

# IMMINENCE IN REFUGEE AND HUMAN RIGHTS LAW: A MISPLACED NOTION FOR INTERNATIONAL PROTECTION

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**Abstract** This article is the first scholarly output of a major research project examining the notion of imminence in the law on international protection. It is the first piece of scholarship to identify an emerging trend, namely the introduction of imminence—whether invoked implicitly or explicitly—as a potential barrier to refugee status or complementary protection. The article analyses the jurisprudence of relevant international bodies and courts and critiques the validity of this notion as a tool for assessing States’ protection obligations.

**Keywords:** Imminence, refugee law, human rights law, complementary protection, *non-refoulement*, time.

## I. INTRODUCTION

Time is everywhere in refugee and human rights law.<sup>1</sup> But in assessing whether someone faces a real chance of being persecuted or subjected to other serious harm if removed, the immediacy or ‘imminence’ of that harm should not be the basis on which protection is granted or denied.<sup>2</sup> A decision-maker who took such an approach would fall into legal error.<sup>3</sup>

We were struck, however, by several types of protection cases in which the nearness in time of harm seemed to play a role, such as those relating to the (future) impacts of climate change and to deterioration of health over time. We were curious about why, and how, the ‘imminence’ of harm was factored into decision-making in this context—either implicitly or

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<sup>1</sup> B Burson, ‘The Concept of Time and the Assessment of Risk in Refugee Status Determination’ (Kaldor Centre Annual Conference, Sydney, 18 November 2016) 1-2, 4 <[http://www.kaldorcentre.unsw.edu.au/sites/default/files/B\\_Burson\\_2016\\_Kaldor\\_Centre\\_Annual\\_Conference.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/B_Burson_2016_Kaldor_Centre_Annual_Conference.pdf)> (writing in his personal capacity).

<sup>2</sup> By ‘protection’ or ‘international protection’, we mean the protection granted to refugees and others at risk of serious harm, based on the principle of *non-refoulement* in refugee and human rights law (refugee status and complementary protection, respectively).

<sup>3</sup> By ‘decision-maker’, we mean refugee and immigration decision-makers (typically immigration officials), tribunal members, and judges who consider international protection claims.

explicitly. What was common to these cases was that the alleged harm was not felt acutely now, but, it was argued, it would have deleterious consequences in the future.

Decision-makers may have imported the notion of imminence, understood in terms of time (*when* harm may occur), from other areas of international law, such as the law of self-defence.<sup>4</sup> Yet, even in that context, there is ‘little scholarly consensus on what is properly meant by “imminence” in the context of contemporary threats.’<sup>5</sup> Indeed, we were surprised by how little jurisprudential discussion there has been of the notion, finding that it has instead been promoted through academic debate rather than legal instruments or case law. In the ‘protection of civilians’/peacekeeping context, where the United Nations (UN) Security Council has traditionally directed peacekeepers to protect civilians from ‘imminent threat of physical violence’<sup>6</sup>—by ‘us[ing] force to protect civilians who were *on the brink of being harmed*’<sup>7</sup>—the notion has again proven to be problematic and poorly understood,<sup>8</sup> at times creating confusion about when to act. For this reason, ‘imminence’ is now rarely invoked in that context.<sup>9</sup> Our concern is that an already unclear notion may be unwittingly transposed into the law on international protection, resulting in poor decision-making, legal error, and, ultimately, negative outcomes for refugees and others in need of protection.

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<sup>4</sup> An imminent threat of attack may justify the use of self-defence by a State: *Mr Barker to Mr Woodbury—(Extract)*, H Ex Doc No 74, 25<sup>th</sup> Cong, 2<sup>nd</sup> sess, better known as the *Caroline case*. The nearness in time of the attack seems to demand something ‘instant, overwhelming, and leaving no choice of means, and no moment of deliberation’: remarks by the United States Secretary of State on the conditions under which a plea of self-defence could be accepted (in relation to the *Caroline* incident), cited in AC Arend, ‘International Law and the Preemptive Use of Military Force’ (2003) 26(3) *Washington University Law Quarterly* 89, 90–1. See also J Wright, ‘The Modern Law of Self-Defense’ (IISS London, 11 January 2017) <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>.

<sup>5</sup> D Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 *American Journal of International Law* 770, 773. Akande and Liefländer agree that due to the lack of scholarly consensus, the notion of imminence ‘needs to be further refined and developed’: D Akande and T Liefländer, ‘Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense’ (2013) 103 *American Journal of International Law* 563, 564.

<sup>6</sup> First used October 1999 in UN Security Council (UNSC) Res 1270 (22 October 1999) UN Doc S/RES/1270 para 14. See H Willmot et al (eds), *Protection of Civilians* (OUP 2016).

<sup>7</sup> Victoria Holt and Glyn Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (United Nations 2009) 40 (emphasis added, fn omitted).

<sup>8</sup> *ibid* 166, 307, 327.

<sup>9</sup> The term ‘imminent’ has been removed, for example, from the mandates of UN missions in Sudan (UNMIS), Darfur (UNAMID), Central African Republic (MINUSCA), Côte d’Ivoire (UNOCI), and the Democratic Republic of the Congo (MONUSCO). See UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 para 12(a); UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769 para 15(a)(ii); UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149 para 30(a)(i); UNSC Res 2162 (25 June 2014) UN Doc S/RES/2162 para 19(a)(i); UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 para 4(a)(i) as cited in Scott Sheeran and Catherine Kent, ‘Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention Conceptual and Normative Interactions’ in Willmot et al (n 6) 45, n 138. Moreover, where it is still invoked, the term ‘imminent’ in this context has been more recently defined to encompass more than an immediate timeframe: ‘The protection of civilians [POC] mandate often specifies an “imminent” threat of physical violence. A POC threat is considered imminent as soon as the mission has a reasonable belief that a potential perpetrator displays a hostile intent, capacity, historical record and opportunity to inflict physical violence. The term “imminent” does not therefore imply that violence is guaranteed to happen in the immediate or near future or is being carried out. A threat of violence against civilians is imminent from the time it is identified until such time that the mission can determine that the threat no longer exists’: United Nations Department of Peacekeeping Operations / Department of Field Support, ‘DPKO/DFS Policy on the Protection of Civilians in United Nations Peacekeeping’ 2015.07 (1 April 2015) para 47; United Nations Department of Peacekeeping Operations / Department of Field Support, ‘Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions’ 2015.02 (February 2015) 25.

For these reasons, this article engages with issues that go well beyond academic inquiry alone: they have immediate and concrete consequences for people whose protection claims are rejected because of a lack of legal clarity about the relevance, nature, and scope of the notion of imminence. A series of cases in New Zealand has already started to delineate the potential of refugee and human rights law to protect people displaced from small Pacific Island countries by the impacts of climate change, disasters, and environmental degradation.<sup>10</sup> While no one has yet been granted protection on these grounds, this jurisprudence provides the most comprehensive analysis of the issues to date. ‘Imminence’ has been discussed specifically in this context, with the Immigration and Protection Tribunal (Tribunal) observing (rightly, in our view) that it imposes no higher threshold than the well-founded fear test in refugee law, and requires ‘no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger’.<sup>11</sup> However, in other jurisdictions, imminence has operated inappropriately as an additional hurdle for people seeking international protection.<sup>12</sup>

This article is the first scholarly output of a larger project examining the notion of imminence in the protection of refugees and other forced migrants. That project is based on the hypothesis that the notion has been introduced haphazardly, and virtually unnoticed, into refugee and human rights law, with no legal or conceptual foundation. While at times decision-makers’ use of the term may simply be loose language that has no particular import in the decision itself, at other times, it is being used to deny protection. Furthermore, there is a danger that loose language may risk the notion being used more substantively.

Beyond its scholarly contribution, we hope that this conceptual article will help to sharpen the focus of decision-makers when considering issues of time and risks of harm in protection cases, and the implications of using the notion of imminence in deciding whether or not individuals require international protection.

## II. SCOPE AND METHODOLOGY

The Refugee Convention remains the ‘cornerstone of the international refugee protection regime’.<sup>13</sup> However, due to its relatively restrictive definition—which requires a person to establish a ‘well-founded fear’ of being persecuted for reasons of his or her race, religion, nationality, political opinion, or membership of a particular social group—it has been supplemented by international and regional human rights law, which has stepped in to fill certain gaps by protecting people against return to a ‘real risk’ of (*inter alia*) being subjected

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<sup>10</sup> \**AC (Tuvalu)* [2014] NZIPT 800517; *AF (Kiribati)* [2013] NZIPT 800413; *AF (Tuvalu)* [2015] NZIPT 800859; \**BG (Fiji)* [2012] NZIPT 800091; *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. Note that an asterisked New Zealand case means that it is a precedent. Australian and New Zealand authorities have considered cases on this issue at least as far back as 1995, as discussed in J McAdam, ‘The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement’ (2015) 3 *Migration Studies* 131.

<sup>11</sup> *AF (Kiribati)* (n 10) [90].

<sup>12</sup> See discussion below in Part IV.

<sup>13</sup> UN High Commissioner for Refugees (UNHCR) EXCOM Conclusion No 103 (LVI) ‘Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection’ (2005) Preamble.

to torture or other cruel, inhuman or degrading treatment or punishment, or being arbitrarily deprived of their life (known as complementary protection).<sup>14</sup>

This article begins by exploring whether the evidentiary standards relevant to assessing claims for international protection, namely ‘well-founded fear’ and ‘real risk’, inherently contain an imminence component. It then examines jurisprudence from international and supranational courts and bodies assessing claims for international protection in which the notion of imminence has formed part of the reasoning, either explicitly or implicitly. The jurisdictions examined are the UN Human Rights Committee (UNHRC), the UN Committee against Torture (UNCAT), the European Court of Human Rights (ECtHR), and the Court of Justice of the European Union (CJEU).<sup>15</sup> They were chosen because: (a) they represent decision-making with respect to non-return to a ‘real risk’ of harm (which is directly relevant to refugee law and the ‘well-founded fear’ test), drawing on international law and/or European Union (EU) law; (b) they invoke the notion of imminence in their decisions, whether implicitly or explicitly; and (c) their decisions are publicly accessible, enabling an in-depth assessment of relevant decisions from each jurisdiction.

Each selected jurisdiction has its own treaty framework and distinctiveness. The UNHRC, a body of independent experts that monitors States’ implementation of the International Covenant on Civil and Political Rights (ICCPR),<sup>16</sup> can consider individual complaints about alleged violations by States that are parties to its First Optional Protocol.<sup>17</sup> In the present context, the most relevant allegations arise in relation to Articles 6 and 7 of the ICCPR, which, respectively, protect the right to life, and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

The UNCAT, established by Article 17 of the Convention against Torture (CAT),<sup>18</sup> may ‘receive and consider communications from or on behalf of individuals’ subject to the jurisdiction of any State that has made a relevant declaration pursuant to Article 22. For present purposes, the relevant provision is Article 3 which provides that ‘[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’

In Europe, Articles 2 and 3 of the European Convention on Human Rights (ECHR) respectively protect the right to life, and the right not to be subjected to torture or inhuman or degrading treatment or punishment.<sup>19</sup> Both have been acknowledged as extending to protect individuals from removal to a real risk of such harm<sup>20</sup>—in other words, they have a *non-refoulement* component. This protection may be present in other rights as well: indeed, the

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<sup>14</sup> For an overview, see J McAdam, ‘Human Rights and Forced Migration’ in E Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014); J McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

<sup>15</sup> The next element of the project is to examine state practice through case law in Australia, Canada, France, Germany, New Zealand, the United Kingdom, and the United States.

<sup>16</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>17</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>18</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>19</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights, as amended).

<sup>20</sup> *Soering v United Kingdom* (1989) 11 EHRR 439 paras 91, 113.

ECtHR has expressly acknowledged this possibility with respect to Article 4 (prohibition of slavery and forced labour),<sup>21</sup> Article 5 (right to liberty and security),<sup>22</sup> Article 6 (right to a fair trial),<sup>23</sup> Article 7 (no punishment without law),<sup>24</sup> Article 8 (right to respect for private and family life),<sup>25</sup> and Article 9 (right to freedom of thought, conscience and religion).<sup>26</sup> However, whereas in a claim based on Articles 2 or 3 an applicant must show that there are ‘substantial grounds’ for believing that he or she would face a real (‘foreseeable’)<sup>27</sup> risk of being subjected to the relevant harm,<sup>28</sup> a claim based on the other provisions demands a much higher standard—a ‘flagrant breach’ or a ‘disproportionate breach’ of a right—which has rarely been met.<sup>29</sup> In many cases, violations of these other rights will already be encapsulated by the prohibition on removal to ‘inhuman or degrading treatment’ in Article 3,<sup>30</sup> which is why such cases are the primary focus in Part IV below.<sup>31</sup>

In the EU, the CJEU, through its preliminary reference procedure, answers questions referred to it by the national courts of EU Member States seeking clarification of the interpretation of EU law.<sup>32</sup> The cases pertinent to the present article relate primarily to the interpretation of the Qualification Directive,<sup>33</sup> which protects third-country nationals recognized as refugees<sup>34</sup> and beneficiaries of ‘subsidiary protection’.<sup>35</sup> The latter are people who cannot be removed because there are ‘substantial grounds ... for believing’ that they ‘would face a real risk of suffering serious harm’,<sup>36</sup> namely (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment; or (c) a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.<sup>37</sup> A significant difference between EU

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<sup>21</sup> *Ould Barar v Sweden* (1999) 28 EHRR CD213.

<sup>22</sup> *Tomic v United Kingdom*, Application No 17837/03, Judgment of 14 October 2003; *El-Masri v Macedonia* (2013) 57 EHRR 25.

<sup>23</sup> *Soering* (n 20); *Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745; *Einhorn v France*, Application No 71555/01, Judgment of 16 October 2001; *Mamatkulov v Turkey* (2005) 41 EHRR 25; *Al-Moayad v Germany* (2007) 44 EHRR SE22; *Stapleton v Ireland* (2010) 51 EHRR SE4; *Othman v United Kingdom* (2012) 55 EHRR 1.

<sup>24</sup> *Gabbari Moreno v Spain* (2004) 39 EHRR 40.

<sup>25</sup> *F v United Kingdom*, Application No 17341/03, Judgment of 22 June 2004.

<sup>26</sup> *Z v United Kingdom*, Application No 27034/05, Judgment of 28 February 2006.

<sup>27</sup> *Soering* (n 20) [100].

<sup>28</sup> *ibid* (extradition); *Cruz Varas v Sweden* (1991) 14 EHRR 1; *Chahal v United Kingdom* (1996) 23 EHRR 413; *Ahmed v Austria* (1997) 24 EHRR 278 (expulsion). See E Lauterpacht and D Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) paras 246, 249, 252.

<sup>29</sup> *Othman* (n 23); *El-Masri* (n 22); *Al Nashiri v Poland*, Application No 28761/11, Judgment of 24 July 2014; *Husayn (Abu Zubaydah) v Poland*, Application No 7511/13, Judgment of 24 July 2014.

<sup>30</sup> *Z* (n 26); see also *R v Special Adjudicator, ex parte Ullah* [2004] 2 AC 323. Multiple rights may, however, be breached: see eg *El-Masri* (n 22).

<sup>31</sup> For an excellent and comprehensive overview of the scope of *non-refoulement* in the ECHR, see C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016).

<sup>32</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Art 267 (ex Art 234 TEC).

<sup>33</sup> The European Parliament and the Council Directive 2011/95/EU 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 [2011] OJ L 337/9 (Qualification Directive).

<sup>34</sup> *ibid* Art 2(d) (which incorporates the definition of a refugee in Art 1A(2) of the Refugee Convention, subject to restricting its application in this context to third-country nationals) and Arts 9–10.

<sup>35</sup> *ibid* Art 15.

<sup>36</sup> *ibid* Art 2(f).

<sup>37</sup> *ibid* Art 15.

law and the ECHR is that the grant of refugee status or subsidiary protection status under the Qualification Directive results in a specific set of rights and benefits for beneficiaries, of which protection against *refoulement* is just one. The situation is notably different under the ECHR, which only provides for protection against *refoulement*.<sup>38</sup>

### III. TIME AND RISK ASSESSMENT IN INTERNATIONAL PROTECTION CASES

The notion that ‘time’ is relevant to the assessment of international protection is not new; rather, it is central to many aspects of both the refugee definition and the broader protection regime.<sup>39</sup> As Durieux has observed, refugee situations ‘are exceptional circumstances in international relations’ and, as such, ‘are necessarily temporary’.<sup>40</sup> Indeed, the UN High Commissioner for Refugees (UNHCR), the body vested with the responsibility to supervise the application of the Refugee Convention, was initially established as a temporary entity with a three-year mandate, which was subsequently extended in five-year increments until 2004 when it finally became open-ended.<sup>41</sup> The cessation clauses of the Refugee Convention envisage that an individual’s need for international protection may be temporary: for instance, refugee status may end if the circumstances in the country of origin change fundamentally.<sup>42</sup> Contemporary debates about temporary protection, accelerated procedures, and durable solutions all invoke the concept of time as a central factor in refugee protection.

In terms of the substantive assessment of who is a refugee, time permeates every aspect of the refugee status determination (RSD) process:

On the one hand, time points backwards because refugee claims are grounded in what has happened in the past. ... RSD, however, also faces forward in time. It reaches into the future and inquires as to the predicament of the claimant in his or her country of origin. Refugee status is recognised precisely because the future there for the claimant is anticipated to be one in which some form of serious harm will accrue to him or her at some projected point in time arising from a failure of the state of origin to protect the enjoyment of his or her fundamental human rights by reason of a Convention-protected ground.<sup>43</sup>

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<sup>38</sup> This is also the case under Arts 4 and 19(2) of the European Union (EU) Charter of Fundamental Rights which guarantee protection against *refoulement* but not necessarily a status akin to that under the Qualification Directive: Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

<sup>39</sup> There is also an increasing interest in time in international law more generally: see for example, M Ambrus and RA Wessel (eds), *Netherlands Yearbook of International Law 2014: Between Pragmatism and Predictability: Temporariness in International Law* (TMC Asser Press 2015) vol 45. In refugee law, see eg J-F Durieux and J McAdam, ‘Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 IJRL 4; J-F Durieux, ‘Time in the Refugee Regime’ (Keynote address, Andrew & Renata Kaldor Centre for International Refugee Law Annual Conference, 18 November 2016).

<sup>40</sup> J-F Durieux, ‘Protection Where? – or When? First Asylum, Deflection Policies and the Significance of Time’ (2009) 21 IJRL 75, 75.

<sup>41</sup> United Nations General Assembly (UNGA) Res 58/153, UN Doc A/RES/58/153 (22 December 2003).

<sup>42</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (together, Refugee Convention) Art 1C; see also Arts 1D, 1E.

<sup>43</sup> Burson (n 1) 1–2.

The maxim that assessing a well-founded fear of persecution involves a forward-looking assessment of risk is well entrenched, yet there is little analysis of *how far forward* the assessment may extend, or what the *role of time* is in that prospective assessment. In light of the lack of explicit consideration of these issues, we begin our analysis by reflecting on whether there is anything inherent in either the ‘well-founded fear’ or ‘real risk’ tests—the so-called ‘standard of proof’ in international protection claims—that provides answers to these questions.

The well-founded fear test in refugee law clearly entails a prospective and forward-looking assessment. Indeed, it has been stated that any refugee determination is necessarily an ‘essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin’.<sup>44</sup> Therefore, a degree of speculation about future risk does not preclude a protection need from being recognized. However, other than these broad forms of guidance, it is striking that while there is a significant body of both jurisprudence and scholarship analysing a number of contentious aspects of the well-founded fear test, comparatively little has been written about the role of time itself.<sup>45</sup> Instead, debates about the ‘well-founded fear’ test have centred on: (a) whether it entails a subjective notion or is entirely objective<sup>46</sup>; (b) the necessary degree of likelihood to establish that a fear/risk is ‘well-founded’<sup>47</sup>; and (c) evidentiary issues, including past persecution and generalized violence.<sup>48</sup>

It is in relation to the degree of likelihood that one would assume a consideration of time would most likely be found. In perhaps the most cited decision on this topic, the United States Supreme Court in *Cardoza-Fonseca* explained that:

There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening...[A] moderate interpretation of the ‘well-founded fear’ standard would indicate ‘that so long as an

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<sup>44</sup> GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 54.

<sup>45</sup> Hathaway and Foster refer to the ‘distant future’ (JC Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 123); Wouters refers to the ‘near future’ (Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 26). Hathaway and Foster observe that ‘the inquiry should not focus just on present risks, but also on such risks as may well eventuate’: 123. Goodwin-Gill and McAdam also note that ‘the element of well-foundedness looks more to the future, than to the past’: Goodwin-Gill and McAdam (n 44) 63; see also 54. Zimmermann and Mahler simply note that ‘the term “fear” expresses a forward-looking expectation of risk’: A Zimmermann and C Mahler, ‘Article 1 A, Para 2 1951 Convention’ in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 341.

<sup>46</sup> Some scholars interpret ‘fear’ as ‘apprehension’ rather than subjective fear: see for example Hathaway and Foster (n 45) 105-6 and Gregor Noll, ‘Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear’ in Gregor Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005) 152. Whereas the preponderance of scholars (as well as judicial authority) takes the view that there is a subjective element to the fear requirement: see for example Goodwin Gill and McAdam (n 44) at 63-64 and Zimmermann (n 45) at 174. For the most comprehensive analysis of the issue, see James C Hathaway, ‘Michigan Guidelines on Well-Founded Fear’ (2005) *Michigan Journal of International Law* 492 and the related article, James C Hathaway and William Hicks, ‘Is there a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?’ (2005) 26 *Michigan Journal of International Law* 505.

<sup>47</sup> In this context the key issue in the scholarship has been the relationship between the ‘well-founded fear’ test in the Refugee Convention and other tests adopted in international human rights law, see for example, Wouters (n 45) at 25-26; 83-85. See also n 52 below.

<sup>48</sup> For a detailed discussion of these issues, see Hathaway and Foster (n 45) at 161-181.

objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility'.<sup>49</sup>

That the well-founded fear test requires only 'a reasonable possibility' of persecution, rather than the likelihood of harm, is an approach that has been widely replicated, with a variety of interchangeable tests effectively amounting to one of 'real chance'.<sup>50</sup> While excluding risks that amount to 'sheer speculation', situations where there is only a 'bare possibility' of harm, or where the risk is 'so slight that it could be discounted',<sup>51</sup> it is an appropriately liberal test that reflects the protective objective of the refugee definition and the inherent challenges in establishing a future risk of persecution with any certainty.

Analysis of the 'well-founded fear' test has tended not to invoke concepts of directness of harm, necessity, or any indication of *when* a risk needs to eventuate. It is possible that a risk becomes more 'remote' or speculative, and thus less likely, the further into the future it is anticipated, but imminence—in the sense of timing—has not and cannot be assumed to constitute an inherent aspect of the well-founded fear test. Rather, that test would appear to be sufficiently open-textured to accommodate a longer-frame assessment of future risk. It thus appears capable of encompassing the evolving nature of many contemporary forms of slower-onset harms which may present less immediate, but no less serious, risks to human rights.

How does the well-founded fear test relate to the parallel 'real risk' test in the context of *non-refoulement* under human rights law (complementary protection)? While the Refugee Convention *itself* provides the test for refugee law, namely, a well-founded fear of being persecuted, there is no clear test provided in most of the relevant human rights treaties due to the fact that the *non-refoulement* obligations derived from the ICCPR and ECHR are implied from other, primary obligations (such as the right not to be subjected to torture). The exception is CAT, where Article 3 explicitly provides that no State shall expel or return a person to another State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

Just as the well-founded fear test has spawned a considerable literature, the real risk test has similarly stimulated analysis of matters such as whether there is a subjective or purely objective element,<sup>52</sup> whether the evidentiary threshold should vary depending on the gravity of harm,<sup>53</sup> and how precisely the relevant standard of likelihood of harm should be

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<sup>49</sup> *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421 (1987) at 440 per Stevens J.

<sup>50</sup> Hathaway and Foster (n 45) 113.

<sup>51</sup> *ibid* 114-5.

<sup>52</sup> For example, McAdam, *Complementary Protection* (n 14) argues that the 'substantial grounds' test in the Qualification Directive is 'an objective one' by contrast to the Refugee Convention: see at 61-3. By contrast Cherubini disagrees that the test as embodied in the Qualification Directive 'clearly rules out the existence of subjective elements': F Cherubini, *Asylum Law in the European Union: From the Geneva Convention to the Law of the EU* (Taylor and Francis 2014) at 203.

<sup>53</sup> Several scholars argue that the evidentiary threshold should vary depending on the severity of treatment, that is, the more severe the consequences, the lower the threshold should be. The core piece appears to be T Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Rights to *de facto* Asylum' (1990) 2 *International Journal of Refugee Law* 361 at 371. Several commentators cite this piece as authority for that proposition: see for example Goodwin Gill and McAdam (n 44) 314; A Fabbriotti, 'The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases' (1998) 10 *IJRL* 637 at 646, and D Weissbrodt and I Hortreiter, 'The Principle of *Non-refoulement*: Article 3 of the



framed. In relation to the last of these, there has been some debate as to whether the ‘real risk’ test represents a higher threshold for applicants than the well-founded fear test,<sup>54</sup> although the better view is that they should be equivalent.<sup>55</sup> Insofar as there is a further gloss on the meaning of real risk, it is the notion of foreseeability- not imminence- that is most often invoked.<sup>56</sup> Yet, foreseeability in and of itself does not denote a particular timeframe.

To the extent that there has been any assessment of the role of time in the context of the real risk test, it has focused on the need for a forward-looking assessment from the date of determination. The ECtHR, for example, is explicit that while historical events may shed light on present or future events,<sup>57</sup> current circumstances are determinative. Often, but not always, this formulation is accompanied by the ECtHR declaring that it makes an *ex nunc* assessment (‘from now on’). For example, in *SHH v United Kingdom*, it stated:

In order to determine whether there is a real risk of ill-treatment in this case, the Court must examine the foreseeable consequences of sending the applicant to Afghanistan, bearing in mind the general situation there and his personal circumstances ... A full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time. Even though the historical position is of interest insofar as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light since the final decision taken by the domestic authorities.<sup>58</sup>

Thus, an *ex nunc* test requires that the future risk be assessed at the date of the decision-maker’s consideration of the case.<sup>59</sup> In other words, procedurally it requires an assessment of

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Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other International Human Rights Treaties (1999) 5 BHRLR 1 at 14.

<sup>54</sup> For helpful discussion of this issue, see in particular, H Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) paras 277-285; and Costello (n 31) at 178-9.

<sup>55</sup> The UNHCR has stated that ‘there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection’: UNHCR, ‘Submission to the Migration Amendment (Complementary Protection) Bill 2009 Inquiry’ (30 September 2009) para 34, <<http://www.aph.gov.au/DocumentStore.ashx?id=f175865d-d80b-43b6-b845-fda2049ab713>>. The jurisprudence of the various international supervisory bodies supports the view that it is, at least in theory, the same standard as ‘real chance’ in the Refugee Convention. For a detailed summary of the case-law, see Andrew and Renata Kaldor Centre for International Refugee Law, ‘Submission in relation to the Migration Amendment (Protection and Other Measures) Bill 2014’ (4 August 2014) paras 43-73, <[http://www.kaldorcentre.unsw.edu.au/sites/default/files/migration\\_amendment\\_protection\\_and\\_other\\_measures\\_bill\\_2014\\_submission\\_final\\_0.pdf](http://www.kaldorcentre.unsw.edu.au/sites/default/files/migration_amendment_protection_and_other_measures_bill_2014_submission_final_0.pdf)>.

<sup>56</sup> For example in the seminal *Soering* decision (n 20), the United Kingdom government had argued that ‘the application of Article 3 (art. 3) in extradition cases should be limited to those occasions in which the treatment or punishment abroad is certain, imminent and serious’: at para 83. However, in its reasoning the court emphasized foreseeability not certainty as the test: see para 90.

<sup>57</sup> The leading case with this formulation is *Chahal* (n 28). See also *Garayev v Azerbaijan*, Application No 53688/08, Judgment of 10 June 2010; *AGR v Netherlands*, Application No 13442/08, Judgment of 12 January 2016; *AWQ v Netherlands*, Application No 25077/06, Judgment of 12 January 2016; *MRA v Netherlands*, Application No 46856/07, Judgment of 12 January 2016. The Court did not use the language of ‘*ex nunc*’ in these cases.

<sup>58</sup> *SHH v United Kingdom* (2013) 57 EHRR 18 para 72. See also *Sheekh v Netherlands* (2007) 45 EHRR 50; *JK v Sweden*, Application No 59166/12, Judgment of 23 August 2016; *Chankayev v Azerbaijan*, Application No 56688/12, Judgment of 14 November 2013; *Tershiyev v Azerbaijan*, Application No 10226/13, Judgment of 31 July 2014; *Mawaka v Netherlands*, Application No 29031/04, Judgment of 1 June 2010; *H v United Kingdom* (2013) 57 EHRR 17; *EG v United Kingdom* (2012) 54 EHRR 1.

<sup>59</sup> *Sheekh* (n 58) para 136.

future risk today, but it should not foreclose the substantive assessment. As the Grand Chamber of the ECtHR recalled in *JK and Others v Sweden*, the principle of an *ex nunc* evaluation of the circumstances requires that the ‘assessment must focus on the foreseeable consequences of the applicant’s removal to the country of destination in the light of the general situation there and his or her personal circumstances.’<sup>60</sup> The court further explained

that it is assessing the applicants’ situation from the present-day point of view. The main question is not how the Swedish immigration authorities assessed the case at the time (that is, when the Migration Agency and the Migration Court took their decisions on 22 November 2011 and 23 April 2012 respectively) but rather whether, in the present-day situation, the applicants would still face a real risk of persecution for the above-mentioned reasons if removed to Iraq.<sup>61</sup>

The CJEU, too, undertakes an *ex nunc* test. In EU law, the assessment of facts and circumstances is regulated by Article 4 of the Qualification Directive. According to the CJEU, this

‘assessment’ takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.<sup>62</sup>

More specifically regarding timing, the Qualification Directive provides that the assessment of all relevant facts is to be carried out on an individual basis, as ‘at the time of taking a decision on the application’.<sup>63</sup> This *ex nunc* assessment of facts and circumstances is further enshrined in the Procedures Directive, which requires that ‘Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)]’.<sup>64</sup>

One context in which there is explicit reference to a minimum future period is in relation to actors of protection.<sup>65</sup> Of particular relevance to the present study is the fact that protection from persecution or serious harm under EU law should be ‘effective and of a non-temporary nature’.<sup>66</sup> While there is no finite future period specified, the fact that ‘protection’ against persecution or serious harm must be non-temporary and durable strongly points to the

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<sup>60</sup> *JK* (n 58) para 83.

<sup>61</sup> *ibid* para 113.

<sup>62</sup> Case C-277/11 *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (First Chamber, 22 November 2012) para 64.

<sup>63</sup> Art 4(3)a. See also UNHCR, ‘Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions’ UN Doc HCR/GIP/16/12 (2 December 2016) para 24 (Guidelines on International Protection No 12): ‘The 1951 Convention protects those who – at the time of the decision – are at risk of persecution in their country of origin, regardless of whether they have already suffered persecution’.

<sup>64</sup> European Parliament and Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L 180/60 Art 46.

<sup>65</sup> Qualification Directive (n 33) Article 7.

<sup>66</sup> *ibid* Recital 26, Art 7.

need for a temporal assessment that looks well beyond the present, or immediate, risk of harm, and into the future.<sup>67</sup>

Having thus established that there is no conceptual reason why imminence—in the sense of timing—should be used to limit a State’s protection obligations, we now turn to consider how some judicial bodies have nonetheless begun to import this notion into the assessment of international protection claims.

#### IV. ‘IMMINENCE’ IN INTERNATIONAL PROTECTION: THE JURISPRUDENCE OF INTERNATIONAL COURTS AND OVERSIGHT BODIES

In examining jurisprudence on imminence in international protection, we focused on cases where the notion of imminence was explicitly invoked, or where the court or body used the concept of timing of future harm as a relevant factor in the assessment of the protection claim.<sup>68</sup>

The notion of imminence has been referred to and used explicitly in all jurisdictions examined for this research, and, in particular, has been engaged in some cases to reject a claim for international protection.<sup>69</sup> For example, in five cases in our study, the ECtHR relied on the absence of an imminent risk to reject the application.<sup>70</sup> Although it has not been invoked as a ground for refusal of protection by the CJEU,<sup>71</sup> that court does recognize

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<sup>67</sup> See also the CJEU interpretation of the cessation clause (Qualification Directive (n 33) Art 11 and Refugee Convention Art 1C) referring to ‘durable change’ in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla v Bundesrepublik Deutschland* [2010] ECR I-01493.

<sup>68</sup> In the four jurisdictions studied, we identified decisions where imminence was explicitly invoked and where the impact of time was particularly significant. We identified 27 cases in relation to UNHCR jurisprudence; 59 cases in relation to UNCAT; 89 cases in relation to the ECtHR; four relevant cases in relation to the CJEU. It may also be noted that the ECtHR also has the ability to suspend expulsion or extradition, pursuant to Rule 39 of the court, to prevent an ‘imminent risk of irreparable damage’ (*Mamatkulov* (n 23) para 104). These initial decisions are not included in this study as there is no factual assessment of imminence. The ECtHR makes such decisions quickly without the full evidence (eg *Mamatkulov* (n 23); *MSS v Belgium and Greece* (2011) 53 EHRR 2) and decisions are not published. Curiously, even though case law indicates that the test for interim measures in practice is ‘imminent risk’, the Practice Direction on Interim Measures issued by the President of the ECtHR in September 2016 did not refer to this standard, but rather to ‘real risk’: ‘The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied’; ECtHR, ‘Practice Direction – Interim Measures’ (Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011, September 2016), 1.

<sup>69</sup> *Khan v Canada*, UNHRC, Communication No 1302/2004, UN Doc CCPR/C/87/D/1302/2004 (2006) para 5.4; *Singh (Daljit) v Canada*, UNHRC, Communication No 1315/2004, UN Doc CCPR/C/86/D/1315/2004 (2006) para 6.3; *Minani v Canada*, UNCAT, Communication No 331/2007, UN Doc CAT/C/43/D/331/2007 (2009) para 7.9; *SPA v Canada*, UNCAT, Communication No 282/2005, UN Doc CAT/C/37/D/282/2005 (2006) para 7.7; *JA v Netherlands*, Application No 21459/14, Judgment of 3 November 2015; *Hussein v Netherlands*, Application No 27725/10, Judgment of 2 April 2013; *Diirshi v Netherlands*, Application No 2314/10, Judgment of 10 September 2013; *ATH v Netherlands*, Application No 54000/11, Judgment of 17 November 2015; *AME v Netherlands*, Application No 51428/10, Judgment of 13 January 2015.

<sup>70</sup> *JA* (n 69); *Hussein* (n 69); *Diirshi* (n 69); *ATH* (n 69); *AME* (n 69) (all involving transfer back to Italy under the Dublin Regulation). While in *Kaboulov v Ukraine*, Application No 41015/04, Judgment of 19 November 2009, the applicant succeeded in showing a general risk of treatment in violation of Article 3, the ECtHR applied a ‘real and imminent risk’ standard in rejecting the more personal risk faced by the applicant: para 112.

<sup>71</sup> The CJEU has so far ruled in 14 cases of interpretation of the Qualification Directive (four more cases are pending); one such case was decided under the Returns Directive instead of the Qualification Directive (Case C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v Abdida* (Grand Chamber, 18 December

considerations of time, seriousness of harm, and likelihood/probability as key elements in the interpretation of EU law relating to protection.<sup>72</sup>

While the number of cases that have invoked the notion in an explicit manner to date is small in the context of the overall caseload of these jurisdictions, it is nonetheless significant that it has been invoked *at all*, given that it does not appear to have a solid foundation in traditional principles of risk assessment in the law on international protection. Similarly, the fact that some decision-makers have expressed scepticism about whether the invocation of a standard of ‘real and imminent risk’ (as has been adopted in a line of ECtHR authority primarily concerning Dublin transfers) is simply a result of ‘nice differences of language’,<sup>73</sup> the reality is that it has been used to deny protection—and the danger is that it could be adopted in future cases. This is particularly concerning given the lack of focused discussion about why it is used, and whether there is any principled basis for doing so.

Analysis of the case law from our selected jurisdictions reveals that while supranational courts and international oversight bodies apply certain general principles (eg substantial grounds for believing and real risk), their decisions lack detailed reasoning or information about how near or far in time a risk of future harm needs to be, what type of evidence is required to substantiate it, and why (when explicitly referred to) ‘imminence’ is used as a test at all, given that it is not expressly contained in any of the relevant legal frameworks.

The analysis below identifies the two key contexts in which these challenges are most acute. The first is where the notion of imminence has been transplanted from a procedural setting (where, arguably, it has an appropriate role to play) to a substantive assessment (where, arguably, it does not). The second concerns protection claims involving a risk of harm that may manifest in the medium- or long-term, such as medical cases where a person’s health may decline over a period of time and environmental deterioration linked to the impacts of climate change. Such cases inevitably raise policy considerations about the role of the receiving State in contributing to/mitigating adverse impacts, and the responsibility of the host State to protect people from potential (but perhaps mitigable) harm.

#### *A. Imminence: The Dangers of Transplantation from Procedural to Substantive Issues*

The context in which the notion of imminence is most likely to be invoked explicitly is in assessing whether an applicant has met procedural requirements related to standing or ‘victimhood’. This is particularly pronounced in the international and regional adjudicatory human rights bodies where a complainant must establish that he or she has standing to bring a complaint.<sup>74</sup>

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2014) (*Abdida*). For a full list of these cases, see International Association of Refugee Law Judges (European Chapter), ‘An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis’ (European Asylum Support Office 2016) 44-46. It may also be noted that although CJEU judgments so far relate to the original Qualification Directive of 2004; these are nevertheless relevant to the interpretation of the recast Qualification Directive of 2011, particularly since the provisions relating to persecution and serious harm remained unchanged.

<sup>72</sup> The most explicit discussion of imminence is found in the recent decision in Case C-353/16 *MP v Secretary of State for the Home Department* (Grand Chamber, 24 April 2018) [2018] at paras 36–45.

<sup>73</sup> *NA (Sudan) v the Secretary of State for the Home Department* [2016] EWCA Civ 1060 at [74].

<sup>74</sup> This is described in various ways, including in the ICCPR, CAT and ECHR context as whether or not the person is a ‘victim’. It may be noted that this is not the case under refugee law.

For example, Article 1 of the ICCPR's First Optional Protocol provides that the UNHRC can consider complaints from individuals 'who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'.<sup>75</sup> Article 2 further provides that 'individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.' Where a complainant does not meet the criteria of a 'victim', the claim is deemed inadmissible.<sup>76</sup>

The UNHRC has long taken the view that an individual can only claim to be a victim of a violation 'if he or she is actually affected'.<sup>77</sup> In 1993, it introduced a further gloss on this test by stating that to be a victim, a person 'must show either 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'.<sup>78</sup> In that case, the UNHRC was not persuaded that, 'at the relevant period of time', the continuing deployment of nuclear weapons in the Netherlands placed the authors—a group of 6,588 concerned Dutch citizens—in the position of 'victims'.<sup>79</sup>

The same approach was adopted in the 2006 decision of *Aalbersberg v Netherlands*, which involved a group of 2,085 Dutch citizens who claimed a violation of Article 6 (the right to life) by virtue of the Netherlands' willingness to use nuclear weapons and to 'cooperate with such use'.<sup>80</sup> The UNHRC framed the question of standing in terms of whether 'the State's stance on the use of nuclear weapons presented the authors with an existing or imminent violation of their right to life'.<sup>81</sup> No such case was made out and the UNHRC therefore dismissed the claim as inadmissible.<sup>82</sup>

The rationale for the use of imminence in relation to standing is manifestly clear: the international and regional adjudicatory bodies do not have the power to issue advisory opinions or engage in moot adjudications.<sup>83</sup> Further, and perhaps more importantly, where a person is not currently a 'victim' for jurisdictional purposes, it is of course possible that the circumstances may change and hence permit a subsequent application to be made once harm is, indeed, imminent. This was explicitly acknowledged in an analogous context in *H v Norway*, where the ECtHR struck out the claim but nonetheless reassured the applicant that

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<sup>75</sup> See also ECHR Art 34 and CAT Art 22(1).

<sup>76</sup> In the context of the ECHR, see *Bahaddar v Netherlands* (1998) 26 EHRR 278, where the ECtHR found the applicant not to be at risk of imminent removal and therefore was 'in no imminent danger of treatment contrary to Article 3': at para 47.

<sup>77</sup> *Aumeeruddy-Cziffra v Mauritius*, UNHRC, Communication No 35/1978, UN Doc CCPR/C/OP/1 (1984) para 9.2; see also *EP v Colombia*, UNHRC, Communication No 318/1988, UN Doc CCPR/C/39/D/318/1988 (1990) para 8.2.

<sup>78</sup> *EW v Netherlands*, UNHRC, Communication No 429/1990, UN Doc CCPR/C/47/D/429/1990 (1993) para 6.4 (emphasis added).

<sup>79</sup> *ibid.*

<sup>80</sup> *Aalbersberg v Netherlands*, UNHRC, Communication No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (2006) para 3.4.

<sup>81</sup> *ibid* para 6.3.

<sup>82</sup> *ibid* para 7. By contrast, the UNCAT found that where an expulsion order was in force against a complainant, the possibility that the complainant could potentially be granted a residence permit in the future was not sufficient to meet the State's obligation under Article 3: *AD v Netherlands*, UNCAT, Communication No 96/1997, UN Doc CAT/C/23/D/96/1997 paras 6.2, 7.3.

<sup>83</sup> An exception is the ECtHR, with Protocol 16 now allowing the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto: Human Rights (Protocol No. 16), 2.X.2013, ETS 214, entered into force on 1 August 2018.

‘should her legal situation in Norway change and a risk of expulsion become imminent, it remain[ed] open to her to lodge a new application with the Court’, which could include ‘a request for an interim measure’.<sup>84</sup>

However, while the notion of imminence may be justified in the limited context of admissibility, our analysis reveals 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. In the latter context, assuming that there is an imminent risk of removal, extradition, deportation, or expulsion, the assessment of State responsibility—and hence of likely future harm—must be undertaken at that moment and cannot be deferred to a later time when the evidence is clearer or more compelling. As long as the removal is imminent—and thus the person’s standing or ‘victimhood’ is made out—the substantive question turns on the likelihood of harm resulting from such removal, and arguably not on precisely how soon after removal it may manifest. To conflate these two fundamentally different contexts and issues, especially without explanation as to the justification for doing so,<sup>85</sup> is highly problematic.

For example, just two weeks after its decision in *Aalbersberg*, the UNHRC conflated these separate issues by finding a claim to be inadmissible because, *inter alia*, the applicant had not adduced sufficient evidence in support of his contention that he would be ‘exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to Pakistan’.<sup>86</sup> Similarly, in another largely contemporaneous decision, the UNHRC found a claim to be inadmissible, in part because the complainant had failed to adduce sufficient evidence that he would be ‘exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant’.<sup>87</sup> In these admissibility decisions, the UNHRC apparently applied the notion of imminence—from a test for standing—to the substantive consideration of the alleged violations.

Similarly, in Europe, the ECtHR has held that even where all the formal admissibility conditions have been met, it ‘may nevertheless declare [an application] inadmissible for reasons relating to the examination on the merits’.<sup>88</sup> For instance, in a number of decisions involving Dublin transfers of asylum seekers from one EU Member State to another, the ECtHR has found that it has not been ‘demonstrated’ or ‘established’ that an applicant’s ‘future prospects if returned ... , whether taken from a material, physical or psychological perspective, disclose a sufficiently *real and imminent risk* of hardship severe enough to fall within the scope of Article 3’ of the ECHR.<sup>89</sup> In reaching these decisions, the court curiously relied on its reasoning in cases such as *Ireland v United Kingdom*<sup>90</sup> and *Jalloh v Germany*,<sup>91</sup>

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<sup>84</sup> See *H v Norway*, Application No 51666/13, Judgment of 17 February 2015 para 8.

<sup>85</sup> It may nevertheless be explained by the fact that human rights instruments are essentially concerned with protection against *refoulement*. However, the well-founded fear test in international refugee law requires the decision-maker to make an assessment on the predicament of an individual irrespective of whether return to the country of nationality or former habitual residence is a viable or imminent option. Indeed, the very wording of Art 1A(2) of the Refugee Convention requires the applicant to be ‘unable ... to return’ to their country of origin. See eg, *Refugee Appeal No 74880* [2005] NZRSAA 294, para 70; *Refugee Appeal No 73861* [2005] NZRSAA 228, [78]. See also Hathaway and Foster (n 45) 69, 70.

<sup>86</sup> *Khan* (n 69) para 5.4.

<sup>87</sup> *Singh* (n 69) which is actually prior to *Aalbersberg* but very contemporaneous: see para 6.3.

<sup>88</sup> ECtHR, ‘Practical Guide on Admissibility Criteria’ (2014) para 375. This Guide is available for downloading at [www.echr.coe.int](http://www.echr.coe.int) (Case-law – Case-law analysis – Admissibility guide).

<sup>89</sup> *Hussein* (n 69) para 78 (emphasis added); *Diirshi* (n 69) para 139. See also, for the same formulation, *AME* (n 69) para 36; *JA* (n 69) para 32; *ATH* (n 69) para 41.

<sup>90</sup> *Ireland v United Kingdom* [1978] 2 EHRR 25 para 161.

neither of which referred to ‘real and imminent risk’. The rationale for introducing an imminence test has not, therefore, been articulated or justified.

### *B. Imminence and Slow-Onset Harm: Particular Challenges*

The timing of future harm is relevant in a range of factual contexts, but the two areas in which the issue is most likely to be raised in contemporary jurisprudence are risks associated with deteriorating health on return to the country of origin, and those associated with the impacts of climate change in the country of origin.

Returning to the departure point for our inquiry, the key challenge is whether it is possible or appropriate to identify a basis on which an international protection application can be rejected if the harm feared by the applicant is likely to manifest over the longer-term. Is there (and should there be) a principled way of defining the relevant time period in assessing risk of future harm? How would variables such as the potential mitigating impacts of disaster risk reduction measures be accommodated within the analysis? As standard refugee cases show, context is extremely important and the rules cannot be too prescriptive: the focus is not on *certainty* of harm, but whether there is a real *risk* of it.<sup>92</sup>

By way of analogy, in situations relating to generalized violence, decision-makers must carry out a detailed analysis of all possible factors and consequences, including potential risk-mitigating factors and their attendant effects. As UNHCR’s Guidelines on International Protection No 12 (UNHCR’s Guidelines) relating to situations of armed conflict and violence note:

When assessing the risk, it is important to take into account the fluctuating character of many contemporary situations of armed conflict and violence. ... For example, even if the level of violence at the time of decision-making is relatively low, over time the situation of armed conflict and violence may change, increasing the degree of risk establishing a well-founded fear. ... Similarly, even if violence has not yet broken out in a particular part of the country, it may be foreseeable that the violence will spread there, taking into account the overall context and history of the situation of armed conflict and violence, the trajectory and mapping of the violence, the power dynamics at play and other conditions in the applicant’s country of origin. The effects of past violence may also still rise to the level of persecution, despite a temporary suspension of hostilities, and need to be assessed carefully. In addition, the implementation of peace and demobilization agreements may lead to new armed actors filling vacuums of power, or to the consolidation of groups composed of former members who have not disarmed and reintegrated into society. This also requires a detailed analysis that constantly evolves in response to local developments in the country of origin.<sup>93</sup>

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<sup>91</sup> *Jalloh v Germany*, Application No 54810/00, Judgment of 11 July 2006 para 67.

<sup>92</sup> See eg UNHCR, Guidelines on International Protection No 12 (n 63) para 21 (footnote omitted): ‘This does not require a probability calculus, based, for example, on the number of people killed, injured or displaced, but requires an analysis of both quantitative and qualitative information assessed against the applicant’s circumstances’.

<sup>93</sup> *ibid* para 25.

Furthermore, the ‘long-term consequences’ of armed conflict or violence, ‘such as demolition of vital infrastructure, insecurity and abject poverty’,<sup>94</sup> can amount to persecution or serious harm, while

[t]he systematic denial of food and medical supplies, the cutting of water supplies and electricity, the destruction of property or the militarization or closure of hospitals and schools may also constitute serious human rights or IHL violations that affect whole communities.<sup>95</sup>

UNHCR’s Guidelines are very useful in highlighting multi-causal movements, the unpredictable nature of armed conflict, its frequently shifting patterns over time, and the long-term consequences of conflict. Notably they do not purport to explain where to draw the line in relation to future harm precisely because this is not a decisive factor. Rather, they state that decision-makers should look at the trajectory of harm (violence, in that context) in deciding whether it is ‘foreseeable’ that it will spread into an area where there is no sign of violence there at the time of the risk assessment.<sup>96</sup> The focus of the assessment remains on foreseeability of harm, and the Guidelines suggest factors to guide that assessment. They highlight that even where mitigating measures might intervene (such as the implementation of peace and demobilization agreements), there may still be negative outcomes. In other words, the presence of ‘multiple’ possibilities, each of which involves speculation, does not foreclose the possibility that protection is warranted. Rather, the flexibility and open-ended nature of the well-founded fear and real risk tests provides the necessary framework for decision-makers to assess protection claims.

Against this backdrop, we now turn to two contexts in which these issues have arisen, namely health deterioration and movement in the context of the adverse impacts of climate change.

### *Health deterioration*

The context in which the question of imminence of harm has arisen most squarely to date concerns cases involving deterioration of health after removal. The most developed jurisprudence on this issue emanates from the ECtHR. Its case law spans decades but has not developed consistently.<sup>97</sup> In the seminal decision of *D v United Kingdom* in 1997, the court held that the proposed removal of a citizen of St Kitts from the United Kingdom in the ‘advanced states of a terminal and incurable illness’<sup>98</sup> would amount to a violation of Article 3 of the ECHR on the basis that:

The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal will hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering.<sup>99</sup>

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<sup>94</sup> *ibid* para 19.

<sup>95</sup> *ibid* para 18. See H Lambert and T Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22 *IJRL*.

<sup>96</sup> UNHCR, Guidelines on International Protection No 12 (n 63) para 25.

<sup>97</sup> C Costello, ‘The Search for the Outer Edges of *Non-refoulement* in Europe: Exceptionality and Flagrant Breaches’ in B Burson and DJ Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016).

<sup>98</sup> *D v United Kingdom* (1997) 24 *EHRR* 423 para 51.

<sup>99</sup> *ibid* para 52.



While imminence of harm was not an explicit consideration in that case, it was central (albeit implicit) in a subsequent decision in 2008, namely *N v United Kingdom*. There, the court rejected an analogous claim on the basis that:

the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda. The applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve *a certain degree of speculation*, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide.<sup>100</sup>

This decision had the effect of precluding successful claims by applicants seeking to resist removal due to health-related issues.<sup>101</sup> However, in the 2016 judgment of *Paposhvili v Belgium*, the ECtHR adopted a less rigid approach. In that case, the Grand Chamber accepted a longer timeframe for the risk assessment, noting that 'the impact of removal on the person concerned must be assessed by comparing his or her state of health prior to removal and *how it would evolve after transfer* to the receiving State.'<sup>102</sup> Nevertheless, the applicant must still be 'seriously ill' at the time of removal, and while

not at imminent risk of dying, would [nevertheless] face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a *serious, rapid and irreversible decline* in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.<sup>103</sup>

This is reminiscent of the language employed by the CJEU in the 2014 *Abdida* decision in which the court referred to 'the seriousness and irreparable nature of the harm that may be caused by the removal', namely 'a serious risk of grave and irreversible deterioration in his state of health'.<sup>104</sup> More recently, the CJEU has considered this issue in some depth, citing the test adopted by the ECtHR in *Paposhvili*; namely, 'a serious, rapid and irreversible decline in his state of health'.<sup>105</sup> The CJEU concluded that in assessing the obligation of *non-*

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<sup>100</sup> *N v United Kingdom* (2008) 47 EHRR 39 para 50 (emphasis added). *N* was followed by the CJEU in Case C-542/13 *M'Bodj v Etat belge* (Grand Chamber, 18 December 2014), and in *Abdida* (n 71).

<sup>101</sup> *Yoh-Ekale Mwanje v Belgium*, Application No 10486/10, Judgment of 20 December 2011. See also *Bensaid v United Kingdom* (2001) 33 EHRR 10 para 39: 'The Court finds that the risk that the applicant would suffer a deterioration in his condition if he is returned to Algeria and that, if he did, he would not receive adequate support or care is to a large extent speculative'. In other cases, the court has rejected cases because the applicant did not meet the 'exceptional circumstances' threshold set out in *D* (n 98), namely that he or she was not critically ill at the time of the determination. See eg *Ndangoya v Sweden*, Application No 17868/03, Judgment of 22 June 2004; *Kochieva v Sweden*, Application No 75203/12, Judgment of 30 April 2013; *Arcila Henao v Netherlands*, Application No 13669/03, Judgment of 24 June 2003; *Amegnigan v Netherlands*, Application No 25629/04, Judgment of 25 November 2004; *EO v Italy*, Application No 34724/10, Judgment of 10 May 2012; *Karara v Finland*, Application No 40900/98, Judgment of Commission, 29 May 1998.

<sup>102</sup> *Paposhvili v Belgium* Application No 41738/10, Judgment of 13 December 2016 para 188 (emphasis added).

<sup>103</sup> *ibid* para 183 (emphasis added). Compare also with *Aswat v United Kingdom* (2014) 58 EHRR 1, where the court found that extradition would violate Art 3 despite a complete lack of certainty about which type of institution and the conditions the applicant would be in. See also, the dissenting opinion of Tulkens, Bonello, and Spielmann JJ in *N* (n 100) para 23.

<sup>104</sup> *Abdida* (n 71) paras 50, 53.

<sup>105</sup> *MP* (n 72) at para 40.

*refoulement* in article 4 of the Charter of Fundamental Rights of the European Union, return is not permitted ‘where such removal would result in a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned’.<sup>106</sup> The use of the word ‘deterioration’ by the CJEU appears to imply that an applicant’s medical condition need not be at a critical stage at the time of the decision.

The concession in *Paposhvili* that a decision-maker must consider the *evolving* situation post-transfer is significant, although there is no precise framing of the outer limits of the relevant temporal period. However, it clearly allows for a longer-term assessment than the more limited test articulated in *N v United Kingdom*. This is certainly how *Paposhvili* has been understood by the English Court of Appeal, which recently affirmed that ‘it is clear’ that the case ‘relaxes the test for violation of Article 3 in the case of removal of a foreign national with a medical condition’, but that ‘it does so only to a very modest extent’.<sup>107</sup> The Court of Appeal’s interpretation assumes that imminence is still a requirement; it has merely been extended from ‘imminence of death’<sup>108</sup> as the criterion to ‘a real risk of a serious and rapid decline in ... health resulting either in intense suffering (to the Article 3 standard) or death *in the near future*’.<sup>109</sup>

The *Paposhvili* decision is consistent with an analogous 2015 decision of the UNHRC. There, Canada was found to be in violation of Article 7 of the ICCPR for deporting a mentally ill person to Jamaica, notwithstanding Canada’s arguments that the potential longer-term consequences of deportation were ‘mere conjecture’ and ‘mere speculation’ because it was ‘just as likely’ that the situation would not be as dire as predicted.<sup>110</sup> On the other hand, in a case where there was no evidence of the applicant’s health deteriorating on the available evidence at the time of the determination, yet arguably a longer-term risk of death in the DRC, UNCAT found this aspect of the claim inadmissible.<sup>111</sup>

In sum, the health context suggests that while the jurisprudence has become more open to the assessment of a claim within a longer timeframe, the notion of imminence, in the sense of timing, is still a present and limiting factor that influences the scope of States’ obligations to provide international protection.

### *Climate change*

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<sup>106</sup> *ibid* [41]. However, in relation to granting subsidiary protection, in order to meet the definition in art 15(b) of the Qualification Directive, there must be an intentional deprivation of medical care, see para 51: ‘In that respect, it should be recalled that the court has held that the serious harm referred to in Article 15(b) of Directive 2004/83 cannot simply be the result of general shortcomings in the health system of the country of origin. The risk of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection.’

<sup>107</sup> *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department* [2018] EWCA Civ 64 at [37].

<sup>108</sup> *ibid* [38].

<sup>109</sup> *ibid* [44] (emphasis added).

<sup>110</sup> *AHG v Canada*, UNHRC, Communication No 2091/2011, UN Doc CCPR/C/113/D/2091/2011 (2015) paras 4.5, 5.4, 6.3.

<sup>111</sup> *Njamba v Sweden*, UNCAT, Communication No 322/2007, UN Doc CAT/C/44/D/322/2007 (2010) at para 7.3. This claim was also found inadmissible because, consistently with UNCAT’s jurisprudence, ‘the aggravation of the condition of an individual’s physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16’.

The other key context in which the question of timing of harm arises concerns claims linked to the adverse impacts of climate change. While the jurisprudence is far less developed than in the health context, such claims are ripe for future litigation and therefore warrant analysis.

The most comprehensive consideration of the future impacts of climate change in the protection context has been undertaken by decision-makers in New Zealand.<sup>112</sup> While the notion of ‘imminence’ has been invoked explicitly in such cases (based on the UNHRC cases on standing),<sup>113</sup> the Tribunal has observed that ‘[i]mminence should not be understood as imposing a test which requires the risk to life be something which is, at least, likely to occur’.<sup>114</sup> Rather, it is comparable to the well-founded fear test in refugee law, requiring ‘no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger’.<sup>115</sup> However, it is important to note that the Tribunal found that the forward-looking nature of the protection inquiry demands that disaster risk reduction and adaptation strategies be taken into account in assessing future risks.<sup>116</sup> As subsequently expressed by a member of the tribunal in an extra curial capacity, the longer the future timeframe, the less predictive certainty there is and the more speculative the risk assessment becomes because of the potential for mitigation, adaptation, and other risk-reducing actions.<sup>117</sup> Accordingly, in the cases considered to date, the climate change-related harms were assessed as being insufficiently ‘present’, or the applicants not ‘in danger’, in part due to the potential for intervening adaptive measures.<sup>118</sup> This conclusion is debatable given that, as recognized in the UNHCR Guidelines related to armed conflict and violence, the possibility of multiple potential outcomes does not automatically overcome the need for international protection, particularly when the trajectory of harm is moving in a clear direction.

In this regard, it is instructive to consider assessments by the Intergovernmental Panel on Climate Change (IPCC) of the likelihood of certain future climate change risks (which could affect displacement). The findings listed below are based on the IPCC’s evaluation of the underlying scientific evidence and the degree of expert agreement, the combination of which determines the level of ‘confidence’ ascribed (ranging from ‘very low’ to ‘very high’).<sup>119</sup> The term ‘virtually certain’ (in the last bullet point) means that the probability is 99–100 per cent.<sup>120</sup> According to the IPCC:

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<sup>112</sup> \**AC (Tuvalu)* (n 10); *AF (Kiribati)* (n 10); *AF (Tuvalu)* (n 10); \**BG (Fiji)* (n 10); *Teitiota* (HC, n 10); *Teitiota* (CA, n 10); *Teitiota* (SC, n 10); Burson (n 1).

<sup>113</sup> *EW* (n 78); *Aalbersberg* (n 80).

<sup>114</sup> *AF (Kiribati)* (n 10) para 90.

<sup>115</sup> *ibid*; see also *AC (Tuvalu)* (n 10) para 57. This was notwithstanding his recognition, in subsequent remarks given in a personal capacity, that in other areas of international law, such as self-defence, ‘imminence’ seems to envisage a very immediate timeframe for harm to materialize, and certainly more immediate than the real chance standard in refugee law: Burson (n 1) 7.

<sup>116</sup> See eg *AC (Tuvalu)* (n 10) para 69; *AF (Kiribati)* (n 10) para 88.

<sup>117</sup> Burson (n 1) 8-10.

<sup>118</sup> *AF Kiribati* (n 10) para 89; *AC (Tuvalu)* (n 10) paras 58, 102, 109. This could include disaster risk reduction and climate change adaptation measures, among other things.

<sup>119</sup> Intergovernmental Panel on Climate Change (IPCC) (Core Writing Team, RK Pachauri and L Meyer (eds)), *Climate Change 2014: Synthesis Report* (IPCC 2014) 121: Confidence in the ‘validity of a finding [is] based on the type, amount, quality, and consistency of evidence (e. g., mechanistic understanding, theory, data, models, expert judgment) and on the degree of agreement.’

<sup>120</sup> *ibid* 2.

- Impacts from recent climate-related extremes, such as heat waves, droughts, floods, cyclones, and wildfires, show the significant vulnerability and exposure of many human systems to current climate variability (*very high confidence*).<sup>121</sup>
- It is *very likely* that heat waves will occur more often and last longer, and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level will rise.<sup>122</sup>
- Low-lying areas are at risk from sea-level rise, which will continue for centuries even if global mean temperature is stabilized (*high confidence*).<sup>123</sup>
- It is *virtually certain* that global mean sea-level rise will continue for many centuries beyond 2100 (the amount will depend on future emissions).<sup>124</sup>
- Over the course of the twenty-first century, climate change is expected to lead to increases in ill-health in many regions, especially in developing countries with low incomes (*high confidence*).<sup>125</sup>
- The negative impacts of climate change on crop yields, across a wide range of regions and crops, have been more common than positive impacts (*high confidence*).<sup>126</sup>
- Climate change is projected to increase risks in urban areas for people, assets, economies and ecosystems, including from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea level rise and storm surges (*very high confidence*). ‘These risks are amplified for those lacking essential infrastructure and services or living in exposed areas.’<sup>127</sup>

The high degree of likelihood expressed in each finding above would certainly meet the well-founded fear threshold in refugee law.<sup>128</sup> As discussed above in Part III, it is not disputed that a ‘well-founded fear’ of being persecuted can equate to a less than 50 per cent chance of harm (even as low as 10 per cent) if the risk is plausible and reasonable.<sup>129</sup> Speculation about what ‘might’ happen in the future is thus a central component of determining refugee status.<sup>130</sup> However, decision-makers place limits on how pre-emptive flight must be to warrant protection, which differ depending on the particular individual’s circumstances and turn on ‘the relation between the nature of the persecution feared and the

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<sup>121</sup> *ibid* 8.

<sup>122</sup> *ibid* 10.

<sup>123</sup> *ibid* 13.

<sup>124</sup> *ibid* 16.

<sup>125</sup> *ibid* 15.

<sup>126</sup> *ibid* 6, see also Figure SPM.4 at 7.

<sup>127</sup> *ibid* 15.

<sup>128</sup> This was, in effect, acknowledged in *AF (Kiribati)* (n 10) para 90, where the Tribunal observed that ‘the concept of an “imminent” risk to life ... 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.’

<sup>129</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 389 (Dawson J), citing *Cardoza-Fonseca* (n 49); *Refugee Appeal No 71404/99* [1999] NZRSAA 292, paras 26–27. The UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, UN Doc HCR/IP/4/Eng/Rev.1 (1992) para 42, states: ‘In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.’ See also A Grahl-Madsen, *The Status of Refugees in International Law* (Leyden 1966) vol 1, 181.

<sup>130</sup> Goodwin-Gill and McAdam (n 44) 54.

degree of likelihood of its happening'.<sup>131</sup> The assessment of the intensity, severity, and nature of *future harm*, based on its foreseeability in light of the individual's circumstances, is the crucial factor.<sup>132</sup>

The IPCC has noted that '[t]ransformations in economic, social, technological and political decisions and actions can enhance adaptation and promote sustainable development (high confidence)',<sup>133</sup> and '[i]nnovation and investments in environmentally sound infrastructure and technologies can reduce GHG [greenhouse gas] emissions and enhance resilience to climate change (very high confidence).'<sup>134</sup> However, in the context of a protection claim, the future mitigation/adaptation possibilities remain speculative and uncertain, and do not detract from the current trajectory of adverse climate change impacts. The competing possibilities thus need to be evaluated in light of the less demanding standard of proof applied in refugee and human rights law.

In conclusion, while the climate change context presents particular challenges, the assessment of an applicant's need for international protection should rest on uniform principles of refugee and human rights law, albeit with sufficient flexibility to respond to different factual contexts.

The two examples discussed above highlight the difficulty of identifying a precise timeframe to assess potential future harm. Indeed, it is likely impossible and inappropriate to attempt to devise with any precision a timeframe that delimits the scope of inquiry. After all it is not clear why State responsibility for future human rights violations following removal should be limited to those occurring within an immediate or short-term period.

#### *V. Discussion: Does Imminence Have Any Place in International Protection?*

As mentioned above, there is little discussion in the case law as to the rationale and justification for invoking an imminence assessment. However, one notable issue that has emerged from a close reading of the case law for this article is that, although 'well-founded fear' has generally not been overlaid with the additional gloss of necessity, directness, or even foreseeability, these concepts are prevalent in the jurisprudence on 'real risk'.

Indeed, it appears that it is the introduction of additional factors by some supranational courts and other international oversight bodies, such as '*necessary* and *foreseeable*',<sup>135</sup> which has sometimes resulted in an imminence-like assessment. Where courts invoke a foreseeability test alone, imminence does not appear to be relevant. But where the concept of necessity (or similar) is introduced, if the risk is not imminent then it seems difficult for decision-makers to conclude that a necessary consequence of removal is the violation of human rights.<sup>136</sup>

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<sup>131</sup> *ibid* 64.

<sup>132</sup> See eg M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2009) 192–3.

<sup>133</sup> IPCC (n 119) 20 (emphasis omitted).

<sup>134</sup> *ibid* 26 (emphasis omitted).

<sup>135</sup> See eg *ARJ v Australia*, UNHRC, Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997) para 6.8 (emphasis added).

<sup>136</sup> See eg *Singh* (n 69) para 6.3.

The problem is that ‘necessary’ and ‘foreseeable’ are conceptually distinct, and it is not clear where the necessity test originated or what its principled basis could be. To take the jurisprudence of the UNHRC as an example, General Comment 31 sets out the basis for an implied *non-refoulement* obligation, stating that:

Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>137</sup>

There is no mention of ‘necessity’ in this context, yet from the 1990s onwards, the UNHRC has sometimes described the relevant test as whether, ‘as a *necessary and foreseeable consequence* of deportation’, there will be a violation.<sup>138</sup> The jurisprudence is inconsistent, however, and our analysis has revealed that where foreseeability is the test, a claim is more likely to succeed.<sup>139</sup> By contrast, when additional factors such as whether the harm would be a ‘necessary’ consequence of removal are introduced, the claim is more likely to be rejected.

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<sup>137</sup> UN Human Rights Committee (UNHRC), ‘General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12 (General Comment 31).

<sup>138</sup> *ARJ* (n 135) para 6.14 (emphasis added). See also *Khan* (n 69) at para 5.4 and *Singh* (n 69) at para 6.3 for explicit use of a necessary and foreseeable test as well as an imminence standard (discussed above); *T v Australia*, UNHRC, Communication No 706/1996, UN Doc CCPR/C/61/D/706/1996 (1997) at paras 8.4, 8.6; *Hamida v Canada*, UNHRC, Communication No 1544/2007, UN Doc CCPR/C/98/DR/1544/2007/Rev.2 (2007), where the UNHRC stated the rule as being whether there is a ‘real risk of treatment contrary to article 7 as a necessary and foreseeable consequence of his expulsion...’ at para 8.7.

<sup>139</sup> In many cases, the UNHRC simply cites the General Comment 31 provision and does not embellish with further test of foreseeability and necessity—see eg *Choudhary v Canada*, UNHRC, Communication No 1898/2009, UN Doc CCPR/C/109/D/1898/2009 (2013) para 9.2. See also *K v Denmark*, UNHRC, Communication No 2393/2014, UN Doc CCPR/C/114/D/2393/2014 (2015) para 7.3; *Khakdar v Russian Federation*, UNHRC, Communication No 2126/2011, UN Doc CCPR/C/112/D/2126/2011 (2014) para 11.3. In *NS v Russian Federation*, UNHRC, Communication No 2192/2012, UN Doc CCPR/C/113/D/2192/2012 (2015) the UNHRC adopted this test: whether he would face a ‘real, foreseeable and personal risk of being subjected to torture if returned’: at para 10.4. In *Osayi Omo-Amenaghawon v Denmark*, UNHRC, Communication No 2288/2013, UN Doc CCPR/C/114/D/2288/2013 (2015), the UNHRC adopted the test from General Comment 31 and added that the risk must be personal and that ‘there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists’: at para 7.2. This was repeated in *RG v Denmark*, UNHRC, Communication No 2351/2014, UN Doc CCPR/C/115/D/2351/2014 (2015) para 7.4. In *Valetov v Kazakhstan*, UNHRC, Communication No 2104/2011, UN Doc CCPR/C/110/D/2104/2011 (2014), the UNHRC emphasized the need for the sending State to examine what its authorities knew or should have known: at para 14.2. In *X v Norway*, UNHRC, Communication No 2474/2014, UN Doc CCPR/C/115/D/2474/2014 (2015) the UNHRC again cited General Comment 31: para 7.3. In *X v Sweden*, UNHRC, Communication No 1833/2008, UN Doc CCPR/C/103/D/1833/2008 (2011) the UNHRC simply cited a ‘real risk’ when finding the claim was made out at para 9.4: see the dissent’s critique of what is perceived as low bar (and hence too expansive a view about scope of implied *refoulement*). In *Jasin v Denmark*, UNHRC, Communication No 2360/2014, UN Doc CCPR/C/114/D/2360/2014 (2015) the UNHRC emphasized that the ‘risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high’: at para 8.3. Here, the UNHRC found that the State party had failed to devote sufficient analysis to ‘the foreseeable consequences of forcibly returning her to Italy’: at para 8.9.

A good illustration of the issue is provided by *Ng v Canada*. That case concerned a man facing execution on return to the United States, and the UNHRC found that, with respect to the potential method of execution, the sending State could ‘reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation’ of Article 7 of the ICCPR.<sup>140</sup> This was so despite strong dissenting views which pointed to the reasons why the harm might not eventuate, including that the applicant had not yet been ‘tried, convicted or sentenced’.<sup>141</sup> Had the test been one of certainty or necessity, then these factors would have dictated that the claim fail.<sup>142</sup> However, as one of the dissenting members explained, *foreseeability*, not *certainty*, is key:

Although it is impossible to predict a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable - or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring...<sup>143</sup>

A similar outcome can be seen where the ECtHR focused squarely on foreseeability.<sup>144</sup> In the extradition case of *Rustamov v Russia*, the court stated that:

[R]equesting an applicant to produce ‘indisputable’ evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him. In this respect it further reiterates its constant case-law to the effect that what should be assessed in this type of case are the *foreseeable consequences* of sending the applicant to the receiving country.<sup>145</sup>

Further, where the UNCAT has ignored the language of ‘imminence’ that has sometimes been invoked by complainants,<sup>146</sup> preferring instead to rely on whether a risk of harm is ‘real, *foreseeable* and personal’,<sup>147</sup> the claim has been more likely to succeed.<sup>148</sup>

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<sup>140</sup> *Ng v Canada*, UNHRC, Communication No 469/1991, UN Doc CCPR/C/49/D/469/1991 (1994) para 16.4.

<sup>141</sup> *ibid* s E para 5 (dissenting opinion of Kurt Herndl).

<sup>142</sup> Indeed this point is borne out in Herndl’s dissenting view: *ibid* s E para 6.

<sup>143</sup> *ibid* s G para 5 (dissenting opinion of Francisco Jos Aguilar Urbina).

<sup>144</sup> See eg *Trabelsi v Belgium* (2015) 60 EHRR 21 para 130, cited with approval in *Paposhvili* (n 102) para 186. See also *Saadi v United Kingdom* (2007) 44 EHRR 50 para 142.

<sup>145</sup> *Rustamov v Russia*, Application No 11209/10, Judgment of 3 July 2012 para 117 (emphasis added). The European Court has affirmed in a couple of cases that speculation is a legitimate part of their enquiry. See *Saadi* (n 144) and *Trabelsi* (n 144), (the latter of which is cited with approval in *Paposhvili* on this point).

<sup>146</sup> See *YBF v Switzerland*, UNCAT, Communication No 467/2011, UN Doc CAT/C/50/D/467/2011 (2013); *Khademi v Switzerland*, UNCAT, Communication No 473/2011, UN Doc CAT/C/53/D/473/2011 (2015); *CM v Switzerland*, UNCAT, Communication No 355/2008, UN Doc CAT/C/44/D/355/2008 (2010); *SM v Switzerland*, UNCAT, Communication No 406/2009, UN Doc CAT/C/49/D/406/2009 (2013); *ET v Switzerland*, UNCAT, Communication No 393/2009, UN Doc CAT/C/48/D/393/2009 (2012); *RD v Switzerland*, UNCAT, Communication No 426/2010, UN Doc CAT/C/51/D/426/2010 (2013); *KN v Switzerland*, UNCAT, Communication No 481/2011, UN Doc CAT/C/52/D/481/2011 (2014); *X v Switzerland*, UNCAT, Communication No 470/2011, UN Doc CAT/C/53/D/470/2011 (2015); *MAH v Switzerland*, UNCAT, Communication No 438/2010, UN Doc CAT/C/51/D/438/2010 (2013); *Rios v Canada*, UNCAT, Communication No 133/1999, UN Doc CAT/C/33/D/133/1999 (2004).

<sup>147</sup> In *AR v Netherlands*, UNCAT, Communication No 203/2002, UN Doc CAT/C/31/D/203/2002 (2003) the UNCAT said: ‘in previous decisions, the Committee has determined that the risk of torture must be “foreseeable, real and personal”’: at para 7.3, repeated again at para 7.6. This test is based on the case law of the ECtHR, which has long considered that risk under Art 3 ECHR must be foreseeable, real and personal: *Soering* (n 20) paras 104, 111.

Indeed, as Wouters observes, although the UNCAT used the terms ‘foreseeable’ and ‘necessary’ in the first individual case regarding Article 3 of the CAT,<sup>149</sup> (thus requiring that the risk of torture be both a foreseeable and necessary consequence of the removal), it has never used the term ‘necessary’ again. In *Haydin v Sweden*, the UNCAT pointed out that ‘the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of Article 3’—in other words, rejecting the notion that these concepts imposed any higher standard than ‘real risk’.<sup>150</sup>

If the evidence is strong, an event or occurrence can be foreseeable even if it is not likely to manifest in the short-term. A risk can be real notwithstanding the fact that its manifestation is some time away. Of course, foreseeability itself does not provide a template for a definable future period, since the ‘temporal limits embodied in the notion of reasonably foreseeable future are unclear’,<sup>151</sup> but it is nonetheless fundamentally different from certainty, likelihood, or probability.

When factors such as necessity are introduced, then the longer the timeframe considered, the less likely it is that the long-term harm can be said to amount to a *necessary* consequence of removal. As such, if extraneous concepts are incorporated into the real risk test in human rights law, it may be less able to accommodate slower-onset forms of harm than the well-founded fear test in refugee law. In other words, the well-founded fear test may have a greater capacity and openness to accommodate longer-range harm than the more stringent real risk test applied in some of the jurisdictions considered in this article. In order to test this hypothesis, a comprehensive examination of the extent to which imminence has been introduced—explicitly or implicitly—into national refugee decision-making is ripe, and forms the next stage of our research project.

## V. CONCLUSION

This article provides the first analysis of the notion of imminence in international refugee and human rights law in assessing the scope of international protection. It examines how acute or ‘real’ a risk of harm must be before supranational courts and international oversight bodies consider that international protection is warranted. The comprehensive analysis of cases from our selected jurisdictions suggests that the notion of imminence has been introduced into the case law—sometimes explicitly, but most commonly only implicitly. Its application is inconsistent, problematic, and difficult to justify by reference to standard principles of refugee and human rights law. Given that a number of contemporary threats are more likely to raise these issues than ever before, further analysis is warranted, including a comprehensive examination of domestic jurisprudence.

While this article represents the first output of a larger project, some interim conclusions can be drawn. The role of time as a factor in risk assessment in refugee law and international protection more broadly is radically underdeveloped, both in the jurisprudence and the scholarship. To be clear, we do not believe that the notion of imminence should be used to

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<sup>148</sup> We did nevertheless find two cases where imminence was mentioned: *Minani* (n 69); *SPA* (n 69).

<sup>149</sup> Wouters (n 45) referring at 460 to *Mutombo v Switzerland*, UNCAT, Communication No 13/1993, UN Doc CAT/C/12/D/13/1993 (1994).

<sup>150</sup> Wouters (n 45) referring at 460 to *Haydin v Sweden*, UNCAT, Communication No 101/1997, UN Doc CAT/C/21/D/101/1997 (1998).

<sup>151</sup> *V03/16047* [2004] RRTA 11 (5 January 2004).



limit international protection in any way: it should not. However, the point in time at which an event may occur is a contextual factor in assessing risk because it can affect how likely something is to occur. In other words, if a threat is likely to manifest very soon, it may be easier for an individual to argue that he or she faces a real chance of being harmed, since there may be less opportunity for mitigating factors to intervene. By contrast, a threat in the more distant future might be able to be allayed or diminished through intervening measures. Nevertheless, if the risk of harm is distant but very real—for instance, the death penalty has been imposed on a person but it may be years before it is carried out—then protection may be required. The core question in each case is whether the risk is sufficiently real to meet the well-founded fear or real risk tests; any further gloss is a distraction.<sup>152</sup> Our critique is that because the role and significance of time is simply not acknowledged by most decision-makers, there is the potential for imminence to creep erroneously into substantive assessments, as has been seen in the examination of jurisprudence above. In our view, both the well-founded fear and real risk tests are sufficiently open-ended for decision-makers to be guided by these alone; they do not foreclose a risk of harm simply because it may eventuate further into the future.

It is indisputable that a protection-limiting criterion should not infiltrate decision-making without an explicit consideration of its legal validity and purpose. It is our hope that this initial attempt to parse out the relevant issues in this context will mark the first of many serious analyses.

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<sup>152</sup> By way of analogy, the CJEU explained that in situations of generalized violence, ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’: Case 465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921 para 39. In the present context, this could be expressed as: the further the risk of harm in terms of time, the more likely it has to be for protection to be granted. See also H Lambert, ‘Causation in International Protection from Armed Conflict’, in D Cantor and J-F Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014) 57-78.