

30 years on: A brave new world or an unfolding disaster?

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Abstract

In this short essay, the focus is on social and political aspects of forced migration. It is argued that policies designed to restrict access to developed countries have, rather like the American “prohibition”, produced a thriving criminal market for smugglers, in this case of people. Making travel more difficult increases both their profits and the sophistication of their methods. Provision of targeted, properly controlled, support for refugees in countries neighbouring conflict zones might help to reduce the pressure on travel to Europe and could be both more successful and more humanitarian. For those who do reach developed countries, there is scope to improve the legal decision-making process. Psychological input should include scientific investigation of legal assumptions, and the provision of relevant expert literature reviews, for example concerning modern knowledge of memory. Trust is the first casualty of repressive violence, and mistrust among opposition groups is probably one of the key mechanisms of its success. We need to make sure that we do not provide further grounds for this sort of reaction. Although there is no brave or new world ahead, we must continue to confront ignorance and prejudice, as we seek to avoid more humanitarian disasters.

It is now just over thirty years since we published a potential framework for under-

standing how survivors of organised state violence react to complex and severe trauma (Turner & Gorst-Unsworth, 1990). We argued that no single psychological process underpins the reactions to this experience, and therefore, there can be no unitary torture syndrome, but rather a series of understandable psychological pathways activated to varying degrees by different experiences, leading to diversity of emotional response, with implications for recovery and treatment. We also asked family doctors about health needs of refugees (Ramsay & Turner, 1993), and it is wonderful to see how the evidence on treatment options has developed since then, especially in recent years.

In this paper, looking back over the last thirty years, in celebration of the anniversary of *Torture* journal, I will focus on political, legal and forensic aspects of forced migration.

History of forced migration, people-smuggling and asylum in the UK and EU

Sadly, although knowledge about how best to understand and support torture survivors has improved, the political context in the western countries that receive refugees and forced migrants has generally deteriorated. The very recent case of Ukrainian (European) refugees, if anything, serves to illustrate the stark contrast with attempted migrations into Europe. There have been increasingly restrictive policies limiting access to the UK and Europe

in general. As Pérez-Sales (2018) points out, these problems are not restricted to Europe. The borders between Guatemala, Mexico and the United States had become dangerous, with many people disappearing there. However, the focus of the present paper will be on the UK and Europe.

When I began to work in this field, in the mid-1980s, using data from the Home Office (the responsible part of the UK government), the numbers of asylum seekers arriving in the UK were relatively low, ranging from 2,352 in 1980 to 5,263 in 1988 (Home Office, 1990). During this period, there was a tightening of visa rules, and, in 1987, a law was passed to penalise international airlines if they transported people to the UK without valid papers. In effect, key immigration controls had been outsourced to the airlines at the point of departure, with a financial penalty if they got it wrong.

These changes largely prevented people from arriving legally in the UK to claim asylum. The legislation was not supported by evidence of increasing abuse of the asylum system. In fact, during the decade 1979 to 1989, the proportion of unfavourable asylum decisions (denial of refugee status or exceptional leave to remain) tended to reduce (Home Office, 1990).

The number of people seeking asylum in the UK increased substantially from 1989. Although varying since then, it has continued at a higher level (although nothing like the numbers in some countries). The big change that I observed at the time concerned the increasing use of paid ‘agents’ (people-smugglers). An activity, which hitherto had often been motivated by an altruistic wish to help people escape violence, increasingly became a viable commercial project.

This increase represents the great failure of the policy of restricting access. Politicians, since then, trying to maintain control over

forced migrants, have adopted even more restrictive policies. This has been done to make the border crossing points even more difficult for refugees and provide even more scope for people smugglers to increase their profits.

Rather like the American experience of alcohol “prohibition”, the more nations adopt such policies, the more they build the (commercial) business case for smugglers (in this case, people rather than alcohol smugglers). This is an untenable position. There will inevitably be increasingly sophisticated criminal activity if we continue like this, with refugees facing ever more dangerous journeys.

This development was not restricted to the UK. By the early 2010s, increasing numbers of smuggled refugees crossed the Mediterranean in small boats. In October 2013, a boat travelling from Libya to Italy sank near the Italian island of Lampedusa with a death toll of at least 359 people. The initial Italian response was to establish a humanitarian military response (*Mare Nostrum*), with ships sailing close to Libya to pick up refugees in distress or dangerous craft, before they set off across the Mediterranean.

It was then argued that providing support off the Libyan coast simply encouraged more people to travel that way, resembling the much-criticised Australian debates over ‘irregular’ asylum seekers. In 2014, this humanitarian policy ended, being replaced by a border control response, off the European rather than the Libyan coast, in the form of Frontex’s Operation Triton (Turner, 2015). This meant that migrants (mainly Syrians) had to experience the dangers of the full Mediterranean passage once again, with an increase in their death toll. UNHCR (2015) estimates that in April 2015, 1,308 refugees and migrants drowned or went missing in a single month.

In March 2016, the European Union made a deal with Turkey, paying six million euros

and making political concessions in return for Turkey's agreement to restrict refugees travelling to Greece (Terry, 2021). The value of asylum seekers on the EU border had therefore been monetised, in my view, a very dangerous precedent.

Politics of displacement and refugee

More recently, asylum seekers have even been recognised to have political value. At the border between the EU and Belarus, refugees found themselves in desperate conditions (UN News, 2021) in a state of limbo between countries, with Belarus "weaponising migrants in retaliation for sanctions" (Moreau, cited in UN News, 2021). At least eight people had already died at the border. Others who had entered Poland had been apprehended and illegally pushed back across the border to Belarus. "Pushbacks that deny access to territory and asylum violate human rights in breach of international law" (Moreau, cited in UN News, 2021). In January 2022, around 500 were still living in temporary accommodation near the border (Belta, 2022).

Over the last year or so, there has been an increase in the smuggling of refugees across the Channel between France and the UK. Recent news stories have suggested that the UK Government has considered pushing back migrants towards France, for example, using border force officers on jet skis. There have even been moves to allow these officers immunity from prosecution if there should be harm or death as a result (Syal, 2021).

It is hard to see where this will end. Will we start to see increasing violence as smugglers react to these changed circumstances? Will nations compete to push away refugees further and further from their borders? It is important to portray this for what it is, a denial of access to European justice. The courts can still decide that someone is or is not a refugee.

Erecting border barriers is a means of preventing refugees from having their status considered.

The media describe refugee migration in increasingly hostile terms, whereas, as clinicians, we are sure that many of the refugees we meet are not being treated fairly. There is a disconnect between these different experiences.

So, what could be done at a political level? One of the first areas for improvement must surely relate to planning military action (and inaction) in countries such as Iraq, Syria, and Afghanistan. I am not in any sense advocating in favour of warfare, but rather suggesting that built into any intervention, any decision, there should be consideration of the humanitarian needs and political impact of internally displaced people, refugees, and other forced migrants. These should not come as a surprise after the event, nor should their cost, as so often appears to be the case.

There is also substantial scope to improve the condition of migrants in developing countries neighbouring conflict zones. Crawley and Skleparis (2018) found that many migrants do not leave their country of origin with the plan of arriving in Europe. Instead, these decisions are often made in steps. Having fled from their home countries, they decide to leave the countries where they first settle because of discrimination and lack of access to human rights or local citizenship. Improving their economic and political standing in these neighbouring countries, facilitated by international action, is likely to help refugees living there and reduce the pressure for onward transit to Europe.

There is a potential economic case to be made for this, although I set this out with some caution, in recognition of the sad truth that aid often does not reach its intended recipients. Betts & Collier (2017) note that the world spends approximately \$75bn a year on the 10% of refugees who have moved to devel-

oped regions, but only around \$5bn a year on the remaining 90% in developing regions. If an effective policy of constructive engagement with these countries were developed, conditions for refugees there could be improved. If this reduced the impetus for refugees to leave and move on, money would be freed up in developed countries, which could be diverted to support even better standards of care in neighbouring countries, a virtuous circle.

If greater aid to neighbouring countries, specifically for their support of forced migrants, and towards a policy of reducing the drivers for people to attempt the often-dangerous journey to Europe, could be delivered effectively, this should also facilitate a shift away from the punitive rule of prohibition. It would not reduce human rights or individual choice, but would surely benefit many more people, especially if UNHCR moves beyond the concept of detention in refugee camps (UNHCR, 2014) and encourages greater integration into neighbouring host countries, where the economic potential of refugees can be fully developed (Betts & Collier, 2017).

Applying the refugee convention, the legal perspective

The limitations of the processes that apply when people seek to have their refugee status accepted have been the focus of my interest over recent years, generally in collaboration with my colleague, Jane Herlihy. The Refugee Convention, established specifically to assist displaced peoples inside Europe at the end of WWII and later extended, allows too much scope for subjective interpretation. Part of the problem arises because of a political desire to create a false dichotomy between refugees and other migrants. In contrast, the truth is that migrants have often experienced a complex mixture of economic, political, and social factors driving their decision to migrate

(Crawley and Skleparis, 2018). There is no such simple differentiation to be made.

The general flaws in the legal system have been demonstrated most clearly in a US study. Researchers were granted access to regional and national asylum data and, alarmingly, found vast differences in decisions over similar cases (Ramji-Nogales et al., 2007). For Chinese asylum seekers (to take just one example), the grant rates between officers in the same region varied between 0% and 68%, and a similarly wide variation was found among judges. This was not just down to the preference of individual decision-makers; quality of representation also had a profound effect on the decision. Those who were unrepresented had a 16% chance of success; those routinely represented had a 46% chance; those represented by a specialist clinic had an 89% chance; those represented pro bono by a large law firm had a 96% chance. This evidence, published under the graphic title of 'Refugee Roulette', plainly suggests that this cannot be a fair or just law in practice.

Cameron (2018), an academic lawyer with experience working with refugees, has cogently argued in favour of exploring different ways of applying the international conventions. In her book (chapter 8), she illustrates a point with the example that as a child at a fair, she put her hand into a bag and by chance picked the one red jellybean among 99 black ones, winning a prize. If her safety turned on the validity of this assertion, simply arguing statistical improbability would surely be an insufficient basis for a decision. Uncommon events do occur, and this is more likely to be the case in someone with an unusual history, such as presenting as a refugee in a western country. Surely any decision would need to demonstrate weighing the validity for or against the alternative hypotheses, and consideration of the whole of the evidence.

If she found herself in front of a refugee decision-maker, it is possible at present for him or her to determine that finding a red jellybean was so improbable that she must be lying about it. Traditionally, in a refugee determination, this might become a solid building block on the way to a decision, the start of a chain of inductive inference. If a finding of fact were made that she did not find the red jellybean, it would follow that she could not have won the prize, and therefore that this could not have affected her future life in some other way. However, argues Cameron, surely what is needed is a probabilistic finding, perhaps that this picking of a red jellybean possibly occurred but was thought to be unlikely. Later in the process, looking at the whole of the material, noting perhaps that Cameron is a respected academic lawyer, that there is no reason for her to lie about this, and so on, the more reasonable conclusion is that she is probably telling the truth about an event which happened to be unlikely. There is, therefore, no reason to conclude that its sequelae did not occur.

Cameron suggests that “refugee narratives are survivor narratives and therefore littered with red jellybeans.” These are the often-unlikely events that do, in fact occur. Basing her argument on case law, she concludes that a decision-maker need not be perfectly certain and does not need to make spurious findings of fact like this. They need to set out best explanations, expressing their level of confidence in each statement they make. This is to adopt a risk assessment approach, much more like the models used by clinicians.

After all, how can a decision-maker really make a particular finding of fact, thereby expressing no doubt at all, that an assault (say) did not occur? The potential error is compounded, in the chain of inductive inference, when the decision-maker, having found this as a certain fact, can then assert, equally firmly,

that a diagnosis of PTSD must be rejected because there was no assault to cause it, even if its characteristic symptoms were found.

This is the danger arising from making firm findings of fact from each building block of evidence as it presents. Suppose instead, the decision-maker had concluded, for example, that the assault was unlikely. This probabilistic decision could perhaps be revised upwards to some extent in the presence of evidence suggesting the clinical features of PTSD, together with any other independent evidence. Rather than being in opposition, these elements can each contribute to the determination. There is still a need for judgment, but this approach would probably correct some of the worst decisions.

I recall one written judgment in which a judge spent more time considering my report, and my credibility than he spent on the asylum seeker’s credibility. I had requested that the primary care records should be obtained but my instructing solicitor had been unable to obtain them. It was very interesting to read the judge’s finding of “fact” that I had not asked for these records, presumably therefore concluding that that I was lying. I had not been asked to attend court in this case, but if I had, I could have provided the documentary proof of my request, including a signed acknowledgement of this by the solicitor. I can therefore say from my own experience that this approach to decision-making is seriously flawed. Having falsely concluded that I lacked credibility, it was easy for him to downgrade the rest of my evidence.

Cameron herself concludes chapter eight by stating, “In a refugee hearing, we know that we are often going to get it wrong. There is no need, and no excuse, for claiming to know more than we do. In the context of ‘radical uncertainty,’ the ‘illusion of certainty is not merely unwise and unnecessary; it is unethical. It needlessly adds the worst kind of insult

to the worst kind of injury, and the law should reject it simply out of decency.”

Applying the refugee convention, the psychological evidence

We have examined written refugee determinations and investigated the reasons given by immigration judges for their decisions (Herlihy, Gleeson and Turner, 2010). Their reasons were not always in line with current scientific evidence. They could be investigated further in some cases, checking the validity of the ‘common sense’ assumptions that judges were making.

For example, the proposition that discrepancies indicate fabrication betrays a lack of understanding of current scientific evidence about memory in general and, as we have shown, particularly about discrepancies after trauma (Herlihy, Scragg & Turner, 2002; Herlihy & Turner, 2006; Herlihy & Turner, 2007; Herlihy, Jobson & Turner, 2012; Hungarian Helsinki Committee, 2013 & 2015). Worryingly, those with both more symptoms of PTSD, and longer delays between research interviews, showed more evidence of inconsistency. This suggests that using discrepancy as a marker of fabrication would penalise those most traumatised and perhaps most in need of international protection.

We have previously demonstrated that avoidance symptoms are more common after sexual than physical torture (Ramsay, Gorst-Unsworth & Turner, 1993; Van Velsen, Gorst-Unsworth & Turner, 1996). This work was taken further by studying refugees and their accounts of Home Office interviews (Bögner, Herlihy & Brewin, 2007; Bögner, Brewin & Herlihy, 2010). Those with a history of sexual violence reported greater overall PTSD severity and avoidance symptoms, greater feelings of shame and more dissociation symptoms. They reported greater difficulty in disclosure

of personal information during Home Office interviews. Once again, this points to the possibility that those with a genuine history of sexual violence would more likely be rejected in the process of determination.

In a presentation to a large group of immigration judges, I asked them to reflect quietly for a few seconds and to try and bring back into memory the event in their life about which they felt the most ashamed. I then asked them to imagine turning to the person next to them and fully and accurately disclosing this event. It could be argued that some of the reasons for the delay, or partial disclosure, in reporting experiences such as sexual assault should require no more than careful thought. However, scientific evidence is always much more robust.

In the centre we established (the Centre for the Study of Emotion and Law), over-general autobiographical memory, previously found in non-refugee populations with PTSD and depression, was also identified in refugees (Graham, Herlihy & Brewin, 2014). Fewer specific memories could easily act against the asylum seeker if the decision-maker considered that this was a feature of fabricating an event that had not occurred. Another analogue study revealed some interesting implications of appearance or demeanour during an account of traumatic experiences, conclusions that confirm that this is an unreliable method of determining credibility (Rogers, Fox & Herlihy, 2015). A study of how experienced lawyers assessed whether to seek a medico-legal report revealed limitations in their understanding of emotional presentations (Wilson-Shaw, Pistrang & Herlihy, 2012). There have also been studies of memory in adolescents seeking asylum (Given-Wilson, Hodes & Herlihy, 2017).

This body of work shows that some apparently reasonable pieces of evidence, often used in considering the validity of an asylum

application, are unreliable. Even more worrying, this is not a random effect; there is often a systematic bias against the asylum claimant most likely to be a refugee.

Conclusions

Unless the system positively facilitates disclosure of a refugee's experience, permits later disclosure where this was not (psychologically or practically) possible initially, accepts that those most traumatised may have the greatest difficulties in disclosing their experiences, and a range of other necessary steps, it cannot be deemed fair and just.

Indeed, it is not easy to see why we should expect an asylum seeker to disclose any of this information to an official, even to a doctor, when both state officials and doctors may have been implicated in their prior detention and torture.

This raises a more general issue concerning the significance of trust. Arguably, engendering mistrust in community groups is the primary mechanism by which repression is achieved (Turner, 1996). One of the necessary conditions for effective resistance is the capacity for members of the political opposition to trust each other, for example, with secrets and with safety from betrayal. Knowing that a comrade has been arrested, and might betray, might even have betrayed, therefore can disrupt mutual trust and opposition activity.

Simply knowing of someone in a circle of friends who has been detained and tortured can be sufficient to lead people, in fear, to hide their private political opinions. It is probably the resulting widespread impact of social mistrust and fragmentation, more than the direct impact on individuals, that repressive regimes generally seek to utilise. That is why it often seems to matter less what you know, or who you are than what or who you symbolise in your community. This is at the heart of repression.

When people start to trust each other again, significant change is possible. One has only to look at the fall of the Berlin wall. For refugees in host countries, rebuilding the capacity to trust is often crucial if long term alienation is to be avoided. This must start with a trustworthy and timely process for determining status.

Failing changes to the legal process, the best way to achieve better standards in case determination is by greater transparency, with decision-makers obliged to audit and defend differences in their determination rates and share this information with international agencies like UNHCR.

However, clinicians and researchers must also engage with this process and move beyond individual asylum reports. We need to develop better models for understanding the general bases for decisions and provide scientific evidence to confirm or refute 'common sense' legal decisions. Like the country expert, we need to engage in developing and presenting general psychological information and not simply rely on individual assessments.

Sadly, if history is any guide to the future, I should not hold my breath waiting for a major change in direction. Indeed, as I write, there are plans to criminalise refugees arriving in the UK without a visa or immigration leave, as well as those deemed to facilitate their arrival - potentially including rescue ships or lifeboat crews (JCHR, 2021).

I can see no brave or new world ahead.

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