or they believed/they were allowed to believe that they were boarding a train towards Vienna and then the train was “hijacked” by the authorities and directed to the Hungarian reception centre at Bicske. A stand-off between the refugees who had thought they were travelling to Vienna and the authorities who very well knew that they wanted to bring them to the reception centre followed, lasting for more than a day.

So developing trust between the authorities and the asylum seeker is not a fast process and both sides commit mistakes, which may – partially – be caused by differences in culture.

The Procedures Directive invites the states to prepare their officers to be able to talk across cultures. They should also recognise the symptoms of post-traumatic stress disorder (PTSD). The effect of PTSD is that the asylum seeker does not behave as the officer would expect from a rational and goal-oriented person. PTSD can have all kinds of impacts: some seem to be very uncooperative, uninterested in their own case, may forget dates, they're unable to report what they want to complain about, or are very agitated, have outbursts of emotions and anger.

The difficulties of cross-cultural communication and overcoming effects of PTSD are exacerbated by what could be called the “credibility game”. The asylum seeker appears and claims that she/he is in need of international protection and states invariably assume that the person is not in genuine need of international protection, that the person is not a refugee by way of proving that he/she is a liar, that he/she is not credible, that you cannot trust that person. So the refugee says “Oh, I was the only son of my mother and she wept for seven days when I left, but I could come to Europe because my brother bought me a ticket in Amman”. And then the authority reacts says, “So you were the only son of your mother and your brother bought you a ticket, you are a liar”, whereas it's just intercultural communication. You know that in many cultures people call close people brothers, without being of the same blood line.

The interpreter's paramount rule is also to be mentioned in that context. Many cases fail because of the interpreter, they fail, because the interpreter is unable or untrained to convey the words and the thoughts of the asylum seeker and the officer. However, neither the officer nor the asylum seeker has a choice, both of them must trust in the competence and goodwill of the interpreter. (The asylum seeker's trust is by definition blind, the officer has the means to control the observation of the rules and of the competences, so it ought to be rational, but in reality is frequently also blind – that is when problems arise.)

Relationships Number 14: The refugee and the receiving society at large

My claim is, that our relationship towards the asylum seekers/the refugees can be read as constructing and understanding our own identity. Elsewhere I proposed ten arguments in favour of protecting refugees<sup>20</sup>. Allow me to recall one of them in the context of collective identity construction and interpretation. It is the “bank of history” argument.

It claims that your predecessors may have taken out a loan from history, in the form of relying on other nations' hospitality (and protection) when they had to flee, as we Hungarians had to in '56, in '48/'49, and several times before. Our predecessors created a debt we owe. Then the Afghamis appear, the Syrians appear, earlier the Croats and Bosnians appeared in Hungary and we provide them with protection, we accept them, we take them in. And thereby we pay back the loan our predecessors took out from history and thereby we establish a link to our predecessors. We become them, they become us. So we construct the continuity of our existence as one: They took out a loan, we are linked to them, so we have to pay back the loan.

This could and should lead to a generous welcoming policy today, as the Hungarian nation is really indebted to history. Unfortunately, instead of opening the doors to the persecuted, the present government of Hungary started a securitizing discourse in the beginning of 2015, animating the population against the migrants whom the government calls “illegal immigrants”, or “subsistence immigrants”. They never utter the word “refugees”. So the government kindles the xenophobia, which was already fairly high in the Hungarian society. Public opinion polls show that the appearance of actual, visible refugees has in fact decreased the level of xenophobia from 46 to 39%, so the society at large became less unwelcoming in summer 2015.<sup>21</sup> But the securitising discourse was successful as the

20 “indeed why? Thoughts on the reasons and motivations for protecting refugees”, in: Kristiansen, Beekta Lemann; Schaumburg-Müller, Steen; Gammittorff-Hansen, Thomas; Koch, Ida Elisabeth (eds); *Protecting the Rights of Others. Festschrift til Jens Vedsted-Hansen*, Copenhagen, DJØF Publishing, 2013, p. 583 - 607

21 Source: TARKI: Omnibus survey, [http://www.tarki.hu/hu/news/2015/05/04/kitekint/20150804\\_idegen.html](http://www.tarki.hu/hu/news/2015/05/04/kitekint/20150804_idegen.html) (20150508)



impression that migration is a major European problem has been strengthened according to the Eurobarometer survey.<sup>22</sup>

Relationships Number 15: The helpers and the receiving society at large

Many of us were very encouraged by the actions of the NGOs but not everyone. The government was depicting helpers as agents of foreign powers – it was a classical “putinizing” move. As Putin has made NGOs with foreign support “foreign agents”, the government controlled media started to refer to Hungarian NGO-s raising their voice in favour of the asylum seekers as liberal agents of foreign forces.

People assisting refugees are targets to radical attacks in the social media, merciless, threatening comments appear on the web under accounts of their actions supportive of the refugees. So it was not a surprise that the UN Special Rapporteur on the Situation of Human Right Defenders (Michel Forst) was very critical at the end of his visit to Hungary in February 2016. “In the context of the refugee crisis and the excessively manipulated fear of the ‘other’ in society, defenders face public criticism by government officials, stigmatisation in the media, unwarranted inspections and reduction of state funding” he noted.<sup>23</sup>

### Conclusion

The first conclusions from this analysis of trust in the context of refugee matters is that the mutual trust of the member states and the institutions on which the EU built is crumbling. But, I believe that the resignation into national existence is nothing but a mistake. Measures which in themselves seem to be rational and efficient in fact lead to a collective failure. This is a classical “tragedy of the commons” situation as described by Garrett Hardin<sup>24</sup>. If you fence off yourself, the next will fence off himself. If we all fence ourselves off, chaos will be much larger than if we had reacted in a concerted way. As to ourselves, individuals, I think that in order to retain trust at our level in the other person and his/her motivations requires autonomous judgement, the critical refusal of much of the public policy and discourse pursued by the government and the mainstream media, especially in Hungary.

Ladies and gentlemen, friends, colleagues: danke schön!

<sup>22</sup> Eurobarometer, B4 Country sheet: Hungary, Autumn 2015

<sup>23</sup> <https://www.protecting-defenders.org/en/news/un-expert-urges-hungary-not-stigmatise-and-intimidate-human-rights-defenders> [20160508]

<sup>24</sup> Garrett-HARDIN: “The Tragedy of the Commons”, Science, 13 December 1968, p. 128.

## Dietmar von der Pfordten

### Aufs Recht vertrauen?

Macht, Gewalt, Konventionen und Clanherrschaft bestimmen – so muss man vermuten – das soziale Zusammenleben der Menschen, bevor das Recht vor etwa fünftausend Jahren in den Stadtkulturen des östlichen Mittelmeerraums bzw. Nahen Ostens auftaucht.<sup>1</sup> Natürlich gab es auch schon vorher ein gewisses personales Vertrauen. Aber dieses war zumindest auf der Seite der Schwächeren wohl sehr fragil, unsicher und ungleich. Das Recht ermöglichte zweierlei: *neues, gesteigertes Vertrauen auf eine gewisse Rechtssicherheit* und einen gewissen *sozialen Ausgleich*, etwa durch Verträge und Kompensation bei Schädigungen. Beides leistet es bis heute. Man konnte und kann also grundsätzlich auf das Recht vertrauen.<sup>2</sup>

Allerdings bedarf diese sehr allgemeine Qualifikation in mehrfacher Hinsicht der Einschränkung. Auf Teile des Rechts kann man heute – leider muss man das feststellen – nicht mehr in gleichem Maße vertrauen. Ich will diese zentrale Feststellung, dass das Recht grundsätzlich Vertrauen schafft, welches aber mittlerweile nicht mehr in gleichem Maße gerechtfertigt ist, in vier Schritten näher erläutern. In einem ersten Schritt wird gefragt, was Vertrauen überhaupt bedeutet. Dann wird in einem zweiten Schritt analysiert, warum und wie das Recht grundsätzlich Vertrauen ermöglicht. Ein dritter Schritt wird der Frage gewidmet sein, warum das Vertrauen in das Recht heute partiell abgenommen hat. Und zum Abschluss soll eine positive Perspektive entfaltet werden, wie das verlorene Vertrauen in das Recht zurückgewonnen werden kann.

### 1. Was bedeutet Vertrauen?

Vertrauen (eng. trust, frz. confiance, ital. fiducia) ist ein *Denken und Fühlen der Menschen* im Hinblick auf die *Beständigkeit von Dingen, Personen, v. a. Menschen* – uns selbst und andere – und zwar hinsichtlich der *Stabilität ihres Verhaltens und ihrer Persönlichkeit*.<sup>3</sup> Vom Vertrauen auf uns selbst, dem Selbstvertrauen, einmal abgesehen, gilt bezüglich *anderer Menschen*: Wir vertrauen darauf, dass *andere Menschen sich so beständig bzw. stabil verhalten*, wie wir es von ihnen erwarten können, insbesondere, wenn sie es selbst zugesichert haben oder konkreten Anlass für unser Vertrauen gegeben haben.<sup>4</sup> Vertrauen bezieht sich schon etymologisch auf *Treue*, nämlich die *Verhaltens- und Persönlichkeits-treue* bzw. *-stabilität anderer bzw. ihre Zuverlässigkeit*. Diese *Treue* bzw. *Zuverlässigkeit*, also die *Verhaltensstabilität anderer*, schafft *Sicherheit* und ermöglicht uns, Vertrauen zu gewinnen und zu erhalten. Würden wir etwa in einem Geschäft einmal gut bedient, dann vertrauen wir darauf, dass diese gute Behandlung stabil bleibt und so auch beim nächsten Mal unsere Erwartungen erfüllt werden. Mit jeder positiven Erfahrung steigt das Vertrauen. Wird die Erwartung in das Verhalten der anderen enttäuscht, so sinkt das Vertrauen oder verschwindet ganz.

<sup>1</sup> Vgl. Hengst, Joachim (1999); Herzog, Roman (1997). Die ältesten schriftlichen, altorientalischen Quellen sind etwa fünftausend Jahre alt, aber vermutlich gab es schon vorher eine gewisse Rechtsentwicklung.

<sup>2</sup> Vgl. Beckler, Katharina (2011), S. 320. Vgl. zu weiteren, zum Teil widersprüchlichen Relationen zwischen Recht und Vertrauen: Schmidchen, Dieter (2000), S. 2.

<sup>3</sup> Vgl. Gloya, Tatjana (2001), Sp. 986-990; Fukuyama, Francis (1995); Hartmann, Martin (2011); McLeod, Carolyn (2015); Seligman, Adam B. (1997). Vgl. Schmidchen, Dieter (2000), S. 3: Annahme über die Verlässlichkeit gewisser Eigenschaften einer Person oder Sache.

<sup>4</sup> Vgl. dagegen die soziologisch-systemtheoretische Auffassung, wonach Vertrauen nur ein Mechanismus zur Reduktion sozialer Komplexität sein soll: Luhmann, Niklas (2014). Kritisch: Hartmann, Martin (2011).

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