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Finding agency in adversity: The future of the refugee law in the context of disasters and climate change

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The Future of Refugee Law?
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Why should refugee lawyers think about disasters and climate change at all?

- More people exposed and vulnerable to disasters
- Cross-border disaster-related displacement is a reality
- Patchwork of discretionary policies and ad hoc responses – i.e. no comprehensive system in EU means protection not guaranteed
- People are seeking (and being denied) international protection under CSR and complementary protection instruments

Therefore

- The principle of anxious scrutiny requires refugee lawyers to leave no stone unturned in determining how such instruments apply



Framing



How shouldn't we conceptualize disasters?

As the indiscriminate force of nature
As the adverse impacts of climate change
As precisely the phenomenon that CSR 51 was not designed for



A and Another v MIEA & Anor [1997] HCA

“By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be the epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention.” (Dawson J)

Cited with approval by Lord Hope in *Horvath* [2000] UKHL 37, who emphasized the notion of surrogate protection



Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689

“The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary” (La Forest J)



K & Fornah v SSHD [2006] UKHL 46

“Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well- founded fear of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”. (Baroness Hale) [97]



Therefore...

- In disasters
 - There appears to be no agent of persecution
 - States tend to do their best to help victims
 - The impact is indiscriminate and cannot thus be related to a Convention reason
- Disasters engender adversity and invite a humanitarian response
- The Refugee Convention is an inappropriate instrument for addressing the protection needs of people displaced in the context of disasters and climate change



Thank you!



These judicial opinions reflect the continued operation of the 'hazard' paradigm

The hazard paradigm:

- Disasters are equivalent to the natural hazards that can trigger them [absent consideration of historical, social, political economic and other underlying factors]
- States tend to do their best to help all people within their jurisdiction – there is no breakdown in the social contract
- Disasters are indiscriminate
- That's not to say that hazard events don't often kill, injure, destroy property and displace 'indiscriminately' - but such impacts always occur in a social context that warrants express articulation



How should refugee lawyers conceptualize disasters?

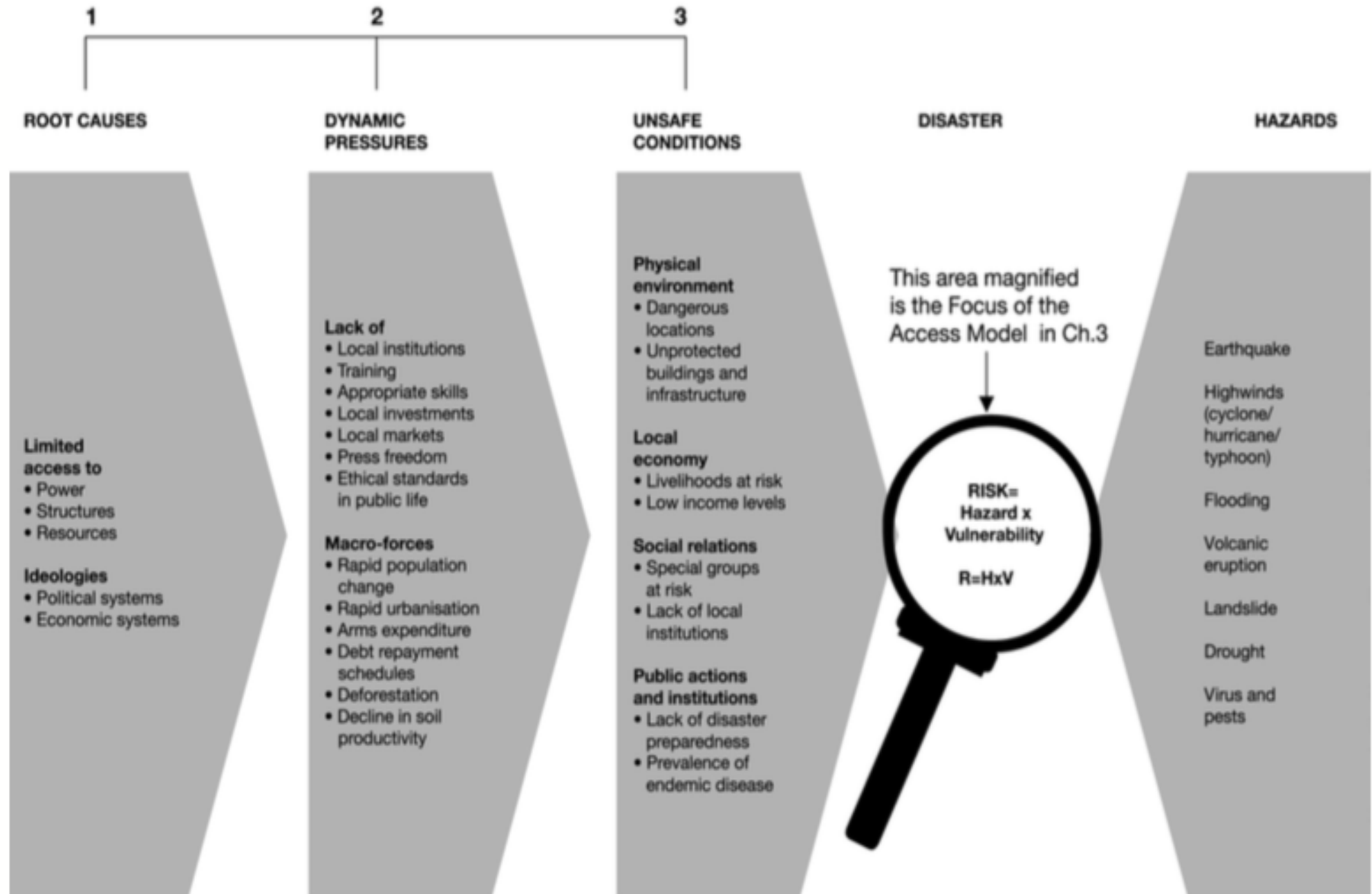
Disasters as revealing and exacerbating discriminatory failures of state protection that result in a serious violation/denial of human rights



Disaster risk = hazard x vulnerability



THE PROGRESSION OF VULNERABILITY



Wisner et al, *At Risk*, 2004

Figure 2.1 Pressure and Release (PAR) model: the progression of vulnerability

The 'social' paradigm

- Disasters are not purely naturally occurring phenomena, but rather are deeply social phenomena
- States do not always do their best to address the needs of all persons within their jurisdiction in the context of a disaster (and in the periods leading up to and in the aftermath of such events and processes)
- Disaster impacts are differential, at times owing to a person's race, religion, nationality, membership of a particular social group or political opinion



Discrimination and disasters

- Thus, depending on the society and situation, social characteristics such as gender, age, physical and mental health status, occupation, marital status, sexuality, race, ethnicity, religion and immigration status may have a bearing on potential loss, injury or death in the face of hazards – or resource made to be hazards – and the prospects and processes for changing that situation - Wisner, Kelman and Gaillard - Framing Disaster: Theories and Stories Seeking to Understand Hazards, Vulnerability and Risk
- “As in normal times, differentiating factors such as race, ethnicity, class, age, and gender are key variables in the emergence of patterns of consensus and conflict... The factors of race, ethnicity, class, gender, and age are also significant in differentiating impact... Preexisting morally and religiously sanctioned patterns of social inequality, for example, are held responsible for further discrimination and deprivation in circumstances of famine in India - Anthony Oliver-Smith, “Anthropological Research on Hazards and Disasters”
- “Discrimination was and is inherent in many societies, with disasters often magnifying the problem... Every emergency involves people who cannot access food and shelter simply because of their age, ethnicity, gender or disability. People already on the margins of society as a result of discrimination are made even more vulnerable through a crisis” - IFRC, *World Disasters Report 2007: Focus on Discrimination*



**How does this paradigm affect the way
claims for international protection fall to
be considered?**



Case law demonstrating appreciation of the 'social' paradigm



Inspiration from emerging NZIPT case law

BG (Fiji); AF (Kiribati) [focus on CSR]; and AC (Tuvalu) [focus on ICCPR] – considered:

- No recognition of international legal obligation in any case, but principles articulated
 - **Being persecuted** – human rights based approach
 - **Nexus** – predicament approach
 - **Risk** – real chance – possibility of anticipatory flight?



Being persecuted in a disaster context

- **Persecution = serious harm + absence of state protection**
- **Serious harm**
 - Economic and social rights in focus [*BG (Fiji)*]
 - Death, injury, disease, hunger, homelessness, displacement (or cast as rights to life, health, adequate standard of living)
- **Absence of state protection**
 - Ex ante failures of disaster risk reduction – including discriminatory conditions that increase vulnerability and exposure - Relative to the facts of the case, ability of state to take measures? [*AC (Tuvalu)*, *ref Budayeva*]
 - Ex post facto failures of disaster response – including discriminatory distribution of relief; failures to ensure physical security; failures to ensure minimum core of economic and social rights [*AF (Kiribati)*]
- **Proximity** between conduct and harm?



Nexus in a disaster context

Targeted:

- Discriminatory distribution of disaster relief (consider obiter comments in Khawar; *RT (Zimbabwe)*; Ahmadis in Pakistan floods 2010)

Bifurcated:

- States electing not to invest in disaster risk reduction in certain areas out of a lack of concern for inhabitants, owing to their race, religion, nationality, MSPG or political opinion (Hurricane Katrina?)

Predicament approach:

- Distinct from singling out by actor of persecution
- Individuals are vulnerable and exposed to disasters because of their race, religion, nationality, membership of a particular social group or political opinion – inviting an intersectional analysis – perhaps combination of protected characteristics – particularly relevant in relation to cumulative persecution
 - Reewin and Bantu in Somali famine? (perhaps take up in discussion?)



Risk on return – the real conceptual challenge

- Beyond remote or speculative, below balance of probabilities [*AF (Kiribati)*; *AC (Tuvalu)*]
- Past failures of DRR create strong presumption of future risk [*AC (Tuvalu)*]
- **'Sudden onset'**
 - Intense risk of serious harm during and in the immediate aftermath
 - In general, conditions cease to entail a real risk of serious harm for majority after intervention of humanitarian assistance – although much more information is needed about specific risks to specific groups in specific contexts (case law is the best way to generate this) – consider smaller disasters
- **'Slower onset'**
 - More complex resolution owing to complex social causes (as distinct from sudden impact of natural hazard event)
 - Can improve with rains/next harvest
 - Often interconnected with conflict
- Questions
 - Is there a date stamp on risk on return?
 - Risk of recurrence?



Therefore, refugee lawyers should conceptualize disasters as:

- Part of the rich fabric of individual claims for international protection having regard to
 - the (discriminatory) social context in which disasters unfold,
 - the various forms of disaster related harm and
 - states' positive obligations in relation to disaster risk reduction and response,
- and mindful of the dominant interpretation of the eligibility requirements for international protection in the jurisdiction



The future?

- Targeted COI – drawing i.e. on Integrated Phase Classification on food insecurity; World Risk Index; ethnography; OCHA situation reports
- More cases generate better understanding of the individual impact of climate change and disasters
- The application of international refugee law in this context is clarified over time on a case by case basis
- Most people continue to be ineligible for refugee status, confirming the ongoing need for alternative approaches as articulated in the Nansen Initiative's Protection Agenda

