

ANALYSIS OF ‘IMMINENCE’ IN INTERNATIONAL PROTECTION CLAIMS: *TEITIOTA V NEW ZEALAND* AND BEYOND

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Abstract The UN Human Rights Committee’s finding in *Teitiota v New Zealand* has garnered widespread global attention for its recognition that the effects of climate change may put people’s lives at risk or expose them to cruel, inhuman or degrading treatment, thus triggering States’ *non-refoulement* obligations. However, a secondary—and highly problematic—consequence of the decision has been its confusing and misplaced focus on ‘imminence’ of harm. This reflects a concerning, albeit uneven, trend in human rights cases generally (and cases concerning climate change and human rights, in particular) to recognize violations only where rights are immediately threatened. This short article reflects on the assumptions that *Teitiota* has triggered about the place of imminence in international protection claims, identifies the source of confusion, and suggests a more appropriate framework to guide a category of case that is likely to become the subject of intense litigation in the future.

Keywords: human rights law, refugee law, imminence, climate change, displacement.

I. INTRODUCTION

The UN Human Rights Committee’s finding in *Teitiota v New Zealand* has garnered widespread global attention for its recognition that ‘without robust national and international efforts’, the effects of climate change may put people’s lives at risk or expose them to cruel, inhuman or degrading treatment, thus triggering States’ *non-refoulement* obligations.¹ The matter concerned Ioane Teitiota, a man from the Pacific atoll country of Kiribati, who had sought protection in New Zealand on the basis that life in Kiribati

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¹ *Teitiota v New Zealand*, UNHRC, Comm No 2278/2016, UN Doc CCPR/C/127/D/2728/2016 (2019) para 9.11.

was becoming increasingly precarious on account of the impacts of climate change.² When his claims were rejected by the New Zealand tribunal and courts, he lodged a complaint with the Human Rights Committee. Although no violation was found on the facts, the Committee's recognition that 'the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states'³ is significant for the signal it sends to lawyers, decision-makers and policymakers considering how to respond to displacement in the context of climate change.

Unfortunately, a secondary—and highly problematic—consequence of the decision has been its confusing and misplaced focus on 'imminence' of harm. This reflects a concerning, albeit uneven, trend in human rights cases generally (and cases concerning climate change and human rights, in particular) to recognize violations only where rights are immediately threatened.⁴ As we have argued elsewhere, 'a protection-limiting criterion should not infiltrate decision-making without an explicit consideration of its legal validity and purpose'.⁵ This is particularly so in the context of climate change litigation, 'given that there is likely to be some interval of time between actions which could or do violate human rights obligations, and the ensuing impacts'.⁶

This short article reflects on the assumptions that *Teitiota* has triggered about the place of imminence in international protection claims, identifies the source of confusion, and suggests a more appropriate framework to guide a category of case that is likely to become the subject of intense litigation in the future.

II. THE INFILTRATION OF IMMINENCE

In international human rights law, a person does not have to show that they face an *imminent* risk of harm on removal for a human rights violation to be established. In the international protection space, neither refugee law nor human rights law imposes an imminence requirement. Rather, the principle of *non-refoulement* applies where a person has a well-founded fear of being persecuted (refugee law) or faces a real risk of being subjected to irreparable harm (human rights law). Imminence is only relevant when it comes to

² His claims under both refugee law and human rights law were rejected. See *AF (Kiribati)* [2013] NZIPT 800413; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

³ *Teitiota v New Zealand* (n 1) para 9.11.

⁴ For detailed analysis of the emergence of 'imminence' as a limiting factor in jurisprudence, see A Anderson, M Foster, H Lambert and J McAdam, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 ICLQ 111. See also J Bell-James and B Collins, 'Human Rights and Climate Change Litigation: Should Temporal Imminence Form Part of Positive Rights Obligations?' (2022) 13 JHRE 212.

⁵ *ibid.*, 140.

⁶ Bell-James and Collins (n 4) 215.

establishing admissibility requirements as a 'victim' of a violation under the First Optional Protocol to the ICCPR.⁷ Since 1993, the Human Rights Committee has consistently held that to meet this requirement, a person must show that 'an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent'.⁸ This is to ensure that the Committee does not engage in moot adjudications, especially given its limited resources.

While a very careful reading of *Teitiota* does reflect this nuance,⁹ the Committee's wording has generated considerable confusion. A survey of reactions to *Teitiota* reveals that commentators either tacitly assume,¹⁰ or expressly believe,¹¹ that imminence is now part of the test for a substantive violation. A consistent theme in these responses is the argument that the implied *non-refoulement* obligation in Article 6 of the ICCPR (right to life) may be engaged where 'sudden-onset events and slow-onset processes ... propel the cross-border movement of individuals ... where such risks are imminent'.¹² Others likewise conclude that 'climate change may lead to the displacement of individuals triggering the obligation of non-refoulement by the receiving State *if it is found that returning an individual would pose an imminent risk to his life* in violation of Article 6',¹³ and categorically state that the Committee 'rejected that this risk was "imminent", as required for there to be a violation of article 6'.¹⁴ As a matter of law, the test is one of

⁷ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸ *EW v Netherlands*, UNHRC, Comm No 429/1990, UN Doc CCPR/C/47/D/429/1990 (1993) para 6.4; see also *Aalbersberg v Netherlands*, UNHRC, Comm No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (2006); discussion in Anderson et al (n 4) 125–8.

⁹ *Teitiota v New Zealand* (n 1) para 8.4, referring inter alia to *Aalbersberg v Netherlands* (n 8) para 6.3; *Bordes and Temeharo v France*, UNHRC 645/1995, UN Doc CCPR/C/57/D/645/1995 (1996) para 5.5.

¹⁰ S Behrman and A Kent, 'The Teitiota Case and the Limitations of the Human Rights Framework' (2020) 75 Questions of International Law 25, 36ff; C Bhardwaj, 'Ioane Teitiota v New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020' (2021) 23 EnvLRev 263; I Bergova, 'Environmental Migration and Asylum: Ioane Teitiota v. New Zealand' (2021) 42 JustSysJ 222

¹¹ A Sinclair-Blakemore, 'Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?' (OxHRH Blog, 2020) <<https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law>>; U Pandit, 'An Analysis of Ioane Teitiota v New Zealand: Paving the Way for Climate Refugees and Non Refoulement Obligations of States under Article 6 of the ICCPR' (2020) NUALS Law Journal <<https://nualslawjournal.com/2020/05/01/an-analysis-of-ioane-teitiota-v-new-zealand-paving-the-way-for-climate-refugees-and-non-refoulement-obligations-of-states-under-article-6-of-the-icpr/>>; 'UN Human Rights Committee Decision on Climate Change is a Wake-up Call, according to UNHCR' (24 January 2020) <<https://www.unhcr.org/en-au/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html>>; A Hatano, 'Emerging International Norms to Protect "Climate Refugees"?: Human Rights Committee's Decision on *Teitiota v New Zealand*' (2021) 10(2) Journal of Human Security Studies 32, 43; S Behrman and A Kent, 'Prospects for Protection in light of the Human Rights Committee's Decision in *Teitiota v New Zealand*' (2021) Polish Migration Review (preprint).

¹² Hatano (n 11) 43 (emphasis added).

¹³ Pandit (n 11) (emphasis added).

¹⁴ Sinclair-Blakemore (n 11).

‘real risk’—‘the likelihood of harm resulting from such removal ... not on precisely how soon after removal it may manifest’.¹⁵

The implications are not just confined to doctrinal scholarship. For instance, a manual developed to assist lawyers with claims by ‘environmental migrants’ now erroneously includes ‘imminence’ as a key component for a successful protection claim.¹⁶ Any misapprehension by lawyers, advocates and decision-makers that imminence of harm is a prerequisite to establishing a violation is likely to seriously diminish the appetite for strategic litigation on this important issue, and thus hinder the development of jurisprudence. It may also result in confusion about the applicable test in protection law more generally. For instance, the use of ‘refugee’ terminology in connection with the Committee’s decision may imply that its findings implicate refugee law, which they do not.¹⁷ In his inaugural vision-setting analysis, for example, the newly appointed Special Rapporteur for the Promotion and Protection of Human Rights in the context of Climate Change suggested that:

It would appear apparent from this finding and the findings of the court that initially heard the case, that persons displaced across international borders are not defined as refugees under the 1951 UN Refugee Convention. Subsequently there appears to be no legal definition for a climate change refugee. Consequently, there are limited legal protections for people displaced across international borders as a consequence of being forcibly displaced by climate change.¹⁸

Rather than viewing *Teitiota* as expanding the potential remedies for people displaced in the context of climate change and disasters, the decision is taken to have effectively foreclosed not only the potential for international human rights law to form part of the legal response, but also refugee law. Neither of these positions is correct.¹⁹

It is clear, therefore, that clarification of the role (if any) and meaning of imminence is not simply a semantic or abstract issue; it has concrete consequences for the protection of individuals as a matter of international and domestic law.

There appear to be two key reasons for the confusion post-*Teitiota*. First, the Human Rights Committee’s conflation of issues relevant to admissibility and

¹⁵ Anderson et al (n 4) 127 (fn omitted).

¹⁶ C Sinha Das et al, *Environmental Migrants: Challenges and Opportunities for the Protection of their Rights: Legal Framework Manual and Activity Packet* (Columbia School of International and Public Affairs and International Organization for Migration, 2021) 6, 29–30, 37, 39, 41.

¹⁷ ‘Initial Planning and Vision for the Mandate: Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change: Ian Fry’, Human Rights Council Fiftieth Session (13 June–8 July 2022), UN Doc A/HRC/50/39 (June 2022) paras 24–29.

¹⁸ On the scope of refugee law in this context, see UNHCR, ‘Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters’ (1 October 2020) <<https://www.refworld.org/docid/5f75f2734.html>>; M Scott, *Climate Change, Disasters and the Refugee Convention* (CUP 2020).

merits arguably introduced uncertainty and ambiguity as to the relevance of imminence. Secondly, the Committee's reference to a timeframe (10 to 15 years²⁰) in the context of real risk appears to have been misinterpreted by some as requiring harm to be imminent.²¹ Each of these issues are addressed in turn.

III. ADMISSIBILITY VERSUS MERITS

In New Zealand's Immigration and Protection Tribunal, where this matter originated, the decision-maker had engaged with the notion of imminence as follows:

Imminence should not be understood as imposing a test which requires the risk to life be something which is, at least, likely to occur. Rather, the concept of an 'imminent' risk to life is to be interpreted in light of the express wording of section 131 [of New Zealand's Immigration Act]. This requires no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger. In other words, these standards should be seen as largely synonymous requiring something akin to the refugee 'real chance' standard. That is to say, something which is more than above mere speculation and conjecture, but sitting below the civil balance of probability standard. ... Nevertheless, the risk to the appellant and his family still falls well short of the threshold required to establish substantial grounds for believing that they would be in danger of arbitrary deprivation of life within the scope of Article 6. It remains firmly in the realm of conjecture or surmise.²²

Although the decision-maker prefaced these remarks with an acknowledgement that imminence was only relevant to standing as a 'victim', the Human Rights Committee quoted extracts of the above in its analysis of the *merits*. It stated that 'the Tribunal considered that the evidence the author provided did not establish that he faced a risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati'.²³

Once the Committee declares a matter to be admissible, the question of imminence of harm is no longer relevant.²⁴ Indeed the Committee had earlier stated, in its discussion of admissibility, that 'in the context of attaining victim status in cases of deportation or extradition, the requirement of

²⁰ See *Teitiota v New Zealand* (n 1) paras 7.2, 9.10, 9.11.

²¹ See eg Sinclair-Blakemore (n 11).

²² *AF (Kiribati)* (n 2) paras 90–91. See I Zink, 'Storm Warning: New Zealand's Treatment of "Climate Refugee" Claims as a Violation of International Law' (2022) 37 *AmUIntlLRev* 441, 64–65 for a critique of the tribunal's analysis on this point. It has been suggested that the tribunal's characterization of 'imminence' here 'bears a stronger similarity to the concept of foreseeability than that of temporal imminence': Bell-James and Collins (n 4) 233.

²³ *Teitiota v New Zealand* (n 1) para 9.6.

²⁴ New Zealand argued that the matter should be ruled inadmissible because there was 'no evidence that the author faced an imminent risk of being arbitrarily deprived of his life when he was removed to Kiribati': *ibid*, para 4.5.

imminence primarily attaches to the decision to remove the individual, whereas the imminence of any anticipated harm in the receiving state influences the assessment of the real risk faced by the individual.²⁵ However, repetition of the New Zealand tribunal's reference to imminence (which had been in relation to admissibility) in the Committee's findings on the merits suggests otherwise, as it naturally creates the impression that imminence forms a relevant element of the substantive claim.²⁶

This is not the first time that the Committee has conflated the question of standing with the substantive question of the purported human rights violation. A previous analysis has revealed 'that there is sometimes a conflation of two conceptually distinct issues: the question of standing/victimhood, and the substantive question of the human rights violation'.²⁷ For instance, in *Khan v Canada* and *Singh (Daljit) v Canada*, the Committee ruled claims inadmissible partly because the complainants had not provided sufficient evidence to support the contention that they would be exposed to 'a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported'.²⁸ Yet because imminence was introduced in these cases via a conflation of distinct issues, its rationale was not articulated or justified.²⁹

IV. IMMINENCE AND REAL RISK

A second source of confusion relates to the discussion of a time frame for future harm. In most claims for international protection (whether pursuant to the Refugee Convention or the principle of *non-refoulement* in human rights law), the question of timing of harm is a non-issue: it is clear (or assumed) that harm will be visited upon the person shortly after their return. Indeed, historically there was little case law and virtually no scholarship examining the question of timing of harm precisely for this reason. However, it is now understood that there are categories of claims in which the timing of harm is an issue, especially where harm is more likely to manifest over a reasonably lengthy time frame. Displacement linked to the impacts of climate change is a prime example.³⁰

²⁵ *ibid*, para 8.5.

²⁶ See also the Committee's summary of the State party's arguments: 'the complainant has not provided evidence to substantiate his claim that he faces actual or imminent harm'; 'the State party considers that there is no evidence that the authors now face an imminent risk of being arbitrarily deprived of life following their return to Kiribati': *ibid*, paras 6.1, 6.2, respectively.

²⁷ Anderson et al (n 4) 126.

²⁸ *Khan v Canada*, UNHRC, Comm No 1302/2004, UN Doc CCPR/C/87/D/1302/2004 (2006) para 5.4; *Singh (Daljit) v Canada*, UNHRC, Comm No 1315/2004, UN Doc CCPR/C/86/D/1315/2004 (2006) para 6.3. See Anderson et al (n 4) 127.

²⁹ Anderson et al (n 4) 128.
³⁰ For discussion of this and other examples, see Anderson et al (n 4); A Anderson, M Foster, H Lambert and J McAdam, 'A Well-Founded Fear of Being Persecuted ... But When?' (2020) 42 *SydLR* 155.

The essence of the Committee's reasoning on this point was as follows:

In the present case, the Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the assessment of the domestic authorities that the measures by [sic] taken by the Republic of Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice.³¹

This reference to a time frame appears to have led some commentators to assume that international protection norms apply only where harm is imminent. However, on reflection, it is clear that the Committee decided no such thing. Assessing a real risk of harm in any protection context involves a two-pronged assessment of the likelihood of harm *in light of* the likelihood of the home State offering protection against such harm. If the home State is able and willing to provide protection at an effective level, it may mean that the harm is not well-founded—or, to put it another way, there is no real risk of harm. Reference above to 'intervening acts by the Republic of Kiribati' appears to be directed precisely to this question.

Indeed, as a matter of principle, there is nothing inherent in either the 'well-founded fear' test in refugee law or the 'real risk' test under international human rights law that suggests that harm must be imminent in order to enliven a State's protection obligations.³² Both tests—well-founded fear and real risk—are sufficiently open-textured to encompass 'the evolving nature of many contemporary forms of slower-onset harms which may present less immediate, but no less serious, risks to human rights'.³³

V. A WAY FORWARD

While an imminence requirement 'could prove fatal to climate change cases given the long-term nature of climate risk', it remains difficult to tell 'whether temporal imminence is in fact intended to be a superadded element of a human

³¹ *Teitiota v New Zealand* (n 1) para 9.12. Contrast the dissenting view of Duncan Muhumuza Laki, who argued that the majority placed 'an unreasonable burden of proof' on the complainant, and that Mr Teitiota faced 'a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of the conditions in Kiribati': Annex 2 dissent, paras 1, 5, respectively.

³² Anderson et al (n 4) 122: 'there is no conceptual reason why imminence—in the sense of timing—should be used to limit a State's protection obligations'.³³ *ibid.*, 119.

rights violation, or whether courts are in fact more concerned with notions of foreseeability'.³⁴ The use of 'imminence' may just be 'a linguistic red herring'.³⁵ It is arguable that the Committee in *Teitiota* conflated an absence of temporal imminence with a lack of foreseeability, given 'the potential for intervening actions that could sever the causal connection' between the act of removal and its consequences.³⁶ Whatever the Committee's intention, however, it is clear that *Teitiota* has muddied the waters when it comes to the role of imminence in human rights cases. This is of grave concern, since the notion may be unwittingly—and erroneously—transposed into national decision-making and result in people being denied protection, even though they have a legal entitlement to it.

It is suggested that the appropriate frame of analysis is one of *foreseeability* of harm—not imminence. This is consonant with the forward-looking assessment in international refugee law, well entrenched in the jurisprudence,³⁷ which requires a degree of speculation about future harm.³⁸ Framing the analysis as whether there is a well-founded fear or real risk of harm in the 'reasonably foreseeable future'³⁹ orients the decision-maker to the true question at the heart of the protection regime, namely risk of harm, without dictating an artificially narrow time period which delimits the ambit of protection.

In light of the propensity for misunderstanding, and for such misunderstanding to lead to an artificial and erroneous delimiting of the scope of international protection, it is time to dispense with the language of imminence in international protection claims altogether. In the meantime, there should be a more nuanced and careful invocation of the concept of imminence by those seeking to describe, interpret or apply the law of international protection to those at risk of harm.

³⁴ Bell-James and Collins (n 4) 235 (fn omitted).

³⁵ *ibid.*, 215.

³⁶ *ibid.*, 233.

³⁷ Anderson et al (n 4) 120; Anderson et al (n 30).

³⁸ GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (4th edn, OUP 2021) 57; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 288 (Kirby J).

³⁹ See generally Anderson et al (n 30).