Human rights and climate change litigation: should temporal imminence form part of positive rights obligations?

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This article examines how the concept of temporal imminence has evolved to become a precondition to a violation of a positive human rights obligation in a number of jurisdictions. We trace the case law back to its roots, especially in the European Court of Human Rights and the Inter-American Court of Human Rights, and find no clear rationale for its inclusion as a criterion of positive obligations in some cases, and serious divergence between cases with apparently similar facts. This analysis elucidates how temporal imminence has found its way into the recent decisions in Urgenda and Teitiota, which considered the link between climate change and positive human rights obligations. We consider how temporal imminence is a particularly inappropriate factor in climate change cases given the long-range nature of the threats. With courts across the world considering climate change and human rights arguments for the first time, we conclude with a note of caution against importing temporal imminence as an element of positive human rights obligations or otherwise introducing it. We argue that in the context of climate change, courts should avoid setting a requirement for a connection between a specific action and event, and rather, observe the wider context of alleged rights violations.

Keywords: climate change, human rights, imminence, immediacy

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Internationally, there is an increasing trend to use human rights instruments as a vehicle for climate change arguments before courts.1 The high profile Urgenda case is one of the most prominent examples of this phenomenon, with the highest court in the Netherlands finding that the State owes an obligation to its citizens, in accordance with the right to life, to take action to reduce greenhouse gas emissions.2 Other cases have not been successful. In the Teitiota case, a Kiribati citizen failed to convince the UN Human Rights Committee of his entitlement to refugee status due to climate change and human rights arguments for the first time, we conclude with a note of caution against importing temporal imminence as an element of positive human rights obligations or otherwise introducing it. We argue that in the context of climate change, courts should avoid setting a requirement for a connection between a specific action and event, and rather, observe the wider context of alleged rights violations.

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threatened harm from climate change.\(^3\) The majority relied heavily on the concept of imminence of harm, and suggested that the 10–15 year time period remaining until such harms were due to materialize allowed for the potential that the Kiribati government might take action to reduce the threat.\(^4\)

The inclusion of temporal imminence as a critical factor in determining a human rights case mounted on climate change grounds is not new, and is part of a trend emerging in other areas of human rights law.\(^5\) International experience indicates that there must be limits to the burden placed on authorities to fulfil positive human rights obligations as a matter of practicality,\(^6\) but these limits have often been interpreted in a fairly haphazard way.\(^7\) Limits applied include amorphous concepts like due diligence,\(^8\) reasonableness\(^9\) and proportionality,\(^10\) and in the absence of a more concrete test or set of criteria to establish when a positive human rights obligation has been violated,\(^11\) there is the potential for factors – including potentially inapt factors – to inadvertently be prioritized. Arguably, this has happened with the concepts of ‘imminence’ and ‘immediacy’,\(^12\) which have crept into human rights discourse generally, and into human rights and climate change cases specifically, as a limiting factor.\(^13\)

That is, some courts have decided that a threat to the enjoyment of a human right must be imminent or immediate for a violation to have occurred.

4. ibid [9.12].
6. See eg Sawhoyamaxa Indigenous Community v Paraguay, Inter-Am.Ct.H.R (Ser. C) No. 4 (2006), Inter-American Court of Human Rights (29 March 2006) at [155], ‘taking into account the difficulties involved in the planning and adoption of public policies and operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities’.
11. While the language of incompatible limitations is used in Australian jurisdictions, the term ‘violation’ (and similar) will be used in this paper for the purposes of describing obligations across several jurisdictions.
12. The terms ‘immediacy’ and ‘imminence’ will be treated as synonymous in this paper for the purposes of simple translation between the language used by courts of different jurisdictions.
13. See eg, *Gonzalez et al. v Mexico*, Inter-Am.Ct.H.R (Ser. C), Inter-American Court of Human Rights (16 November 2009) (‘Cotton Field’); *Urgenda* (n 1); *Teitiota* (n 3) footnote 5.
Imminence as a superadded element of a claim is particularly troublesome for climate change litigation. Climate change impacts have historically been communicated as long-term threats, with groups such as the Intergovernmental Panel on Climate Change (‘IPCC’) often using 2100 total radiative forcing as the benchmark for expressing climate projections.14 This long-range forecasting of climate change impacts might mean that it is difficult to demonstrate a temporal connection between an action or a decision of government, for example, and a climate harm. If this notion of close temporal connection becomes embedded in climate change and human rights cases, it might jeopardize their future success.

The purpose of this article is to analyse and discuss whether there is a sound theoretical basis for incorporating temporal imminence as a superadded element of a human rights claim, with the object of stemming the growth of its influence on climate change litigation. To understand how temporal imminence has made its way into climate change litigation, we trace the concept back to its foundations and examine jurisprudence from the European Court of Human Rights (‘ECtHR’) and the Inter-American Court of Human Rights (‘IACtHR’). We argue that there are several key problems with imminence/immediacy being elevated to a precondition of a violation of a positive human rights obligation generally. First, several recent analyses of case law trace the concept to its roots and cannot find a clear rationale for it.15 Second, where immediacy has been adopted by regional human rights courts it has been applied in an uncoordinated and largely unexplained manner. This has led to a farrago of approaches, and in particular, to a divergence between cases where courts accept broad knowledge of a general set of circumstances as being sufficient to establish a violation of a positive obligations, as opposed to a narrow approach where courts require knowledge of a specific fact or circumstance. It is only in the latter cases that temporal imminence becomes critical. Third, it is not always clear what a court means by the terms ‘imminence’ or ‘immediate’. For example, the plain and ordinary meaning of ‘imminent’ refers to something ‘about to happen’ or ‘likely to happen very soon’. It requires a relationship between an act and consequence that is temporal in nature. However, we observed that (1) some courts are using the term ‘imminence’ in a manner that is more similar to ‘foreseeable’16—the plain and ordinary meaning of which is something that can be predicted or foreseen but which does not necessarily require a close temporal connection between an act and a consequence; and (2) some courts or bodies may be conflating the concept of imminence with the possibility of intervening actions occurring that sever the causal relationship between an act and a consequence.17 Indeed, even the successful Urgenda case referred to a test of ‘real and immediate risk’, but construed it as meaning that the risk is directly threatening the

14. Eg IPCC, IPCC First Assessment Report (1990, Geneva, World Meteorological Organisation) 11; Matthew Collins and Reto Knutti, ‘Long-term Climate Change: Projections, Commitments and Irreversibility’ in IPCC, Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, Cambridge 2013) 1054. The methodology for the choice of the 2100 benchmark is unclear although may have originated in the IPCC First Assessment Report where it was noted that, at the time, it was too difficult to make accurate calculations for years beyond 2100, see 78, [5.5.1].
16. See eg, Urgenda (n 1).
17. See eg, Teitiota (n 3).
persons involved, rather than requiring a temporal connection. Thus, the language of imminence may in fact be a linguistic red herring, and the successful outcome in Urgenda may not prevent another court from adopting the language used, but, this time, construing ‘real and immediate risk’ as requiring a close temporal connection.

Given its vexed history, we conclude by arguing that temporal imminence should not be imported as a superadded element of human rights law or otherwise introduced, and that courts more generally should be very cautious in adopting imminence jurisprudence. This caution is especially important in the instance of climate change litigation, given that there is likely to be some interval of time between actions which could or do violate human rights obligations, and the ensuing impacts. Urgently clarifying the role of temporal imminence in positive human rights obligations is also especially important as there are some jurisdictions – for example, Australia – which are about to examine the link between climate change and human rights for the first time.

It is beyond the scope of an article of this length to decisively argue how the positive obligation should be interpreted in jurisdictions such as Australia, although flexible concepts of reasonableness and due diligence might offer useful blueprints: provided these tests are applied without a prioritization of imminence as a factor, the high level of knowledge and probability regarding future climate change risks could mitigate the need for temporal imminence to be used as a limiting factor.

2 EUROPEAN COURT OF HUMAN RIGHTS

Climate change litigation on human rights grounds is a reasonably recent phenomenon, and it is necessary to traverse older and more general human rights cases to understand where the concepts of imminence/immediacy derive from. The criteria under discussion have a rich history in cases heard by the ECtHR, and their emergence can be traced back to the Osman case. In Osman the ECtHR found that the positive obligation to safeguard the right to life only arises where a two-step test is satisfied: knowledge of a

18. Urgenda (n 1) [5.2.2].
20. The positive obligation to safeguard human rights bears some similarities to a duty of care in negligence, and therefore tortious concepts of foreseeability and causation may be more appropriate tests to apply. In an assessment of reasonable foreseeability, temporal imminence may be relevant (eg, in the risk of suicide cases), but it is not a decisive factor. Note that an argument for a negligence-style assessment is also made by Stoyanova (n 7).
21. The International Law Association has commented that the ‘golden thread’ of the due diligence standard on authorities is reasonableness and the standard should be interpreted fluidly based on the particular circumstances of each case. See Stephens and French (n 9) 8.
23. Osman v The United Kingdom (1998) VIII Eur Court HR 3124 (‘Osman’).
risk to the life of an individual, and immediacy of that risk.\textsuperscript{24} \textit{Osman} arose in the criminal law context, where a schoolteacher (Paget-Lewis) shot and wounded a former student and killed the student’s father. The former student and his mother were the applicants, and they argued that the State, having responsibility for the police, had failed to act on clear warning signs that the teacher’s behaviour constituted a threat to the student and his family, signs including acts of harassment and stalking. The State argued that ‘the police could not be taken at any relevant time to have appreciated that Paget-Lewis represented a real and immediate threat to the lives of the Osman family’.\textsuperscript{25} There is no indication that the reference to ‘immediate’ derives from any particular test or case judgment. The Court, in its conclusion, adopted this criterion of immediacy, noting that ‘the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis’.\textsuperscript{26} Further, while the applicants suggested that the police could have taken measures such as searching the teacher’s home or detaining him, ‘it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it’.\textsuperscript{27}

Whilst it is unclear whether the ‘real and immediate’ test (hereafter, the \textit{Osman} test) derives from any particular source, it is apparent that it was an attempt to limit the circumstances in which liability may be found. Whilst the State acknowledged that a positive obligation could arise in particular circumstances, the Court emphasized that ‘bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’.\textsuperscript{28} Thus the ‘real and immediate’ criterion was a policy choice to ensure that the State is not unduly burdened and hampered in its carrying out of essential functions.

There are two observations that can be made regarding the ‘real and immediate’ test in \textit{Osman}. First, the test conflates notions of temporal immediacy with foreseeability. This is a point also made by Ebert and Sijniensky, and Stoyanova: that the criteria of ‘real’ and ‘imminent’ are often applied together with no distinction made between the two terms.\textsuperscript{29} Second, it was unclear whether the Court was setting out a test of general application, or one confined to the nexus between criminality and risk. The latter interpretation was supported by the ECtHR in the case of \textit{Valentin}, where it was remarked that such positive obligations arise where it is known, or ought to have been known to the authorities in view of the circumstances, that the victim was at real and immediate risk from the criminal acts of a third party [emphasis added], and, if so, that they failed to take measures

\begin{itemize}
\item \textsuperscript{24} ibid [116]–[117].
\item \textsuperscript{25} ibid [111].
\item \textsuperscript{26} ibid [121].
\item \textsuperscript{27} ibid [121].
\item \textsuperscript{28} ibid [116].
\item \textsuperscript{29} Ebert and Sijniensky (n 15) 358; Vladislava Stoyanova, ‘Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights’ (2018) 18 Human Rights Law Review 309, 339.
\end{itemize}
within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.\textsuperscript{30}

That is, the test was interpreted to apply only in cases where it is alleged that an entity should have protected someone from the criminal acts of a third party; a sensible policy justification. However, despite this potential intention to limit the scope of the test, we will discuss below how Courts have applied the test in circumstances broader than intended by the Court in \textit{Osman}.

A review of earlier cases does not provide any insight as to where the immediacy criterion might have originated. \textit{LCB v United Kingdom}\textsuperscript{31} was decided just before \textit{Osman} in 1998, and involved an argument from the applicant that her childhood leukemia was caused by her father’s exposure to radiation during nuclear tests on Christmas Island, where he was a worker. The applicant argued that the State’s failure to warn her parents of the possible risk to her health caused by her father’s participation in the nuclear tests, and earlier failure to monitor her father’s radiation dose levels, gave rise to violations of her right to life.\textsuperscript{32} The argument regarding monitoring of health failed on the basis of no jurisdiction,\textsuperscript{33} and the argument regarding a failure to warn was unsuccessful as the Court could not find a causal link between the father’s exposure to radiation and the subsequent leukaemia diagnosis of his child.\textsuperscript{34}

For present purposes, the most interesting part of the Court’s judgment is found in obiter dicta, where the Court remarked that:

> it is perhaps arguable that, had there been some reason to believe that she was in danger of contracting a life-threatening disease owing to her father’s presence on Christmas Island, the State authorities would have been under a duty to have made this known to her parents whether or not they considered the information would assist the applicant.\textsuperscript{35}

This suggestion is clearly at odds with the need for a close temporal link between an action and the consequences. This suggests one of two things: that \textit{Osman} overturned ECtHR jurisprudence from earlier in the same year, or that the \textit{Osman} test was intended to be confined to its particular factual and/or legal situation.

The former interpretation could be supported by the fact that the test of ‘real and immediate risk’ has since been applied in a considerable number of subsequent cases before the ECtHR. Ebert and Sijniensky, however, have reviewed categories of cases, and summarized them as cases involving (1) risks caused by non-state actors, (2) risks that cannot be attributed to specific actors, and (3) risks entailing state involvement.\textsuperscript{36} Within this latter category, cases can be divided into those which arise generally within a State’s sphere of power (eg, cases involving suicides in custody), and then those involving direct State contributions (eg, State use of explosives).\textsuperscript{37} The authors concluded that cases falling into the first two categories, such as \textit{Osman} itself, are

\textsuperscript{30} Centre for Legal Resources on behalf of Valentin Campeanu v Romania (2014) V Eur Court HR 1, 58–59. This interpretation is also supported in Vladislava Stoyanova, ‘Due Diligence versus Positive Obligations’ in J Niemi, L Peroni and V Stoyanova (eds), \textit{International Law and Violence Against Women: Europe and the Istanbul Convention} (Routledge 2020) 17.

\textsuperscript{31} (1998) ECHR 49.

\textsuperscript{32} \textit{LCB v United Kingdom} (1998) ECHR 49 [25]–[29].

\textsuperscript{33} ibid [35].

\textsuperscript{34} ibid [39].

\textsuperscript{35} ibid [40].

\textsuperscript{36} Ebert and Sijniensky (n 15) 348.

\textsuperscript{37} ibid 350.
relatively rare. Despite this, Courts have applied the Osman test of ‘real and immediate risk’ in cases in the latter category, which Ebert and Sijniensky note ‘may be surprising given that the Osman test was specifically created to deal with violations by non-State actors’. Ebert and Siniensky’s analysis therefore supports the second possible characterization of Osman, which is that it was intended to be confined to a particular factual and legal situation. Problematically, the test has been interpreted as one of broader application, and has been applied to situations which it was not intended for. The conflation of ‘real’ and ‘immediate’, including in Osman itself, potentially created a confusion that has persisted, and if the two elements were expressed and applied separately, this might have led courts to address more precisely whether both realness of risk and close temporal connection are needed in a particular factual and legal context.

Despite this conflation of the criteria in Osman, in some other cases before the ECHR the Court has dealt with ‘real’ and ‘immediate’ as two separate criteria; essentially, foreseeability, and temporal imminence. For example, Keenan v United Kingdom involved a claim against the State by the mother of a prisoner who committed suicide. The applicant argued that the State had a positive duty to safeguard the lives of those within its jurisdiction, and that the State violated this by placing her son in a segregated environment whilst there was a real and immediate risk that he would self-harm. The Court concluded that the risk to the son was real, as ‘his mental state was such that his threats had to be taken seriously and were therefore to that extent real’. However, ‘the immediacy of the risk varied … [as his] behaviour showed periods of apparent normalcy or at least of ability to cope with the stresses facing him’. What this judgment indicates is that, whilst the Court found the risk to be foreseeable, the lack of temporal imminence was a barrier to success – and in turn, an essential criterion for liability. Again though, what is not made explicit is whether the requirement for temporal imminence is something closely related to and confined to the factual situation in this case. For example, in the risk of suicide context, it might be impossible to predict that a person will commit suicide months or years into the future, but suicide can perhaps be predicted several days into the future by a trained professional. Accordingly, temporal imminence is critical in this factual scenario but not necessarily in every context.

However, and notwithstanding the distinction drawn in Keenan between the criteria, a consistent approach has eluded the ECHR, and more conflated approaches have been taken – even in cases which were factually very similar to Keenan. In other suicide cases, the ‘real and immediate’ test not only conflated the two independent criteria, but applied the test as synonymous with ‘reasonable foreseeability’. For example, the case of Younger v United Kingdom concerned a prisoner who had committed suicide in a holding cell awaiting transfer to a prison. The Court ultimately concluded that the prisoner’s ‘act in hanging himself was not reasonably foreseeable. As the evidence does not establish that he was, or ought to have been, known to the

38. ibid.
39. ibid 349.
40. This point is also made by Stoyanova (n 29) 339.
41. ibid 358.
42. Keenan v United Kingdom [2001] III Eur Court HR 95.
43. ibid 127.
44. ibid 130.
45. ibid 130.
authorities as a real and immediate suicide risk, the authorities cannot be found [liable]’. In this sense, ‘immediate’ appears to function as part of a more general ‘foreseeability’ test, and the Court seems to treat ‘reasonably foreseeable’ and ‘real and immediate’ as synonymous concepts.

There have also been cases in the second category identified by Ebert and Sjiniensky; cases that arise generally within a State’s sphere of power. These might be more obviously or directly relevant to the climate change context than the cases thus far discussed.

In Öneryildiz v Turkey, a methane explosion occurred at a rubbish tip immediately adjacent to a village, causing multiple deaths and property damage. An expert report prepared for the relevant municipal Council in May 1991 highlighted serious risks posed by the proximity of the rubbish tip to the residents nearby, including the possibility of a methane explosion. This report was not acted upon and two years later, in April 1993, the explosion occurred. The Court imported the Osman elements, and concluded that

neither the reality nor the immediacy of the danger in question is in dispute, seeing that the risk of an explosion had clearly come into being long before it was highlighted in the report of May 1991 and that, as the site continued to operate in the same conditions, that risk could only have increased during the period until it materialised on 28 April 1993.

Stoyanova has argued that ‘this [view] implies a very long timeframe of imminent risk’ because the risk was considered imminent years before the explosion happened. What is important in this case is that, despite the extended time period (almost two years) between the report and eventual explosion, this time gap did not dissuade the court from finding temporal imminence. Öneryildiz v Turkey can therefore be construed as an example of a court using broad knowledge of a general set of circumstances to establish a violation of a positive obligation, whilst the Osman test, likely due to the particular situation in question and the need to restrict liability as a policy matter, exemplifies the narrow approach whereby courts require knowledge of a specific fact or circumstance.

The broader knowledge approach may be more appropriate when dealing with risks of the type that arose in Öneryildiz v Turkey. The report in question warned of the possibility of a methane explosion, and there was perhaps a chance that this explosion could have materialized every single day in the two-year time period in question. However, the probability of it occurring might have been low. Arguably, then, there might be a trade-off between the probability of risk and the temporal imminence of that risk. In the case of the methane explosion, it could have happened at any time, but it was difficult to predict with certainty. Climate change might be viewed as being fundamentally different in that there is a much higher probability that a particular risk will occur, but the manifestation of the risk just happens to be at a temporally distant point. What this comparison suggests is that a broader catch-all test such as foreseeability may be more appropriate to climate change cases than is a test of

46. Younger v United Kingdom [2003] I Eur Court HR 281, 309.
47. [2004] XII Eur Court HR 79.
48. Önerildiz v Turkey [2004] XII Eur Court HR 79, 118.
temporal imminence, because temporal imminence seems only to be a sensible limiting factor in particular factual scenarios.

This argument is supported by considering other similar cases. In *Budayeva v Russia,* 50 a series of mudslides had caused a number of deaths, as well as personal injuries and property damage. The applicants argued that, due to a failure to mitigate mudslide risk despite prior occurrences and warnings issued, the government had violated the right to life. The Court confirmed that the right to life includes a positive obligation on the part of a State to take appropriate steps to safeguard the lives of persons within their jurisdiction. 51 The Court found in favour of the applicants, but the line between temporal imminence and foreseeability was blurred in the judgment. At one point the Court mentioned a requirement for a State party to take measures when faced with an imminent and clearly identifiable natural hazard. 52 At a later stage of the judgment, the Court concluded that the State party should have taken measures due to the foreseeable exposure of residents to a mortal risk, with a causal link established between the omissions and the deaths in question. 53 Thus it is unclear whether temporal imminence or foreseeability was the central consideration. We suggest that it would be more sensible to interpret foreseeability of the risk as the overarching principle that was relevant here, although temporal imminence may have played a role in this assessment. However, it was ultimately the fact that the authorities knew that the risk was likely to transpire that was critical.

In summary, the test of ‘real and immediate’ risk from *Osman* seems to have generated considerable confusion and uncertainty before the ECtHR. Both elements of the test are often conflated in application, and it is unclear whether temporal imminence is intended to be a key factor for consideration in all decisions, or to function as part of a broader foreseeability test in appropriate circumstances. It is also unclear whether imminence should be interpreted as requiring knowledge of a particular fact or circumstance, or as requiring knowledge of a general and ongoing set of circumstances. Second, the test has been applied in a potentially broader range of scenarios than was initially intended. 54 Stoyanova has argued that ‘the test is … limited to circumstances where the person exposed to the harm can be individualised and identified in advance, and the risk of harm is immediate’, and that this limitation makes sense in the context of preventing harm from the criminal actions of third parties, as ‘it might be unreasonable to expect the authorities to take protective operation [sic] measures of an ad hoc nature without some imminence and concreteness of the risk’. 55 She has further argued that the test is inappropriate in circumstances where the issue is the general protection of society, and in situations where the State is ‘under the obligation to put in place a general legislative and administrative framework for regulating activities so that harm is prevented’. 56

Ebert and Sijniensky argue that the test is especially problematic in the context of what they term ‘structural risks’, which they define as ‘any risk to the life of an individual that is fostered by prevalent social structures such as racism or sexism, often

50. [2008] II Eur Court HR 267.
51. *Budayeva and others v Russia* [2008] II Eur Court HR 267, 288.
52. ibid 290.
53. ibid 295–6.
54. Stoyanova (n 29) 340.
55. ibid 340–1.
56. ibid 341.
resulting in patterns of widespread violence against members of a certain group.\textsuperscript{57} Because these risks often do not emanate from one particular individual, it is difficult to show immediacy. Ebert and Sijniensky argue that a more appropriate test for structural risks is (1) existence of the risk, (2) realness of the risk, and (3) the State’s knowledge of the risk. This framing could incorporate risks that are not immediate in a temporal sense: immediacy might be relevant in terms of the precise content of the measures required to be taken by a State, but would not be a criterion for the taking of measures generally.\textsuperscript{58} Essentially Ebert and Sijniensky propose a test of foreseeability in the context of structural risks, whilst acknowledging that temporal imminence may become relevant in determining the scope of any duty, but not its existence.

It has previously been argued that climate change could be characterized as a structural risk\textsuperscript{59} due to it being a collective responsibility issue, and therefore Ebert and Sijniensky’s test might be more appropriate than the Osman test in this type of case.

3 INTER-AMERICAN COURT OF HUMAN RIGHTS

The other major stream of jurisprudence which courts can and do draw upon in climate change litigation is that of the IACtHR, especially given recent advisory opinions of the Court on environmental issues. However, these cases should be approached with caution: as in the ECtHR, the concept of temporal imminence has permeated IACtHR jurisprudence in an uncoordinated fashion. Also as in the ECtHR, the biggest dichotomy has emerged between cases where a violation of a positive obligation is found based on broad knowledge of circumstances, as opposed to the more onerous requirement of specific knowledge of a particular event. This section will review the key IACtHR jurisprudence relevant to the concept of imminence to highlight the issues with importing it into climate change jurisprudence.

3.1 The original due diligence standard for positive obligations

The existence of a positive obligation to protect human rights has existed in the IACtHR since its very first judgment, Velasquez Rodriguez.\textsuperscript{60} The Court in Velasquez Rodriguez considered Article 1(1) of the American Convention of Human Rights (‘ACHR’),\textsuperscript{61} which states that ‘the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms’.\textsuperscript{62} ‘Respect’ and ‘ensure’ were interpreted respectively as encompassing negative and positive obligations.\textsuperscript{63}

\textsuperscript{57} Ebert and Sijniensky (n 15) 362–3.
\textsuperscript{58} ibid 366.
\textsuperscript{59} Bell-James and Collins (n 19) 22.
\textsuperscript{60} Velasquez Rodriguez (n 8).
\textsuperscript{62} ibid art 1(1).
As in the ECtHR, the IACtHR had to develop some limitations on the applicability of the positive right as a matter of practicality, and the resulting concept was ‘due diligence’. The Court in Velasquez Rodriguez hesitated to set out a stringent test for due diligence, noting that ‘it is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State party’. While the standard is not articulated, requirements to ‘take reasonable steps’ are referenced with respect to the ‘duty to prevent’ and to the broader positive obligation under Article 1(1) of the ACHR.

Commentators on IACtHR jurisprudence have observed that the concept of due diligence derived from reasonableness, and is largely considered to be a flexible standard rather than a strict test, due to the lack of uniformity in the standard of conduct expected of actors in discharging their human rights obligations. Whilst there are benefits to a flexible standard, commentators also warn of the pitfalls of variability, noting that the standard of due diligence can change over time.

At its inception, there was no discernible element of imminence or immediacy incorporated into this iteration of the due diligence standard. However, the Osman test was applied by the IACtHR in 2006 in Pueblo Bello, and has been applied in most subsequent IACtHR cases. In fact, the test has become so embedded as an element of the due diligence standard itself that it was clearly delineated as such in recent landmark advisory opinions of the IACtHR. However, the appearance of immediacy as an element of due diligence at this point in time is curious, given that the IACtHR’s characterization of the positive obligation and due diligence standard pre-dated the ECtHR’s decision in Osman. While it may appear to be an arbitrary addition, the answer to Osman’s apparition might lie in the particular nature of the cases which have traditionally come before the IACtHR. Most have concerned events of mass violence that are particular to the political landscape, where States have acquiesced or even collaborated with paramilitary forces to carry out these events.

64. Velasquez Rodriguez (n 8).
65. ibid [187–8].
68. Stephens and French (n 9), 2.
69. ibid 8; Bonnitcha and McCorquodale (n 66) 905–6.
71. Advisory Opinion on the environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights, Inter-Am.Ct.H.R, OC-23/17, Inter-American Court of Human Rights (7 February 2018).
72. Eg Barrios Altos v Peru, Inter-Am.Ct.H.R (Ser C) No 83 (2001), Inter-American Court of Human Rights (3 September 2001); Case of Myrna Mack Change v Guatemala, Inter-Am.Ct.H.R (Ser C) No101 (2003), Inter-American Court of Human Rights (25 November 2003); Mapiripan Massacre v Colombia, Inter-Am.Ct.H.R (Ser. C) No. 134 (2005), Inter-American Court of
similarly to the facts of the foundational judgment on the existence of the positive obligation in Velasquez Rodriguez. For example, the Mapiripan Massacre v Colombia and Moiwana Village v Suriname cases both partially considered the positive obligation to ensure rights in Article 1(1), but the focus was on investigations which had been conducted without due diligence following a finding of negative violations of rights. The collaboration of State agents in the initiating human rights violation in these cases made any consideration of the existence of the State’s knowledge a moot point: a key distinction from the facts in the Osman case. Following these cases, in the IACtHR context the due diligence standard with respect to preventing violations of human rights has remained loosely configured due to the absence of the considerations of knowledge that provide the necessary conditions for the birth of concepts such as ‘imminence’ in IACtHR jurisprudence.

In the few cases where knowledge had been considered prior to the introduction of the Osman test in 2006, its existence was treated as a relevant factor but not a strict precondition for satisfying a due diligence standard. For example, in Street Children (Villagran Morales et al.) v Guatemala violations of the negative obligations within the rights to personal liberty, life and humane treatment were found following the abduction and murder of five boys, known as juvenile delinquents, by members of the National Police Force. The Court also considered positive obligations of the State with respect to the rights of the child, due to allegations that the State of Guatemala had omitted to protect the children in the context of the ongoing epidemic of ‘street children’ and their abductions in the region, which were well known to be perpetrated by police officers. Guatemalan officials had previously reported to the Committee on the Rights of the Child that they were aware of the issue of ‘street children’ and had received ‘a number of complaints’ although it was not specified from whom. The State also admitted that it had knowledge of 84 murders of children in the locality over the three-month period within which the five boys in this case were abducted. On these facts, the IACtHR confirmed a violation of the positive obligation of Article 1(1) in the context of the rights of the child, stating that “if the State had elements to believe that “street children” are affected by factors that may induce them to commit unlawful acts, or has elements to conclude that they have committed such...
acts, in specific cases, it should increase measures to prevent crimes and recurrence [emphasis added].

At no point in their reasoning did the IACtHR mandate the knowledge of the State as a prerequisite for the satisfaction of the due diligence standard in all cases. However, it is clear in this case that the State’s knowledge of the context in which the boys were murdered was substantively relevant to the conclusion that it was under an obligation to act. In fact, the phrases ‘elements to believe’ and ‘elements to conclude’ appear to set a lower standard than explicit knowledge. Notably, the IACtHR’s consideration of knowledge involved no consideration of immediacy or imminence of harm to any particular child, but focused on broad knowledge of an ongoing problem.

In summary, prior to 2006, the IACtHR rarely had the opportunity to consider the role of knowledge in positive human rights obligations. Where knowledge was considered, it was not a strict requirement but rather part of the factual matrix where relevant to the circumstances. That said, Street Children did not concern government intervention in the actions of private entities and was not precisely analogous to Osman.

3.2 The marriage of due diligence and the Osman test: Pueblo Bello

Pueblo Bello in 2006 arguably presented the first opportunity for the Court to consider an Osman type scenario. Again, it concerned a civilian massacre perpetrated by paramilitary groups, with the Court tasked with considering alleged violations, including of the right to life. It was alleged that the Colombian Army had collaborated with the paramilitary forces in the perpetration of the crime. Importantly this evidence was excluded from the IACtHR’s ‘proven facts’ due to a deficiency in the evidence regarding collusion. As a result, and contrary to previous cases with

82. ibid [197].
83. A similar finding was made in the Case of the Mayagna (Sumo) Awas Tigni Community v Nicaragua, Inter-Am.Ct.H.R (Ser C) No. 79, Inter-American Court of Human Rights (31 August 2001), which appeared to consider knowledge to an extent, although, again, it was not mandated as an element in need of satisfaction but rather a relevant factor. Comparable to the facts in the Street Children case (n 76), this case involved an ongoing land rights dispute which the government was aware of due to a number of formal complaints that had been raised by the petitioners.
84. This is despite the fact that the State arguably had actual knowledge of the state of emergency in the region in this case regardless.
85. See also Maria da Penha Maia Fernandes v Brazil, Inter-Am.Comm’n H.R. No. 4/01(Ser C) No. 140 (31 January 2006), where the Commission found a violation of art 1(1) of the ACHR on the basis that ‘the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors [therefore] it is the view of the Commission that this case involves not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence’, at [56]. See also paragraphs [7]–[58].
86. Street Children (n 76) [194].
87. Pueblo Bello (n 70).
88. A key issue was whether the heavily armed paramilitary groups had been let through a military roadblock on the main route into the village: see [80]–[84].
89. This is partly because, at the disciplinary jurisdiction, the Office of the Delegate Disciplinary Attorney for Human Rights did not consider evidence to establish the responsibility of the soldiers under investigation: ibid [84]–[92], [121].
similar facts, State culpability could not be proven. With the perpetrators classed as private individuals, relevant violations were considered only within the context of the positive obligation within Article 1(1). The Court concluded that the State is not responsible for all acts of individuals, but that ‘its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger … and to the reasonable possibilities of preventing or avoiding that danger [emphasis added]’.

This was the first time that the language of the Osman test was directly quoted in the IACtHR, indicating that the existence of imminence was a necessary finding for a violation of the State’s positive human rights obligations in the context of the duty to prevent individual perpetrations of crime. Nonetheless, in the test’s application, the absence of the State’s explicit knowledge of the specific village massacre was not fatal to the applicant’s claim. As in the Street Children case, the Court instead considered the broader context, and the fact that the town had been declared an emergency zone was sufficient to demonstrate that the State was aware of a potential risk to the villagers. This also meant that the danger of violence was ‘reasonably foreseeable’ and a breach of the State’s positive human rights obligations was found.

Consequently the Pueblo Bello judgment, despite using the language of imminence, was similar to the application of the due diligence standard in earlier cases. Rather than focusing on knowledge of a specific event, as in Osman, each of these cases considered knowledge of the context of an ongoing threat to human rights in general as being persuasive for establishing government responsibility for specific events. This is arguably an easier threshold to meet, especially when compared to Osman, where a lack of temporal imminence in respect of a specific threat precluded the establishment of State responsibility despite the fact that information was repeatedly provided to State agents of an escalating threat of harm to particular persons. This emphasis on general context, including pre-existing environments conducive to violence, necessarily reduces the utility of imminence as a prerequisite for liability. In contrast, emphasis on a single particular event elevates the importance of imminence as a factor. Therefore, although Pueblo Bello is regarded as the landmark IACtHR case incorporating the Osman test, in substance, the Court deferred to its historically flexible due diligence standard which focused on reasonableness and foreseeability to find violations of obligations. Nonetheless, perhaps inadvertently, Pueblo Bello has been characterized as

90. Mapiripan Massacre (n 72); Moiwana Community (n 72).
91. Pueblo Bello (n 70) [122].
92. ibid [124].
93. ibid.
94. ibid [135].
95. ibid [139].
96. ibid [140].
97. See eg, Street Children (n 76); Mayagna (n 83).
98. The ‘emergency zone’ in Pueblo Bello (n 70) [139]; Street Children (n 76) [181] and Mayagna (n 83).
99. Osman (n 23).
100. Ebert and Sijniensky (n 15) 352.
endorsing a temporal imminence consideration, with imminence now regarded as an element of the due diligence test.101

3.3 Integration of imminence and the due diligence standard

Following Pueblo Bello, the application of the Osman test has been arbitrary and inconsistent. Included in the mix are cases (1) where the Osman test has been applied needlessly, (2) where the test may have been useful due to a specific context but its application was largely unexplained or seemingly unimportant, and (3) where the Osman test and ‘imminence’ seriously affected outcomes and caused a clear departure from the Court’s traditionally flexible due diligence test. Cases in the third category demonstrate the most harmful impacts of the importation of the Osman test into IACtHR jurisprudence. However, cases in (1) and (2) have also had negative effects, contributing to confusion and, more worryingly, further embedding a problematic concept within international law.

The first category of cases is where the Osman test has been applied needlessly. For example, Sawhoyamaxa Indigenous Community v Paraguay102 – one of the first IACtHR cases post Pueblo Bello – framed the State’s positive obligation to process a pending land rights claim in an expedient manner with reference to the Osman ‘immediacy’ test.103 Nonetheless, the judgment was absent a discussion of imminence, which is unsurprising given the factual context that the harm was current and within the government’s own administrative processes. The question of knowledge, let alone immediacy, was not relevant to this case and yet the language of the Osman test found itself lodged within a new iteration of the due diligence standard.

The second category of cases is where the Osman test could have been genuinely useful on the facts but, despite its technical application, was seemingly unimportant to the outcome. For example, Valle Jaramillo et al. v Colombia104 involved the arbitrary detention and extrajudicial execution of human rights defenders, including Mr Valle Jaramillo. The facts of this case could have facilitated dialogue about a specific and imminent risk to Valle Jaramillo’s life, including addressing his public presence, public statements and testimony in court,105 which contributed to strong evidence that the State was aware of a specific risk to him in addition to its awareness of a general context of violence against human rights advocates. Nonetheless, the Court did not apply the Osman test and instead used broader concepts of foreseeability, with the requirement for measures of protection to be implemented by the State due to Valle Jaramillo’s ‘situation of special vulnerability’.106 This approach is similar to the reasoning surrounding the ‘emergency zone’ in

101. Grans (n 63) 738.
102. Sawhoyamaxa Indigenous Community (n 6). This case involved a claim by the Sawhoyamaxa people that the State had breached their human rights as a result of the dormant status of their land rights claim which had been pending and unresolved since 1991. Also see Xakmok Kasek Indigenous Community v Paraguay, Inter-Am.Ct.H.R. (Ser C) No 2014, Inter-American Court of Human Rights (24 August 2010).
103. Sawhoyamaxa Indigenous Community (n 6) [155].
104. Valle Jaramillo et al. v Colombia (Ser C) No 192, Inter-American Court of Human Rights (27 November 2008).
105. ibid [82]–[94].
106. ibid [82].
Pueblo Bello, although in that case there was no comparable evidence of actual imminent threats of a specific event, as was the case with respect to Valle Jaramillo’s murder.

Jessica Gonzales v United States,107 heard in the Inter-American Commission of Human Rights,108 involved allegations that police failed to respond to Jessica Gonzales’ repeated calls reporting that her husband had violated a restraining order and had abducted their three daughters, whose bodies were later discovered in the back of his truck.109 In this case, the Commission used the term ‘due diligence’ to assess the conduct of the police and raised two questions: (1) whether the state authorities should have known that the victims were at ‘real and imminent’ risk of domestic violence; and (2) whether the authorities undertook reasonable measures of protection.110 The existence of the restraining order was enough on its own for a determination to be made that the situation faced by Gonzalez and her daughters was one of real and imminent risk.111 Interestingly, the repeated calls that Gonzalez made to the police station the night that her daughters went missing did not form a major part of the consideration of whether a real and imminent risk was demonstrated. There is little emphasis on temporality, even though in this case temporality could have been of major relevance. The Commission’s focus, contrary to having imminence at its core, appears to align more closely with a broader standard of reasonable foreseeability. Further, arguably, the restraining order alone did not create awareness of a specific circumstance of violence, but rather of a pre-existing climate of potential violence. Again, this is a similar application of the Osman test as that in Pueblo Bello, and one which does not require the same stringency as in Osman itself. This case provides further evidence that the precondition of imminence does not have real utility in Inter-American jurisprudence. Rather, imminence is a quiet stowaway within the original due diligence test. Although its presence in these cases is seemingly negligible and harmless, its further embedment as an apparent precondition has, in other cases, generated more problematic results.

Gonzalez et al. (Cotton Field) v Mexico112 in 2009 was arguably the first substantive IACtHR application of the imminence test that affected the outcome of a case. The IACtHR assessed the State’s responsibility for the disappearance and eventual murder of three young women in a gender hate crime.113 The area suffered a ‘phenomenon’ of disappearances of women.114 The applicants, the mothers of the victims, alleged there had been a failure to search for the victims before their remains were found.115 The Court confirmed that imminence formed a part of the due diligence assessment at the outset116 and applied the Osman test at two

108. The IACHR is an organ of the Organization of American States based in Washington DC, United States. The Inter-American Court of Human Rights is based in San José, Costa Rica. Together the Court and the Commission make up the human rights protection system of the Organization of American States.
109. Jessica Gonzales (n 107) [2].
110. ibid [132].
111. ibid [143].
112. Cotton Field (n 13).
113. ibid [2].
114. ibid [114].
115. ibid [182].
116. ibid [280].
separate points: (1) prior to the disappearance of the victims; and (2) following the disappearance, but prior to the discovery of the bodies.\textsuperscript{117} With respect to the first time period, the State’s knowledge of a state of crisis for the safety of women in the region was noted, but no violation was found because the State had no knowledge of a risk of real and imminent danger when it came to the specific victims.\textsuperscript{118} The State was in violation for their conduct during the second period because by this stage, the specific disappearance of the girls was known and it was aware of a ‘real and imminent’ risk. This determination seems to demand a higher standard than that in\textit{Pueblo Bello, Jessica Gonzales and Valle Jaramillo}, where it was held that knowledge of a state of emergency, climate of violence, or similar, was sufficient to prove a positive human rights violation.\textsuperscript{119} It is also a departure from due diligence cases prior to the importation of the \textit{Osman} test, such as the case of the \textit{Street Children}, where an ‘epidemic’ of violence was enough to trigger the positive obligations of the State to protect them. The Court in this case appears to have opted for a far more individualist, rather than structural, approach to positive obligations, which more closely resembles the approach taken by the ECtHR in \textit{Osman}. It is likely that the application of the imminence test was the cause of this more stringent approach in \textit{Cotton Field}, although confirmation of this assessment is elusive due to absence of a clear breakdown of the test in the majority opinion.

Another case where the introduction of the \textit{Osman} test may have altered the approach of the IACtHR is \textit{Human Rights Defender et al. v Guatemala}.\textsuperscript{120} Similar to \textit{Cotton Field} and \textit{Osman} itself, \textit{Human Rights Defender} focused on the imminence of a particular event: the death of human rights defender, Mr Florentin Gudiel Ramos. The judgment sidestepped the context of imminent threats to well-known defenders more generally, as was important to the outcome in \textit{Valle Jaramillo}, to assess the temporal imminence specifically of Mr Ramos’ murder in light of a prior complaint to the police made by the victim’s daughter. The Court emphasized that the daughter’s complaint was filed one year in advance of the murder and did not explicitly reference her father, only that men had called her home and threatened herself and her son.\textsuperscript{121} While the Commission raised evidence of a report of armed men watching Mr Ramos’ house at night in the lead up to his death, this evidence was not considered by the Court in the context of the right to life.\textsuperscript{122} On these facts, the majority decided that the threat to Mr Ramos was not real or imminent enough to demand State action.\textsuperscript{123}

\textsuperscript{117} ibid [280].
\textsuperscript{118} ibid [282]. This is a notable departure from the judgment in \textit{Maria da Penha} (n 85) where the existence of a ‘climate of violence’ [56] was enough to accept a violation of the positive obligations of the State with respect to their omissions in preventing violence against women in general.
\textsuperscript{119} \textit{Pueblo Bello} (n 70) [134]; \textit{Jessica Gonzales} (n 107) [143]; \textit{Valle Jaramillo et al.} (n 104) [82].
\textsuperscript{120} \textit{Human Rights Defender et al. v Guatemala}, Inter-Am.Ct.HR (Ser C) (28 August 2014).
\textsuperscript{121} ibid [133].
\textsuperscript{122} ibid.
\textsuperscript{123} There were other relevant proven facts which were not explicitly important to the Court: Mr Ramos was the Mayor of the region at the time of his death and a high-profile human rights advocate and defender. Years earlier, his son had been disappeared by State agents (presumed executed). The family’s advocacy surrounding the disappearance led security forces to consider them ‘subversive’ [83] which caused them to flee Guatemala to Mexico and the US. Upon Mr Ramos’ eventual return to Guatemala, he became a leader in the community, winning awards and generally attracting attention for his efforts towards peace following civil war.
The judges required knowledge of the specific impending threat to satisfy the requirement that the State knew of a real and immediate threat to the life of Mr Ramos. A successful outcome for the applicants would have required the existence of specific threats pertaining to specific persons. However, the dissenting judgment criticized this approach as ‘excessively formalistic’, and endorsed the more liberal approach of assessing the context of vulnerability of human rights defenders generally at the time the event occurred. In so doing, the dissenting judgment appeared to favour the more traditional and flexible due diligence standard.

Cotton Field and Human Rights Defender demonstrate that the most tangible harm the Osman test might have caused in the IACtHR, after its haphazard infiltration of the due diligence test, has been to make positive obligations effectively unprovable due to an evidentiary burden requiring crystal-ball foresight of a specific event.

The trouble that this interpretive digression in the Inter-American context could cause for questions of environmental harm and, more specifically, for climate change jurisprudence, are foreshadowed in recent advisory opinions of the IACtHR. In 2018, the IACtHR handed down its opinion, following Colombia’s request, concerning the obligation to respect and ensure the rights to life and to personal integrity in the face of potential environment damage. For a positive obligation to arise in this context, two factors were cited as being necessary for the establishment of the obligation: first, that the authorities knew or should have known of a situation of real and imminent danger; and second, that there was a causal link between the impact on life and the significant damage caused to the environment. Thus, the Osman test is included in the due diligence standard in the Court’s non-adversarial communications and in environmental law, while the scope of the standard or what it means is not expanded upon. This is despite the due diligence standard in international environmental law traditionally being silent as to imminence within opinions of the International Tribunal for the Law of the Sea and the International Court of Justice. This is, in our view, another example of the ostensibly harmless

On these facts, the Commission argued that Mr Ramos had ‘the exact profile of the defenders who were being attacked’ in the current climate of Guatemala. The former municipal Mayor was later recorded to admit that Mr Ramos had been ‘one of the community leaders threatened in the municipality’.

124. This interpretation is supported by the case of Luna Lopez v Honduras, Inter-Am.Ct.H.R (Ser C) (10 October 2013). Mr Luna Lopez, a well-known environmental activist, had received numerous death threats within the space of a few months before he was murdered, and had expressly reported the threats to the relevant authorities. On these facts the Court readily concluded that the State had knowledge of a real and imminent danger to Mr Luna Lopez and failed to adopt the necessary measures to protect him.

125. Joint Partially Dissenting Opinion of Judges Roberto F Caldas and Eduardo Errer Mac-Gregor Poisot in Human Rights Defender v Guatemala (n 120) [9].

126. ibid.

127. Advisory Opinion on the environment and human rights (n 71).

128. ibid [120].

129. ibid [124].

130. See Advisory Opinion: Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, No. 17 (1 February 2011) [117]–[120].

cross-jurisdictional infiltration of the Osman test resulting in problematic and unsubstantiated reasoning.

The 2018 decision of Judge Tolosa Villabona in the Colombian Supreme Court two months later in Future Generations v Ministry of the Environment & Ors\textsuperscript{132} may help delay the application of the Osman test in Inter-American jurisprudence on climate change. This case saw 25 youth plaintiffs successfully sue the Colombian government to enforce their rights to a healthy environment and to life, amongst others, as a result of the government’s failure to reduce deforestation. Tolosa Villabona ruled that deforestation of the Amazon presents an imminent and grave danger to children, young people and adults, as well as to future generations, as a result of its contribution to carbon emissions.\textsuperscript{133} These imminent dangers were deemed to be apparent as a result of increase in temperatures, melting ice caps, extinction of species and the occurrence of natural disasters.\textsuperscript{134} Similarly to cases such as Pueblo Bello and Valle Jaramillo in the IACtHR, this Colombian case appears to favour reasonable foreseeability over substantive application of the Osman test, despite the importation of its language. In this case, the context of the threat of climate change and the environment of ongoing ‘emergency’ overcame a need for evidence of State knowledge of specific threats to the 25 young plaintiffs themselves. Nonetheless, if precedents such as Human Rights Defender and Cotton Field are anything to go by, the threat of an increasingly insurmountable evidentiary burden in similar cases in the Americas exists for as long as the language of the Osman test remains embedded and unexplained in the jurisprudence.

3.4 Conclusion

Putting aside the question as to whether Osman was a useful precedent for the IACtHR in the Pueblo Bello case in the first place, it is difficult to understand why imminence has infiltrated the due diligence standard in cases where its utility is limited, and in some cases, counterproductive. Outwardly, this development has shifted the due diligence standard from being a concept which is designed for flexibility to a test demanding a more prescriptive application.

Although its substantive effect has at times been harmless, the inclusion of the Osman test in the majority of IACtHR cases following Pueblo Bello has caused confusion and, in some cases, a restriction of the due diligence test resulting in poorer outcomes for victims of human rights violations. In particular, it has moved the Court away from considering knowledge of climates of general danger as being sufficient to prove the foreseeability of specific events, to a higher bar, reminiscent of Osman, that requires knowledge of specific, as well as imminent, events. In such cases, the imminence requirement appears to have encouraged a standard of foreseeability that is so narrow that it is near impossible to meet. It has also further embedded a supposed condition precedent (without a clear rationale) within international human rights and, in some cases, environmental law, which will likely cause significant difficulties in climate change and human rights jurisprudence.


\textsuperscript{133} ibid 34.

\textsuperscript{134} ibid 15.
4 IMMINENCE IN CLIMATE CHANGE AND HUMAN RIGHTS CASES

The preceding review of ECtHR and IACtHR cases has demonstrated how imminence and immediacy have permeated human rights jurisprudence, but in an uncoordinated and incoherent fashion. More recently, there have been a number of cases brought across the world framing the projected impacts of climate change within the lens of a human rights violation. These cases have drawn upon the established human rights jurisprudence discussed in this article, and the notion of imminence has unsurprisingly received some attention. This section will discuss two recent and prominent examples that relied on the concept of imminence/immediacy, but construed the concept differently and reached different conclusions.

The landmark decision in *State of the Netherlands v Urgenda Foundation* (‘*Urgenda*’) made ripples around the world because it was one of the earliest challenges to climate change policy on human rights grounds, and it succeeded before the highest court in the Netherlands. *Urgenda* initially commenced in the District Court of the Hague with the Urgenda organization claiming that the Dutch government had an obligation to reduce its domestic CO2 emissions. This obligation was essentially argued based on two different grounds – a duty of care owed under Dutch environmental law, as well as obligations owed pursuant to the European Convention on Human Rights, including the rights to life and to respect for private and family life.

*Urgenda* succeeded at first instance before the Hague District Court on the claim under environmental law. It then also succeeded on human rights grounds in appeals to the Court of Appeal and subsequently in the Supreme Court. Whilst the Courts used the terminology of imminence and accepted that the risk was imminent, their interpretation bears a stronger resemblance to foreseeability.

The Court of Appeal noted that ‘a future infringement of [the rights to life and family] is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event’. The government has a positive obligation to take steps to prevent a future infringement, but the obligation will be interpreted in a manner such that it does not place an ‘impossible or disproportionate burden’ on the government. The Court of Appeal specifically used the term ‘imminent’ in its reasoning, noting that ‘if the government knows that there is a real and imminent threat, the State must take precautionary measures to

135. See eg Peel and Osofsky (n 22).
136. (n 1).
139. Arts 2(1) and 8(1).
142. *Urgenda* Supreme Court (n 1).
143. *Urgenda* Court of Appeal (n 141) [41].
144. ibid [41]–[42].
prevent infringement as far as possible. In light of this, the Court shall assess the asserted (imminent) climate dangers. From there, the Court listed harms likely to occur as a result of climate change, including sea level rise, heat stress, health concerns and loss of biodiversity, and then concluded ‘as is evident from the above, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life’. Whilst the term ‘imminent’ was used as a precursor to the climate harms, it is difficult to see how the harms can be characterized as temporally imminent, especially as narrowly defined by the judgment in Osman. In fact, part of Urgenda’s argument concerned the potential for worsening harm in the second part of this century. The conclusion that there is a ‘real threat’ of harm thus speaks more to the foreseeability of impacts occurring, rather than to their temporal imminence.

The case then went on appeal to the Supreme Court, where the Court explicitly confirmed that temporal imminence is unnecessary, despite using the language of immediacy in the applied test. In respect of the right to life under the European Convention, the Court concluded that the State is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term ‘real and immediate risk’ must be understood to refer to a risk that is both genuine and imminent. The term ‘immediate’ does not refer to imminence in the sense that the risk must materialize within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialize in the longer term. Again, reference to the State being ‘aware of the risk’ resembles a notion of reasonable foreseeability rather than one tied to temporality. The Court further concluded that, due to the operation of the precautionary principle, a State must take steps to prevent harm even where its materialization is uncertain. This requirement might set the bar even lower than the negligence/private law concept of foreseeability, as action would be required to address a risk that is perhaps less than reasonably foreseeable. While this is a good outcome from a climate change perspective, the language of immediacy as part of the court’s reasoning is still troubling as it could potentially be picked up and construed differently in different hands, reintroducing the problematically limiting temporal imminence requirement.

The other relevant development in the human rights and climate change space is Teitiota. In 2019, the United Nations Human Rights Committee (‘UNHRC’) delivered its views on a communication submitted by Ioane Teitiota, a national of the Republic of Kiribati. Mr Teitiota had previously applied for refugee status in New Zealand. His claim was rejected and, as a result, he argued that New Zealand

145. ibid [43].
146. ibid [44].
147. ibid [45].
148. ibid [44].
149. Urgenda Supreme Court (n 1) [5.2.2]. A similar finding was made in relation to the right to private and family life: [5.2.3].
150. ibid [5.3.2].
151. (n 3).
152. Teitiota (n 3).
had violated his right to life under the International Covenant on Civil and Political Rights (‘ICCPR’). Teitiota had previously resided on the island of Tarawa, and argued that climate change and sea-level rise were contaminating freshwater through saltwater incursion, eroding land, and causing conflict and disputes amongst residents. His claim for refugee status was rejected, with the New Zealand Immigration and Protection Tribunal finding that there was no risk to his life at the relevant time. The Tribunal relied on a UNHRC opinion Aalbersberg et al. v the Netherlands, a case regarding nuclear weapons where it was stated that a risk of violation of the ICCPR must be ‘imminent’, which means it must be at least likely to occur. Again, this characterization bears a stronger similarity to the concept of foreseeability than that of temporal imminence.

The UNHRC assessed the claims put forward by Teitiota with a focus on the state of affairs in Tarawa at the time of his deportation from New Zealand in 2015, and concluded that his right to life was not endangered at the time. At this stage, the UNHRC introduced a temporal dimension to its views, concluding:

In the present case, the Committee accepts the author’s claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.

We argue that this analysis conflates a lack of temporal imminence with a lack of foreseeability. The problem articulated by the UNHRC is not necessarily that the timing of potential climate impacts is still temporally distant. The problem is that the harm itself was construed as not being foreseeable due to the potential for intervening actions that could sever the causal connection. As with the discussion above of the Osman test and its application in subsequent cases, it is often difficult to separate notions of foreseeability and imminence. Often an event will be more foreseeable when it is more temporally imminent (for example, the risk of suicide cases). However, we query whether the UNHRC would respond differently if presented with a harm that they were convinced was 100 per cent certain to occur, but 10–15 years in the future. The validity and strength of the argument that rejected Tetiota’s claim based on the potential for intervening actions is beyond the scope of this paper, but the reasoning was firmly opposed in the dissenting opinion of Committee member Duncan Muhumuza Laki. The argument has also recently been discussed by Jane McAdam who noted: ‘[T]his reasoning requires scrutiny. Mere speculation about hypothetical events far into the future is very different from situations where there is sound scientific evidence weighing strongly in favour of particular outcomes’.

153. ibid [1.1].
154. ibid [2.1].
155. ibid [2.9].
156. (CCPR/C/87/D/1440/2005).
157. ibid [2.9].
158. Teitiota (n 3) [9.6]–[9.10].
159. ibid [9.12].
160. Keenan (n 42) 281.
161. Teitiota (n 3).
also seems to assume a position where it is more likely that action can in fact be taken to reduce the impacts of climate change, and that this action will be taken. Whether the evidence supporting this assumption is more persuasive than the likelihood of the maintenance of the status quo is unclear.

It is also relevant to note that whilst the majority views were endorsed by 15 members of the Committee, two members delivered dissenting opinions. Vasilka Sancin delivered a dissenting opinion based on lack of access to safe drinking water; while Duncan Muhumuza Laki delivered a strong dissenting opinion grounded in foreseeability, finding that the majority opinion imposed an unreasonable burden of proof on Teitiota. Laki expressed the view that conditions in Kiribati are ‘significantly grave, and pose a real, personal and reasonably foreseeable [emphasis added] risk of a threat to his life’, and that Teitiota ‘faces a real, personal and reasonably foreseeable [emphasis added] risk of a threat to his right to life as a result of the conditions in Kiribati’. Laki also placed emphasis on the fact that the Committee’s standard for violations of the right to life includes threats to life, even if they do not result in loss of life. Importantly, Laki’s analysis did not place any weight on the temporal connection between the actions and the likely harm.

We argue that the test of reasonable foreseeability put forward by Laki in dissent would also accord with more general discourse of the UNHRC, which has jurisdiction both to make General Comments regarding the interpretation of the ICCPR, as well as to deliver views on individual communications submitted to them. In late 2018, the UNHRC released a General Comment on the Right to Life under Article 6 of the ICCPR, and noted that Article 6 imposes a positive duty on States to ‘establish a legal framework to ensure the full enjoyment of the right to life by all individuals … includ[ing] an obligation for State parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable [emphasis added] threats, including from threats emanating from private persons and entities’. That is, reasonable foreseeability is the test enunciated in the General Comment. Interestingly, ‘due diligence’ is also expressed as a metric to ensure ‘protect[ion of] the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State’, citing its General Comment 31 on the nature of the general legal obligation imposed on States parties to the Covenant, as well as Paragraph

163. Teitiota (n 3) Annex 2 at [1].
164. ibid.
165. ibid Annex 2 at [5].
166. ibid.
167. ICCPR art 40(4).
170. ibid [18]. Bell-James and Collins argued that this could include an obligation on States to protect citizens from threats orchestrated by private entities including proponents of fossil fuel projects: Bell-James and Collins (n 19) 18.
171. Human Rights Committee (n 169) [7].
116 of the Osman judgment containing the imminence element. Despite this, neither imminence nor concepts of temporality enter the text in the body of General Comment 36.

In summary, the emergence of climate change and human rights cases before domestic and international courts and tribunals has seen the terminology of imminence creeping into arguments and judgments. This is unsurprising given the long history of imminence/immediacy in international law that we have highlighted. However, if temporal imminence is to be introduced as a precondition for the violation of a positive obligation, this requirement could prove fatal to climate change cases given the long-term nature of climate risk. This is especially so if temporal imminence is interpreted as requiring specific knowledge of a particular imminent threat and if knowledge of a more general state of emergency or crisis is deemed inadequate to prove State responsibility. On careful reading of Urgenda and Teitiota though, it is difficult to ascertain whether temporal imminence is in fact intended to be a superadded element of a human rights violation, or whether courts are in fact more concerned with notions of foreseeability, but using the language of imminence that is a remnant from international jurisprudence such as that of the ECtHR and IACtHR. It is essential that this confusion is addressed before temporal imminence becomes entrenched as part of human rights and climate change jurisprudence, perhaps inadvertently.

Additionally, such attention can ensure that courts focus more clearly on how foreseeability should be construed, most especially since Teitiota exposes a problem that extends beyond the role of temporal imminence.

5 CONCLUSION: TEMPORAL IMMINENCE IN HUMAN RIGHTS LAW AND CLIMATE CHANGE LAW

Human rights and climate change litigation is increasing across the world and, in light of Urgenda and Teitiota, we argue that there is an urgent need to clarify the role of temporal imminence in assessing claims related to violations of positive human rights obligations. Our starting point for this work was to examine where the concept of temporal imminence – as referred to in Urgenda and Teitiota – derived from. This proved to be a much more complex exercise than originally anticipated, given the breadth and depth of case law internationally considering notions of immediacy and imminence in human rights law.

Investigating the origin of the imminence concept has exposed a less than clear rationale behind its propagation throughout both general human rights law and recent climate litigation.

While the precise origin of the imminence concept remains elusive, the jurisprudence of the ECtHR and IACtHR, beginning with Osman, can be seen as a clear launch pad for its embedment into contemporary human rights law. While the language of the Osman test has persisted throughout the cases of these courts, its application, as our analysis demonstrates, has varied significantly. To summarize: (1) some judgments use the terms ‘imminence’ or ‘immediacy’ to capture notions of knowledge or foreseeability that bear no connection to temporality;174 (2) others inconsistently interpret the language of ‘imminence’ or ‘immediacy’ as including an element of

173. See eg, Osman (n 23); Cotton Field (n 13); Human Rights Defender v Guatemala (n 120).
174. Eg Younger (n 46) 309; Jessica Gonzales (n 107); Urgenda Court of Appeal (n 141).
temporality; the use of temporal imminence in some judgments, as opposed to general foreseeability, at times appears to bear no relationship to its relative utility based on the facts of the case; and where temporal imminence has been applied, it tends to lead courts away from accepting knowledge of an ongoing set of threatening circumstances as demonstrating State responsibility for human rights violations, and to draw courts towards requiring there to be specific knowledge of a particular threat that is temporally imminent.

This last point reflects one of the greatest points of divergence in the case law, which concerns whether a positive violation can be made out based on broad knowledge of an ongoing set of circumstances, or whether a narrower approach where there is knowledge of a specific circumstance is necessary. In the latter case, temporal imminence becomes central to the court’s analysis. Osman itself is one of the cases that adopted the narrow approach, but there are sound policy reasons to confine this approach to its facts. It appears that in Osman the ECtHR was making a clear policy decision to avoid opening the floodgates to increased liability on the part of public entities such as the police.

We argue that the broad approach is more apt in the case of large, cumulative threats such as those presented by climate change. As we argued in section 2, there might be a trade-off between notions of knowledge, probability and temporal imminence. Temporal imminence might be a useful limiting factor in the case of risks where knowledge and probability are low. However, in the case of climate risk, knowledge and probability are high. It is beyond doubt that climate change impacts will be felt on a widespread scale across the globe, even in the face of efforts to restrict carbon dioxide emissions. Thus, in climate cases there is no clear need for temporal imminence as a limiting factor, and applying it indiscriminately can be expected to lead to unjust outcomes.

To date, the notion of imminence in major climate cases has not become firmly entrenched in discourse and precedent. Teitiota, as a case embedded in the international refugee law framework, can likely be distinguished from more general human rights law. Whether the underlying reasoning is correct is also doubtful. Further, it is unclear from the application of the ‘imminence’ test in that case whether the UNHRC was in fact demanding a close temporal link between a cause and effect, or whether it was simply concerned about the potential for an intervening act to sever this causal link.

Urgenda also used the language of immediacy but the court did not seem to interpret this term as requiring a temporal link; rather, the term was interpreted to mean something more akin to foreseeability. Given the confusion that has permeated the ECtHR and the IACtHR, it is unsurprising that this confusion has carried over to The Hague.

Nonetheless, it is crucial to unpack and address the confusion regarding imminence and immediacy and its role in human rights law generally before human rights and climate change jurisprudence progresses further. With a major human rights and climate change case due to be heard in Australia in 2022, we are especially concerned to ensure that notions of imminence are not transplanted, or otherwise introduced, without careful consideration of the origins of the concept, its utility and its implications.

175. Eg Human Rights Defender v Guatemala (n 120); Öneryıldız (n 48) 118.
176. Eg Jessica Gonzales (n 107); Valle Jaramillo (n 104); Budayeva (n 51) 288.
177. Eg Cotton Field (n 13); Human Rights Defender v Guatemala (n 120).
178. Anderson et al. (n 5); McAdam (n 162).
Some potential consequences of adopting the unchecked language of imminence or immediacy have already been seen in international judgments where elements of temporality have crept into reasoning uninvited. Considering the case law surveyed in this article, we can see no clear justification for temporal imminence being used as a superadded requirement for finding a violation of a positive obligation of a human right. Whilst temporal imminence might be a useful element to apply in some cases to limit liability for practical reasons (as, for example, in *Osman*), it does not and should not necessarily have a role in all cases.

The tests and standards that courts will find useful to frame their reasoning on positive human rights obligations generally, and on climate change risks specifically, are far from settled. In jurisdictions that currently have in place comprehensive human rights legislation, it is likely that the judgments of international courts will be influential in defining this emerging field. As these questions arise, it is our firm opinion that a flexible test capable of addressing new problems should be preferred, such as due diligence or foreseeability. Elements such as imminence should not be introduced without careful scrutiny of both its origins and the specific facts and circumstances of each case in which it was deployed. A method of reasoning that is conducive to agility will certainly be required in order for courts to grapple with human rights issues at the scale created by the impacts of climate change.

179. Eg *Cotton Field* (n 13).
180. Eg *Human Rights Act 2019* (Qld) s 48(2).
181. This was also suggested by Stoyanova (n 29) 339.