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SQUARING CLIMATE CHANGE MITIGATION WITH RESPECT FOR INDIGENOUS RIGHTS: NEW ZEALAND'S APPROACH

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Abstract

In the face of rapidly accelerating global warming, undertaking measures which help to mitigate the resultant effects is becoming increasingly important for states. This paper analyses, from a New Zealand perspective, the unique challenges that states with indigenous populations face in undertaking such climate change mitigation measures. This paper argues that in the area of climate change mitigation, New Zealand intends to take an approach which ensures the fulfilment of its obligations does not detrimentally affect indigenous rights. This paper does this by, firstly, outlining New Zealand's cardinal climate change obligation under the Paris Agreement to pursue mitigation measures. Next, this paper outlines the potential for the fulfilment of this obligation to detrimentally affect indigenous rights, with a particular focus on the New Zealand context. On the basis that indigenous rights in relation to traditional lands are most predictably affected by climate change mitigation measures, this paper then ascertains New Zealand's obligations in respect of the rights of Māori to their traditional lands at international law. Finally, this paper shows New Zealand's compliance with its international duties regarding indigenous rights in fulfilling its climate change mitigation obligation by analysing its climate change legislation and baseline policy. In analysing the actions of New Zealand, this paper highlights how states can take an integrated approach to climate change mitigation which achieves their mitigation obligations without prejudicing the rights of indigenous peoples.

Keywords: *"Climate Change Mitigation" "Indigenous Rights" "International Law" "Climate Change Response (Zero Carbon) Amendment Act 2019".*

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I Introduction

Addressing climate change and respecting the rights of indigenous peoples are both topics which are of ever-increasing importance. However, the potential exists for these two aims to conflict. As yet, there is no discernible guide showing how states might address climate change in a way that does not detrimentally affect indigenous rights. Accordingly, this paper is interested in the question of how states might square their concurrent yet potentially conflicting climate change and indigenous protection obligations. New Zealand, where there exists both a strong, and strengthening, indigenous voice as well as a rapidly quickening appetite for measures to address climate change, is arguably at the forefront of navigating this potential crossroad.

This essay argues that, in the area of international climate change mitigation, New Zealand intends to take an approach which ensures the fulfilment of its obligations does not detrimentally affect indigenous rights. The New Zealand Government has begun to do this this by integrating in its decision making legislation which enables the development of policy which balances its international mitigation obligation with the protection of Māori rights.

Firstly, this paper will define mitigation in the climate change context and highlight the increasing pressure on states to undertake mitigation measures. Secondly, this paper will analyse states' central international climate change mitigation obligation from a New Zealand perspective. Next, this paper will outline the tension which exists between states' central mitigation obligation and indigenous rights in order to show the unique difficulties that states with indigenous populations, such as New Zealand, face in aiming to fulfil their mitigation obligation. Having found that, in the area of indigenous rights, climate change mitigation measures most predictably negatively impact the relationship of indigenous peoples with their traditional lands, this paper will then turn to the obligations on New Zealand at international law to respect the rights of Māori in relation to their traditional lands. Finally, this paper will evaluate the compliance of New Zealand in the area of climate change mitigation with its obligations to Māori by evaluating the relevant parts of its domestic climate change framework.

II The Importance and Urgency of Climate Change Mitigation

States are often required to face various urgent challenges at once. The focus of this paper is on two topics that are emerging as increasingly urgent and potentially contradictory: climate change mitigation measures and indigenous rights. Before delving into how states might concurrently address their potentially competing obligations in facing these challenges, it will be useful to first outline, why, at a high level, climate change mitigation measures are becoming increasingly urgent for states to implement. Accordingly, this part does not attempt to outline the legal obligations on states regarding climate change mitigation, but rather intends to highlight the practical necessity for states to undertake mitigation measures. In other words, this part intends to show that, at a political level, there is little scope for states to opt out of undertaking mitigation measures. Consequently, this part highlights that states with indigenous populations are all but required to undertake climate change mitigation measures even where these may conflict with the rights of indigenous peoples. A discussion of how mitigation measures and the rights of indigenous often conflict comes in part IV of this paper. In order to show the practical necessity for states to undertake climate change mitigation measures, this part, first, defines mitigation in the climate context, and second, outlines factors which are contributing to the practical necessity for states to implement mitigation measures.

A Mitigation in the Climate Change Context

Effectively, the idea of mitigation revolves around making less severe something that is considered to be painful or serious.[1] In the climate change context, mitigation, therefore, means making less severe the effects of climate change. Climate change is caused by rapid increases in global surface temperatures which are, in turn, caused by increased greenhouse gas concentrations in the atmosphere.[2] Human activities are increasing greenhouse gas emissions which are in turn causing rapidly increasing atmospheric greenhouse gas concentrations.[3] Therefore, the only way to mitigate human-induced climate change is for humans to undertake

[1] Collins Dictionary "Mitigate" Collins Dictionary www.collinsdictionary.com (Retrieved 16 September 2021).
[2] Valérie Masson-Delmotte, Panmao Zhai, Anna Pirani and others *Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 7 August 2021) at 5-12.
[3] At 5-8.

activities which help to lower atmospheric greenhouse gas concentrations.[4] The only ways in which humans can do this are by lowering or preventing greenhouse gas emissions, or by undertaking activities which result in the removal of greenhouse gas emissions from the atmosphere.[5] Thus, all climate change mitigation measures undertaken by states necessarily fall under the general objective of reducing the concentration of greenhouse gases in the earth's atmosphere.

By the early 1990s, prevention of climate change was no longer seen as possible, and thus scientists and policymakers agreed that mitigation was the key tool that states could undertake to address climate change.[6] This part now turns to recent factors which are increasing the pressure on states to undertake mitigation measures.

B Increasing Pressure on States to Undertake Mitigation Measures

A first key reason that undertaking climate change mitigation is becoming increasingly urgent for states is growing scientific specificity about the effects of climate change. The IPCC's 2021 report notes that improved scientific knowledge regarding the effects of human-induced activities on climate processes and the climate system has allowed the IPCC to make climate-related projections with a "narrower range" than previously.[7] Therefore states know more precisely the nature of the imminent climate effects. Increased specificity is important because it leaves less room for disagreement regarding the science of climate change. Further, one would imagine that specificity is only likely to increase further as time progresses.

Increasingly dire warnings regarding climate change from the Intergovernmental Panel on Climate Change (IPCC) are also contributing to the pressure on states to undertake mitigation

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[4] and Masson-Delmotte, Zhai, Pirani and others, above n 2, at 5-6; and Intergovernmental Panel on Climate Change "Working Group III Mitigation of Climate Change" (The Intergovernmental Panel on Climate Change) https://www.ipcc.ch/ (Note: no publication date is available for this source. The information was retrieved on 16 September 2021); and Brenda Heelan Powell and Rebecca Kauffman "Climate Change Mitigation and Adaptation" (2020) 44(4) LawNow 7 at 7.

[5] Powell and Kauffman, above n 4, at 7; and Masson-Delmotte, Zhai, Pirani and others, above n 2, at 6, 10; and Intergovernmental Panel on Climate Change, above n 4.

[6] Rebecca Tsosie "Indigenous People and Environmental Justice: The Impact of Climate Change" (2007) 78(4) U Colo L Rev 1625 at 1658.

[7] Masson-Delmotte, Zhai, Pirani and others, above n 2, at 13, 14.

measures. The IPCC is a United Nations body which assesses climate change science.[8] IPCC reports inform international negotiations to address climate change, and as such the projections contained in IPCC reports are a key source of pressure on states to undertake mitigation measures.[9] The IPCC's 2021 report outlines that the earth's surface temperature is estimated to have increased by between 0.8°C to 1.3°C between 1850-1900 and 2010-2019.[10] The IPCC notes that the scale of these changes is concerning, particularly when one considers the effects of this warming.[11] Such effects have already begun to materialise through increased intensity of dangerous weather events such as droughts, heatwaves, tropical cyclones and flooding, which can increasingly be attributed to human induced climate change.[12] In its 2021 report, the IPCC considered five emissions scenarios.[13] In the most likely scenario, which shows the likely outcome if states act in accordance with their climate change mitigation pledges, temperatures are predicted to increase by 2.1 to 3.5 degrees Celsius by 2081-2100.[14] Therefore, even if emissions decrease in line with states' current climate change mitigation pledges, it is very likely that global warming of more than 2°C will occur. Therefore, the IPCC's latest report makes clear to states that mitigation measures are of the utmost importance in reducing the severity of global warming and the resultant increasingly adverse climate events.

The solidifying global consensus that climate change action is needed is also a source of pressure on states to undertake mitigation measures. Perhaps the most important development in this area has been the re-joining of the United States to the Paris Agreement on February 19, 2021.[15] Aside from the fact the United States makes up 14.5 per cent of global emissions,[16]

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[8] The Intergovernmental Panel on Climate Change "The Intergovernmental Panel on Climate Change" Intergovernmental Panel on Climate Change https://www.ipcc.ch/ (Note: no publication date is available for this source. The information was retrieved on 4 October 2021).

[9] The Intergovernmental Panel on Climate Change, above n 8.

[10] Masson-Delmotte, Zhai, Pirani and others, above n 2, at 6.

[11] At 9, 10.

[12] At 10.

[13] At 15-18.

[14] At 18; and Umair Irfan "IPCC 2021 report: How bad will climate change get" *Vox* (online ed, Washington DC, 10 September 2021).

[15] Jeff Tolerson "Scientists Relieved as Joe Biden Wins Tight US Presidential Election" (2020) 22(4) DUJS 183 at 183; and Melissa Denchak "Paris Climate Agreement: Everything You Need to Know" (19 February 2021) National Resources Defense Council https://www.nrdc.org/.

[16] Hannah Ritchie and Max Roser "United States CO2 Country Profile" Our World in Data https://ourworldindata.org/ (Note: no publication date was available for this source. The information was retrieved on 13 September 2021).

the political significance of the United States re-joining the pinnacle international climate change Agreement on the global narrative and momentum should not be understated. Further, there are only six states that have not ratified the Paris Agreement which together account for approximately four per cent of global emissions.[17] As such, the global consensus that climate change mitigation must be undertaken by states is increasingly strong.

Other actors such as Non-Governmental Organisations (NGOs) are also important actors in displaying the global consensus that climate change mitigation action is urgent. At the closing session of the May-June 2021 Climate Change Conference, various NGOs admitted as observers made statements calling on states to take more ambitious action which ensures faster emissions reductions.[18] The Climate Action Network, youth NGOs, and the International Indigenous Peoples Forum on Climate Change all made statements to this effect, with the latter asserting that:[19]

> The most recent scientific reports indicate that the present level of ambition is far under what is necessary to keep the temperature rise to less than 1.5 degrees Centigrade. This must change now, with enhanced NDCs in advance of COP 26.

Cumulatively, these factors show that, in practice, states are all but required to undertake climate change mitigation measures. Accordingly, states with indigenous populations have little choice but to undertake mitigation measures even though these might conflict with indigenous rights.

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[17] Ritchie and Roser, above n 16; and United Nations Framework Convention on Climate Change "Paris Agreement – Status of Ratification" United Nations https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 13 September 2021); and Soila Apparicio and Natalie Sauer "Which countries have not ratified the Paris climate agreement?" *Climate Home News* (online ed, Kent, 13 August 2020).

[18] United Nations Framework Convention on Climate Change "Admitted NGOs" United Nations https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 13 September 2021); and Angela Ibay on behalf of Climate Action Network International "Joint SBI-SBSTA Closing Plenary" (17 June 2021) United Nations Framework Convention on Climate Change: Statements – May-June 2021 Climate Change Conference https://unfccc.int/; and Youth non-governmental organizations (YOUNGO) "Closing intervention SB52" (16 June 2021) United Nations Framework Convention on Climate Change: Statements – May-June 2021 Climate Change Conference https://unfccc.int/; and International Indigenous Peoples Forum on Climate Change "Closing Plenary" (17 June 2021) United Nations Framework Convention on Climate Change: Statements – May-June 2021 Climate Change Conference https://unfccc.int/.

[19] International Indigenous Peoples Forum on Climate Change, above n 18.

III New Zealand's Key International Climate Change Mitigation Obligation

In order to prove that in the area of international climate change mitigation, New Zealand intends to take an approach which aims to ensure to fulfilment of its obligations does not detrimentally affect indigenous rights, it will be important to outline the nature of New Zealand's international mitigation obligations.

A International Climate Change Law Framework

The nature of any legal international climate change obligation is decided through negotiation by states parties to the United Nations Framework Convention on Climate Change (UNFCCC). Importantly, the UNFCCC represents an enduring framework under which conventions aimed at addressing climate change can be formulated.[20] The Paris Agreement is the most recent convention to have been negotiated under the UNFCCC.[21] Accordingly, the Paris Agreement is currently the central instrument guiding international coordination on the climate change response.[22]

After the mixed reception by states to the initial climate change convention negotiated under the UNFCCC, the Kyoto Protocol, in 2011 UNFCCC members agreed to begin negotiations aimed at concluding a new instrument which would apply to all parties.[23] Those negotiations concluded in 2015 with states agreeing to the text of the Paris Agreement in 2015.[24] The Paris Agreement enacts a legal regime under which the pursuit of mitigation targets set out by state-

[20] United Nations Framework Convention on Climate Change "About the Secretariat" United Nations https://unfccc.int/ Note: no publication date was available for this source. The information was retrieved on 15 September 2021).

[21] United Nations Framework Convention on Climate Change, above n 20; and Paris Agreement 55 ILM 743 (adopted 12 December 2015, entered into force 4 November 2016) preamble; and Vernon Rive "International Environmental Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis NZ Ltd, Wellington, 2020) 731 at 758.

[22] Rive, above n 21, at 759.

[23] At 757-758.

[24] At 759; and United Nations Framework Convention on Climate Change "The Paris Agreement" United Nations <https://unfccc.int/> (Note: no publication date was available for this source. The information was retrieved on 16 September 2021).

determined "nationally determined contributions" is the pinnacle obligation.[25] To enable this, there exists a binding obligation on states to report their climate change mitigation commitments in the form of a nationally determined contribution.[26] However, the Paris Agreement does not set out the level by which states must reduce their emissions.[27] In this way, the fulfilment of emissions reductions commitments set by states does not constitute a legal obligation, but the requirement to "pursue" the commitments set is binding.[28] By 4 October 2016, the requisite number of countries representing over 55 per cent of global emissions had ratified the Paris Agreement, triggering its entry into force 30 days later on 4 November 2016.[29]

B The Legally Binding Mitigation Obligation Under the Paris Agreement

Thus, the paramount international legal obligation regarding climate change mitigation on state parties is to pursue the targets set out in their nationally determined contributions (NDCs) under the Paris Agreement. A party's NDC comprises of the actions they intend to undertake in order to mitigate their net contribution to emissions which cause climate change.[30] As the UNFCCC states, "NDCs embody efforts by each country to reduce national emissions."[31] Accordingly, the pursuit of targets set out by NDCs submitted by states are at the crux of the international effort to mitigate the severity of the effects of climate change.[32] As of September 2021, 191 of the 197 UNFCCC's state parties had ratified the Paris Agreement, making the obligations contained in it binding on countries collectively constituting 97 per cent of global greenhouse

[25] Rive, above n 21, at 759.

[26] Paris Agreement, above n 21, arts 3, 4.2; and Rive, above n 21, at 759; and Daniel Bodansky "The Legal Character of the Paris Agreement" (2016) 25(2) Review of European, Comparative & International Environmental Law 142 at 150.

[27] Paris Agreement, above n 21, arts 3, 4; and Rive, above n 21, at 759.

[28] Paris Agreement, above n 21, art 4.2; and Rive, above n 21, at 759.

[29] Rive, above n 21, at 759; and United Nations Framework Convention on Climate Change "Status of Ratification" United Nations https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 16 September 2021).

[30] United Nations Framework Convention on Climate Change "Nationally Determined Contributions (NDCs)" United Nations https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 14 September 2021).

[31] United Nations Framework Convention on Climate Change, above n 30.

[32] Michael A Mehling, Gilbert E Metcalf; Robert N Stavins "Linking Heterogeneous Climate Policies (Consistent with the Paris Agreement)" (2018) 48(4) Envtl L 647 at 650; and United Nations Framework Convention on Climate Change, above n 30; and Rive, above n 21, at 759.

gas emissions.[33] The legal obligation is contained in Article 4.2 of the Paris Agreement, which states:[34]

> Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

The legal nature of the obligation outlined by the second sentence of Article 4.2, namely the obligation to pursue mitigation measures, has been subject to some debate. There is general agreement that the article does not outline an obligation on state parties to achieve, or even to implement, the targets outlined in states' NDCs.[35] Rather, the obligation is assessed against the conduct of a state.[36] As Mayer outlines:[37]

> The mitigation measures necessary for a Party to fulfil its obligation under the second sentence of Article 4(2) must have a reasonable likelihood of achieving the mitigation objectives contained in the NDC, based on what the Party knows or should know.

It follows that a party to the Paris Agreement could not be held responsible based on a failure to achieve its mitigation target. Rather, the enquiry regarding responsibility would centre on an alleged failure to "take adequate steps towards achieving that target", irrespective of whether the state party ultimately achieved its target or not.[38] Therefore, while states are not legally obliged at international law to meet the targets set out in their NDCs, they are legally obliged to pursue domestic mitigation measures with the goal of achieving the targets their NDC sets out.

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[33] Mehling, Metcalf and Stavins, above n 32, at 649; and United Nations Framework Convention on Climate Change, above n 29.

[34] Paris Agreement, above n 21, art 4.2.

[35] Geert Van Calster and Leonie Reins (eds) *The Paris Agreement on Climate Change: A Commentary* (online looseleaf ed, Edward Elgar Publishing Limited) at [4.53]; and Daniel Klein, María Pía Carazo and Meinhard Doelle and others (eds) *The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press, Oxford, 2017) 91 at 99.

[36] Van Calster and Reins, above n 35, at [4.49] and [4.53]; and Klein, Carazo, Doelle and others, above n 35, at 99.

[37] Benoît Mayer in Van Calster and Reins, above n 35, at [4.50].

[38] At [4.53].

C The Mitigation Obligation from a New Zealand Perspective

Accordingly, New Zealand is legally obliged to take adequate steps towards achieving the targets set out in its NDC. In order to understand this legal obligation from New Zealand's perspective, it will be necessary to consider the particular voluntary targets that New Zealand has set and thus must pursue, as well as the primary domestic means by which New Zealand might pursue its target.

1 New Zealand's nationally determined contribution

New Zealand submitted its first NDC under the Paris Agreement in October 2016.[39] Under it, New Zealand committed to reducing greenhouse gas emissions to 30 per cent less than 2005 levels by 2030.[40] This first NDC outlines an intention to rely on international market mechanisms to enable emissions trading, in order to, in turn, achieve its emissions mitigation commitment. The key way in which the first NDC envisioned this occurring was through the establishment of incentives for the planting of new forests, recognition of the importance of the management of carbon sinks such as forests, and the prevention of deforestation.

In April 2020, New Zealand submitted an updated NDC under the Paris Agreement which reflected the domestic legal and policy developments it had undertaken since it submitted its first NDC.[41] The updated NDC outlines New Zealand's long term emissions reduction target of net zero emissions of greenhouse gases (excluding biogenic methane) by 2050.[42] Biogenic methane, which is largely produced by agricultural livestock, is subject to a required reduction of between 24 and 47 per cent by 2050.[43] Further, New Zealand's updated NDC highlights the establishment of a framework allowing for consecutive emissions budgets which are aimed at

[39] United Nations Framework Convention on Climate Change "New Zealand's First NDC" (5 October 2016) NDC Registry (interim) https://unfccc.int/.

[40] United Nations Framework Convention on Climate Change, above n 39.

[41] United Nations Framework Convention on Climate Change "New Zealand's Updated NDC" (22 April 2020) NDC Registry (interim) https://unfccc.int/.

[42] United Nations Framework Convention on Climate Change, above n 41.

[43] United Nations Framework Convention on Climate Change, above n 41; and Farah Hancock "Can NZ really meet its methane emissions targets?" *Radio New Zealand* (online ed, Wellington, 26 July 2021); and Tina Morrison "Methane vaccine for cows could be 'game changer' for global emissions" *Stuff* (online ed, Wellington, 25 July 2021).

providing short term goals on the path to the achievement of the 2050 target. Finally, the updated NDC highlights the establishment in 2019 of an independent Climate Change Commission tasked with providing expert advice and ensuring successive governments remain on track to meet their overarching objective.[44]

Thus, New Zealand's NDCs demonstrate the greenhouse gas emissions reduction targets New Zealand has committed to pursue.

2 Pursuing emissions reduction in New Zealand

The primary ways in which New Zealand might pursue its climate change mitigation targets can be gleaned from its domestic emissions profile. The two sectors which contribute the most to New Zealand's gross emissions are agriculture and road transport.[45] As of 2019, emissions resulting from the agricultural sector made up 48 per cent of New Zealand's total gross emissions,[46] while emissions from road transport made up 17.8 per cent of total gross emissions.[47]

Reducing emissions from the agricultural sector is difficult because there is currently no way to prevent livestock from emitting methane. For this reason, the Ministry for Primary Industries invests around $20 million per year "in the research and development of ways to reduce biological emissions from agriculture".[48] While some scientific breakthroughs occurred in 2015 regarding potential means of reducing methane emissions from cattle and sheep, such discoveries are still a long way off being able to be used on farms.[49] Regarding emissions from

[44] United Nations Framework Convention on Climate Change, above n 41.

[45] Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990–2019* (Ministry for the Environment, April 2021) at 83 and 165; and Leith Huffadine "NZ greenhouse gas emissions: Agriculture, energy sectors biggest contributors in 2019" *Radio New Zealand* (online ed, Wellington, 13 April 2021).

[46] Ministry for the Environment, above n 45, at 165.

[47] At 83.

[48] Ministry for Primary Industries "Agriculture and greenhouse gases" (16 November 2020) New Zealand Government https://www.mpi.govt.nz/.

[49] Ministry for Primary Industries, above n 48.

road transport, low-emissions vehicles are expensive to purchase in comparison to petrol and diesel vehicles, meaning uptake of them by consumers has been slow.[50]

In light of the difficulty of reducing emissions in the road transport and agricultural sectors, increasing the share of energy produced by renewable sources has emerged as a key focus of the Government's mitigation strategy.[51] In fact, in 2020, the Government signalled an intention to bring forward the timeframe within which it aims to ensure that 100 per cent of New Zealand's energy is produced by renewable means to 2030, from the previous target of 2035.[52] In 2020, 81.1 per cent of New Zealand energy was produced by renewable sources, such as from hydroelectric, geothermal, and wind sources.[53] The Government has explicitly signalled that making progress towards, and achieving, the goal of 100 per cent renewable energy production is a measure which will help New Zealand to achieve its climate change mitigation targets.[54] Certainly this holds true when one considers that emissions produced from public electricity and heat production constituted five per cent of New Zealand's total gross emissions in 2019.[55]

Therefore, New Zealand intends to take a comprehensive and multifaceted approach to pursuing climate change mitigation, with increasing the share of energy produced by renewable sources being a key near-term focus. Thus, increasing the share of energy produced by renewable sources is a key way in which states can, and are, pursuing their climate change mitigation goals. This is important because it is this method of climate change mitigation which most clearly gives rise to potential transgressions of indigenous rights.

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[50] Michael Wood and James Shaw "Clean car package to drive down emissions" (press release, 13 June 2021); and Ministry of Transport "Monthly EV statistics" New Zealand Government https://www.transport.govt.nz/ (Note: no publication date was available for this source. The information was retrieved on 15 September 2021).

[51] Jacinda Ardern "100% renewable electricity generation by 2030" (press release, 10 September 2020).

[52] Jacinda Ardern, above n 51; and Megan Woods "NZ Embracing renewable electricity future" (press release, 16 July 2019); "Labour promises 100% renewable electricity generation by 2030" *Radio New Zealand* (online ed, Wellington, 10 September 2020).

[53] New Zealand Trade and Enterprise "New Zealand: Renewable Energy" New Zealand Government https://www.nzte.govt.nz/ (Note: no publication date was available for this source. The information was retrieved on 15 September 2021).

[54] Megan Woods, above n 52.

[55] Ministry for the Environment, above n 45, at 83.

IV The Tension Between Climate Change Mitigation Measures and Indigenous Rights

This paper will now outline the tension between states' international mitigation obligations and indigenous rights. Highlighting this tension is important because it shows the unique difficulties that states with indigenous populations face in aiming to fulfil their mitigation obligations. Building on the previous part, which outlined the international climate change mitigation obligations generally and from a New Zealand perspective, this part will consider the tension both from a general and New Zealand perspective. Importantly, the purpose of this part is not to evaluate whether New Zealand, or any other state, is fulfilling its concurrent international legal obligations regarding climate change mitigation and the protection of indigenous rights. Rather, in highlighting the difficulty of pursuing climate change mitigation measures whilst respecting indigenous rights, this part exposes the significance of the task which lies before states.

A The Impact of Climate Change Mitigation Measures on Indigenous Communities

In states with indigenous populations, there exists the risk that efforts undertaken to mitigate climate change will prejudice indigenous rights. Conversely, respecting indigenous rights may preclude projects that seek to contribute to climate change mitigation efforts. This is because states seeking to implement projects aimed at mitigating climate change, such as renewable energy production schemes and reforestation, will have to do so within the bounds of existing indigenous proprietary and human rights.[56] Thus, the apparent dichotomy between respecting indigenous rights and mitigating climate change poses a challenge for states in fulfilling their associated international legal obligations.

In fact, ever since the UNFCCC was concluded in 1992, indigenous peoples have raised their concerns regarding the impact of climate change mitigation measures on their rights in a number of international fora.[57] Specifically, indigenous peoples have expressed their concern

[56] Ole W Pedersen, "The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation" (2011) 80(4) Nord J Intl L 403 at 422-423.

[57] Emily Gerrard "Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples" (2008) 31(3) UNSWLJ 31 941 at 941-942.

that "measures to mitigate climate change are based on a worldview of territory that reduces forests, lands, seas and sacred sites to only their carbon absorbing capacity".[58] Further, the Department of Economic and Social Affairs has highlighted that, globally, many sources of renewable energy are found in indigenous peoples' territories.[59] Accordingly, actions of states and corporations in the development of renewable energy projects such as those aiming to produce energy from wind, hydroelectric and solar sources are "disproportionately impacting" indigenous peoples in many states, including in Mexico, Kenya, Sweden, Malaysia and Canada, to name a few.[60] This issue is becoming increasingly acute globally, with the United Nations Special Rapporteur on the rights of indigenous peoples in 2017 warning of the "increasing number of allegations concerning situations where climate change mitigation projects have negatively affected the rights of indigenous peoples".[61]

In Mexico, indigenous communities were detrimentally impacted by the establishment of wind farm projects by the Mexican Government in the Oaxaca region.[62] Such projects were undertaken in the 1990s by Mexico, with assistance from the World Bank, in an attempt to convince international companies of the viability of investing in wind farm projects in Mexico.[63] However, indigenous peoples in the region complained that the projects had brought with them "environmental degradation, takings of land without just compensation, a loss of birds and the disruption of the water table, along with a general disruption of indigenous lifeways."[64]

Further, climate change mitigation objectives have the potential to undermine traditional indigenous land ownership in its entirety. This was seen in Kenya where in 2014, the Kenyan government forcibly evicted 15,000 indigenous Sengwer people from their traditional lands in

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[58] At 941-942.

[59] Department of Economic and Social Affairs (Division for Inclusive Social Development) *State of the World's Indigenous Peoples: Rights to Lands, Territories and Resources* (United Nations, ST/ESA/375, March 2021) at 39.

[60] At 41-42, 52, 104.

[61] United Nations Special Rapporteur on the Rights of Indigenous Peoples *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* (Human Rights Council, A/HRC/36/46, November 2017) at 5.

[62] Shalanda Baker "Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects" (2012) 30(3) Wis Int'l L J 668 at 682.

[63] At 682.

[64] At 682.

order to make way for an impending forest management project under the United Nations Reduced Emissions from Deforestation and Degradation (REDD+) programme.[65] The REDD+ programme is a mechanism under the UNFCCC which provides financial incentives for developing countries to "invest in low-carbon paths to sustainable development" such as encouraging sustainable forest management.[66] More widely, in the six years following the beginning of the REDD+ programme's implementation, communal ownership of forests in 28 developing countries was reduced by 80 per cent.[67] More than anything, this shows that violating indigenous rights is a means of 'getting rid' of the difficulties that squaring climate change mitigation efforts with protecting indigenous rights regarding land present to states.

Finally, in Canada, Hoicka and others outline that "the majority of potential renewable electricity generation capacity for solar, hydro, wind and biomass is on land that is or has been subject to land claims with Indigenous communities."[68] Prior to 1970, the flooding of lands caused by dams built for the purpose of producing renewable hydroelectric electricity caused the destruction of the burial sites, traditional fishing and hunting areas and subsequently poverty in and displacement of indigenous communities in various provinces including British Colombia, Manitoba, and Labrador.[69] Those events have informed indigenous opposition to contemporary hydroelectric projects such as the Site C dam currently being constructed in British Colombia, and the Muskrat Falls project in Labrador.[70] Regarding the latter, in a report released in March 2020, the Newfoundland and Labrador Supreme Court Justice Richard LeBlanc found that the provincial government's failure to undertake meaningful consultation with indigenous communities undermined the trust of those communities in the project.[71]

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[65] Jennifer Tridgell, "Seeing REDD: Carbon Forest Programmes and Indigenous Rights" (2016) AJEL 86 at 90-91.

[66] UN-REDD Programme "About REDD+" UN-REDD Programme (12 April 2021) www.unredd.net/.

[67] Tridgell, above n 65, at 90-91.

[68] Christina E Hoicka, Katarina Savic and Alicia Campney "Reconciliation through renewable energy? A survey of Indigenous communities, involvement, and peoples in Canada" (2021) 74 Energy Research & Social Science 101897 at 101898.

[69] At 101898-101899.

[70] At 101898-101899; and Robert D Stefanelli, Chad Walker, Derek Kornelsen and others "Renewable energy and energy autonomy: how Indigenous peoples in Canada are shaping an energy future" (2019) 27(1) *Environmental Reviews* 95 at 96.

[71] APTN National News "Inquiry finds environment of 'mistrust' after lack of Indigenous consultations for Muskrat Falls project" *APTN National News* (online ed, Winnipeg, 13 March 2020).

Accordingly, states' efforts to pursue climate change mitigation required by their international obligations have the potential to conflict with indigenous rights. Further, it is notable that effects of projects on the relationship of indigenous peoples with their traditional lands is an underlying theme throughout the examples canvassed. This paper now moves to further consider the tension, with particular attention to the effect of projects on the relationship of indigenous peoples with their traditional lands, from a New Zealand perspective.

B The New Zealand Context

The implementation of projects which allow for an increased proportion of New Zealand's energy to be produced by renewable means is an important way in which New Zealand can pursue its emissions reductions targets in order to fulfil its legal obligation under the Paris Agreement. Nevertheless, New Zealand has a significant indigenous population, meaning that the tension between mitigation projects and indigenous rights arises. This is evident in the provisions of New Zealand's domestic legislation, the Resource Management Act 1991 (RMA), and has been reflected in domestic case law. Further, preliminary material on the legislation which will soon replace the RMA indicates that the importance of both climate mitigation measures and the protection of Māori rights in New Zealand will be heightened under the new legislation, meaning reconciling those objectives is likely to become more difficult in the future.

1 The Resource Management Act 1991 and its replacement

The importance of the RMA in governing natural and physical resources in New Zealand should not be understated. The RMA is extremely comprehensive, not least shown by the fact that upon its enactment in 1991 it replaced 59 statutes.[72] The RMA has become increasingly unwieldy since its enactment, and the current Government has begun the process of replacing it with new legislation.[73] The Government's reform objectives as well as an exposure draft of the legislation replacing the RMA indicates that both provisions aimed at reducing of risks posed by climate change as well as at protecting Māori rights are likely to be reproduced in a

[72] Ceri Warnock and Maree Baker-Galloway *Focus on Resource Management Law* (LexisNexis NZ Limited, Wellington, 2015) at 17.

[73] David Parker "RMA to be repealed and replaced" (press release, 10 February 2021); and Sam Sachdeva "Govt releases first draft of RMA replacement" *Newsroom* (online ed, Wellington, 29 June 2021).

stronger form.[74] Regarding climate change mitigation, the Government's fourth key objective in its resource management law reform is to "better mitigate emissions contributing to climate change".[75] Accordingly, the exposure draft of the new Act states that all plans under it must promote "following environmental outcomes… (p) in relation to natural hazards and climate change— (i) the significant risks of both are reduced"[76] whereas the current Act merely provides that those "exercising functions and powers under it… shall have particular regard to— (i) the effects of climate change".[77] Māori rights are also likely to be strengthened under the new legislation. The Government's third key objective of its resource management law reform is to "give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori".[78] Accordingly, the proposed purpose of the new Act as reflected in the exposure draft is "to enable— (a) Te Oranga o te Taiao to be upheld…" with "Te Oranga o te Taiao incorporate[ing]— (b) the intrinsic relationship between iwi and hapū and te taiao".[79] Thus, the relationship between Māori and the natural environment (te taiao)[80] is likely to be at the forefront of the new Act. In sum, it is likely that the issue of reconciling climate mitigation measures with protecting Māori rights in New Zealand will become increasingly acute in the near future.

At present, in order for a renewable energy project to go ahead in New Zealand, it must gain the relevant resource consent under the process outlined in the RMA.[81] Under the Act, Māori rights are a key consideration for decision makers in approving or declining projects, including

[74] New Zealand Government "Draft for Consultation, Natural and Built Environments Bill, Government Bill" (June 2021) New Zealand Government https://environment.govt.nz/; and New Zealand Government *Reforming our Resource Management System: Natural and Built Environments Bill – Parliamentary paper on the exposure draft* (New Zealand Government, Parliamentary Paper C.32, June 2021) at 9; and Ministry for the Environment "Exposure draft for the Natural and Built Environments Act Released" (June 2021) Ministry for the Environment https://environment.govt.nz/.

[75] New Zealand Government *Reforming our Resource Management System: Natural and Built Environments Bill – Parliamentary paper on the exposure draft,* above n 74, *at* 9.

[76] New Zealand Government "Draft for Consultation, Natural and Built Environments Bill, Government Bill", above n 74; and Ministry for the Environment, above n 74.

[77] Resource Management Act 1991, s 7(i).

[78] New Zealand Government *Reforming our Resource Management System: Natural and Built Environments Bill – Parliamentary paper on the exposure draft,* above n 74, at 9.

[79] New Zealand Government "Draft for Consultation, Natural and Built Environments Bill, Government Bill", above n 74.

[80] Māori Dictionary "Taiao" Māori Dictionary https://maoridictionary.co.nz/ (Retrieved 1 October 2021).

[81] Sections 104-104D.

those which might assist New Zealand to fulfil its international climate change mitigation obligation to pursue emissions reductions.

The purpose of the RMA is to "promote the sustainable management of natural and physical resources" in New Zealand.[82] The Act outlines a series of "matters of national importance" which must be "recognise[d] and provide[d] for" in order for the purpose of the the Act to be achieved. The key matter of national importance for the purpose of this paper is that outlined under s 6(e) of the Act: "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".[83] The High Court and Court of Appeal have confirmed that the term "ancestral land" means land that formerly belonged to ancestors.[84] This interpretation applies in the RMA context, meaning s 6(e) can be applied widely.[85] Further, matters of national importance under s 6 can alone be grounds for refusing resource consent for proposed activities; this has occurred in a number of domestic Environment Court and High Court decisions.[86] As such, it is clear that difficulty may arise where the obligation to recognise and provide for Māori cultural rights under s 6(e) sits in conflict with the granting of resource consents for projects that might be pivotal in contributing to New Zealand's fulfilment of its obligation to pursue emissions reductions. This conflict is evident in the New Zealand case law generally, but the conflict is perhaps most salient in the New Zealand High Court case of *Unison Networks Ltd v Hastings District Council* (*Unison Networks*) which is discussed in turn.

2 *New Zealand case law*

Several domestic New Zealand cases show the difficulty between respect for Māori rights and the execution of projects on traditional Māori lands. This paper will briefly consider two cases in order to demonstrate this tension, before turning to a case which makes apparent the potential implications of this for the fulfilment of New Zealand's climate change mitigation obligation.

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[82] Section 5.

[83] Section 6(e).

[84] *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 8; and *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 280.

[85] Warnock and Baker-Galloway, above n 72, at 109.

[86] Paul Beverley "The Mechanisms for the Protection of Maori Interests under Part II of the Resource Management Act 1991" (1998) 2(2) NZJEL 121 at 146-148.

Firstly, the High Court in *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* rejected the view of Bay of Plenty iwi, Ngāti Awa, that use of groundwater for bottling and overseas export by a commercial water bottling company would detrimentally affect the metaphysical spiritual essence of the water.[87] The High Court effectively upheld the Environment Court's finding that "any adverse [cultural] effect that may be perceived by members of Ngāti Awa has not been shown to be of a nature and scale that warrants refusing consent on this basis alone."[88] Thus, this case shows the tension between Māori cultural concerns and aspects of certain projects on traditional Māori lands.

Secondly, the High Court in *Friends & Community of Ngawha Inc v Minister of Corrections* considered the argument that the impact of the establishment of a prison in Northland on a local taniwha, which are "supernatural creatures in Māori tradition"[89] would detrimentally affect "the relationship of Māori and their culture and traditions with their… taonga" under s 6(e) of the Resource Management Act.[90] Essentially, the Court focused on the beliefs of Māori regarding the taniwha, determining that based on a factual finding that the taniwha would not be affected by the prison or the works necessary for its construction, the beliefs of some Māori regarding the taniwha could not be affected by the prison's construction either.[91] Thus, this case once again shows the conflict between Māori cultural rights and the implementation of projects on traditional lands.

The High Court's decision in *Unison Networks* makes clear the tension between Māori cultural rights might and climate change mitigation efforts. In this case, the High Court considered an application for resource consent by Unison Networks Ltd to develop the second stage of a wind farm in the Hawkes Bay region of New Zealand.[92] Unison Networks Ltd was originally granted consent for this proposal, but this was reversed by the Environment Court on appeal. The High Court upheld the decision of the Environment Court to reject the application for the proposal.[93]

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[87] *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [7], [156].

[88] At [156]; and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZRMA 76 (HC) at [118].

[89] Basil Keane "Story: Taniwha" (24 June 2007) Te Ara: The Encyclopaedia of New Zealand https://teara.govt.nz/.

[90] Warnock and Baker-Galloway, above n 72, at 109.

[91] *Friends & Community of Ngawha Inc v Minister of Corrections* [2002] 9 ELRNZ 67 (CA) at [22].

[92] *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [1]; and Ceri Warnock and Abby Suszko *Butterworths Student Companion: Resource Management* (LexisNexis NZ Limited, Wellington, 2013).

[93] *Unison Networks Ltd v Hastings District Council*, above n 92, at [82], [102].

The basis on which the Environment Court reversed the decision to allow this project encapsulates the tension between the rights of Māori under the Resource Management Act and New Zealand's key emissions reduction obligation.

The key issue in the Environment Court case was whether the positive effects of the proposal on climate change mitigation outweighed the adverse effects on the landscape and on the relationship of Māori with the land on which the wind farm would be built on. This is shown by the conclusion of the Environment Court:[94]

> Important as the issues of climate change and the use of renewable sources of energy unquestionably are, they cannot dominate all other values. The adverse effects of the proposal on what is undoubtedly an outstanding landscape, and its adverse effects on the relationship of Māori with this land and the values it has for them, clearly bring us to the conclusion that the tipping point in favour of other values has been reached.

As such, provisions of domestic law aimed at protecting Māori cultural rights formed an integral part of the reasoning which led the Environment Court and High Court to decline a project which would contribute to New Zealand's climate change mitigation efforts. Consequently, the *Unison Networks* case displays the very real tension which exists in the New Zealand context between actions required for climate change mitigation and the protection of Māori rights, particularly those regarding traditional lands.

The issue which emerges is that giving effect to provisions of domestic legislation aimed at respecting Maori rights does not sit comfortably with New Zealand's international legal obligation to pursue its emissions reduction targets where projects on traditional lands are relied on to do so. However, pursuing climate change mitigation without regard to indigenous rights is not an acceptable solution to addressing this risk – either domestically or, as the following section will demonstrate, at international law. Thus, New Zealand must find a way to balance its obligation to undertake climate change mitigation with its obligations to Māori. In order for this paper to ascertain whether New Zealand is in fact successfully balancing its competing obligations in accordance with international law, the existence and nature of any international

[94] At [46].

obligation on New Zealand to respect indigenous rights must be outlined. Thus, this paper now undertakes that task.

V International Law on the Protection of Indigenous Rights

Customary international law and, where relevant, treaties, on the rights of indigenous peoples are legally binding on states. Therefore, when fulfilling their international obligations regarding climate change mitigation, states must act consistently with their obligations in respect of indigenous peoples. This part aims to ascertain the nature and scope of New Zealand's international obligations in respect of indigenous peoples. The author notes that this part limits discussion to the scope of New Zealand's obligations regarding the relationship of indigenous peoples with their traditional lands. This is because, as outlined in the previous part, climate change mitigation measures which prejudice indigenous rights most predictably detrimentally affect the relationship of indigenous peoples with their traditional lands. Firstly, this part will analyse references to the rights of indigenous peoples in international climate change instruments in order to show that states believe indigenous rights are relevant to climate change mitigation. Next, this part will turn to the significance of the international law principle espoused under the Vienna Convention on the Law of Treaties that treaties shall be interpreted within the wider context of international law. Finally, this part will outline the substantive international law on the right regarding the relationship of indigenous peoples with their traditional lands with which New Zealand's cardinal mitigation obligation must be interpreted consistently.[95]

A International Climate Change Instruments

References to indigenous rights in the Paris Agreement and in UNFCCC Conference of the Parties (COP) decisions shed light on the parties' views on the relevance of indigenous rights to climate change mitigation. The following analysis shows that these references indicate that states believe indigenous rights are relevant to climate change mitigation.

[95] Paris Agreement, above n 21, preamble; and Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(c).

Firstly, Recital 11 of the preamble to the Paris Agreement outlines that state parties acknowledge that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities… and peoples in vulnerable situations…".[96] The reference to the rights of indigenous peoples in the preamble of the Paris Agreement came as a result of advocacy by indigenous peoples' groups alongside civil society organisations calling on states to ensure the integration of the rights of indigenous peoples in the implementation of the Agreement.[97]

The preamble of a treaty provides the context for its interpretation.[98] As the Vienna Convention on the Law of Treaties outlines regarding the general rules of treaty interpretation, "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes…".[99] The importance of any Treaty preamble should be determined in the light of factors which shed light on how parties to the treaty intended the preamble to be interpreted.[100] Important factors in the context of the Paris Agreement preamble include the fact that the preamble was the result of lengthy negotiations, the level of specificity of some recitals, and that the subject matter of various preambular recitals is not explicitly referenced in the articles of the Agreements itself.[101]

As Boer notes, Recital 11's specific reference to the human rights of all vulnerable groups makes it "the most comprehensive [recital] of the whole Preamble".[102] The purpose of the recital is to clarify that the parties obligations under the Agreement extend to rights which do not explicitly fall within the ambit of international climate and environmental law.[103] However, the lack of reference to indigenous rights beyond the Preamble may point to the Paris Agreement's limitations in this respect.[104] As Doelle point out, the rights referenced, including

[96] Paris Agreement, above n 21, preamble.
[97] Klein, Carazo, Doelle and others, above n 35, at 170-171.
[98] Van Calster and Reins, above n 35, at [P.01].
[99] Van Calster and Reins, above n 35, at [P.02]; and Vienna Convention on the Law of Treaties, above n 95, art 31(2).
[100] Van Calster and Reins, above n 35, at [P.02] and [P.03].
[101] At [P.02]-[P.04], [P.59].
[102] At [P.53], [P.59].
[103] At [P.53].
[104] At [P.59].

indigenous rights, are "largely limited to the preamble of the Paris Agreement, making their full integration into the implementation of the regime less certain."[105]

In light of this uncertainty, it is useful to ascertain whether parties to the UNFCCC have demonstrated concern for the rights of indigenous peoples through any Conference of the Parties (COP) decisions. The COP is the UNFCCC's key decision-making body under which state parties take decisions which aim to promote the Convention's implementation.[106]

Firstly, in Decision 1/CP.16, parties agreed that when undertaking mitigation actions through improved forest management, "the following safeguards should be promoted and supported… (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations…". The use of the word 'should' reflects that the provision is a recommendation.[107] Thus, this provision does not bind state parties to act consistently with their international obligations regarding the rights of indigenous peoples in pursuing climate change mitigation through improved forest management.

Secondly, the parties' decisions regarding the establishment and scope of a local communities and indigenous peoples platform under the UNFCCC may be of assistance in determining whether states intend to act consistently with indigenous rights in fulfilling their climate change obligations. Under COP Decision 1/CP.21 in 2015, parties, recognising the need to "strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change", established a platform through which indigenous peoples and local communities could share their experiences of and their best

[105] Meinhard Doelle cited in Van Calster and Reins, above n 35, at [P.59].

[106] United Nations Framework Convention on Climate Change "Conference of the Parties (COP) United Nations Framework https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 2 October 2021).

[107] Bodansky, above n 26, at 145; and Conference of the Parties, UNFCCC *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. Addendum. Part two: Action taken by the Conference of the Parties at its sixteenth session* FCCC/CP/2010/7/Add.1 (2011), Decision 1/CP.16 "Appendix I Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries" at [2].

practice regarding climate change mitigation and adaptation.[108] This came to be known as the Local Communities and Indigenous Peoples Platform (LCIPP).[109] Two years later, under Decision 2/CP.23, the COP decided that the LCIPP:[110]

> will perform the following functions: (c) the [LCIPP] should facilitate the integration of diverse knowledge systems, practices and innovations in designing and implementing international and national actions, programmes and policies *in a manner that respects and promotes the rights and interests of local communities and indigenous peoples*.

The use of the word 'will' indicates that the start parties expect the LCIPP to operate in a way that respects the rights of indigenous peoples. Nevertheless, this does not necessarily show that state parties have the same expectation for themselves.

Accordingly, the preamble of the Paris Agreement and relevant COP decisions fall short of binding state parties' to respect the rights of indigenous peoples in fulfilling their international climate change mitigation obligations. Nevertheless, the references canvassed show that states recognise the relevance of protecting indigenous rights to the pursuit of their climate change mitigation commitments. This part now turns to consider what this recognition means for the applicability of international law on indigenous rights to states' climate change mitigation obligations.

B Vienna Convention on the Law of Treaties: Article 31(3)(c)

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[108] Conference of the Parties, UNFCCC *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. Addendum. Part two: Action taken by the Conference of the Parties at its twenty-first session* (2016), Decision 1/CP.21 "Non-Party stakeholders" at [135]; and Ella Belfer, James Ford, Michelle Maillet and others "Pursuing an Indigenous Platform: Exploring Opportunities and Constraints for Indigenous Participation in the UNFCCC" (2019) 19(1) Global Environmental Politics 12 at 27; and United Nations Framework Convention on Climate Change "Local Communities and Indigenous Peoples Platform" United Nations https://unfccc.int/ (Note: no publication date was available for this source. The information was retrieved on 13 September 2021).

[109] United Nations Framework Convention on Climate Change, above n 106.

[110] Conference of the Parties, UNFCCC *Report of the Conference of the Parties on its twenty-third session, held in Bonn from 6 to 18 November 2017. Addendum. Part two: Action taken by the Conference of the Parties at its twenty-third session* FCCC/CP/2017/11/Add.1 (2018), Decision 2/CP.23 "Local communities and indigenous peoples platform" at [6].

The Vienna Convention on the Law of Treaties (Vienna Convention) concerns the general rules of treaty interpretation.[111] Article 31(3)(c) of the Vienna Convention outlines the customary international law principle that treaties shall be interpreted within the wider context of international law.[112] Article 31(3)(c) states: "There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."[113] This makes clear the fact that the international legal system in its totality forms part of the context of treaties concluded at international law.[114] Article 31(3)(c) envisions a wide approach to determining which rules of international law may be applicable to treaty interpretation in any given situation.[115] As Dörr puts it Article 31(3)(c) "must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation."[116] Therefore, using the sources of international law outlined by Article 38 of the Statute of the International Court of Justice as a guide, the relevant international law context in respect of the Paris Agreement may be formed by other treaties, by customary international law principles, and/or by the general principles of law.[117]

As such, the significance of Article 31(3)(c) of the Vienna Convention is that it confirms that parties' international climate change mitigation obligations must be interpreted in the wider context of international law. States recognise that indigenous rights are relevant to climate change mitigation, and Article 31(3)(c) requires that international law which is relevant to states' climate change mitigation obligation informs how it is to be interpreted. Thus, states' climate change mitigation obligations must be interpreted in the context of their international obligations regarding respect for the rights of indigenous peoples. Accordingly, this paper will now assess the international law principles regarding indigenous peoples' rights. It is timely to restate that, as discussed in the previous part, where indigenous rights and measures to undertake climate change mitigation conflict, the rights of indigenous peoples to their traditional lands is almost invariably involved. Thus, this paper limits discussion of indigenous rights to the rights of indigenous peoples in respect of their traditional lands.

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[111] Vienna Convention on the Law of Treaties, above n 95, art 31.

[112] Art 31(3)(c); and Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties* (online looseleaf ed, Springer) at [31.92].

[113] Vienna Convention on the Law of Treaties, above n 95, art 31(3)(c).

[114] Dörr and Schmalenbach, above n 112, at [31.92].

[115] At [31.95].

[116] At [31.95].

[117] At [31.96], [31.98]-[31.99].

C International Law on Indigenous Rights Protection Relevant to New Zealand

New Zealand is bound by any rules of international law which protect the rights of indigenous peoples that exist by virtue of treaties to which it is a party or customary international law. Because there is no universally signed treaty aimed to protecting the rights of indigenous peoples, or any definitive ruling by the International Court of Justice, the obligations on New Zealand in this respect are not immediately obvious.[118] Nevertheless, principles relevant to indigenous peoples' relationship to their traditional lands do emerge upon a careful consideration of international law sources. Firstly, The International Covenant on Civil and Political Rights (ICCPR) outlines the right of minorities to their culture, which in the case of indigenous peoples is interpreted as encompassing limited rights in respect of their traditional lands. Secondly, customary international law may impose on states a narrow obligation to recognise certain rights of indigenous peoples. The existence of international law regarding the rights of indigenous peoples in respect of their traditional lands is significant because it requires New Zealand to respect those rights in fulfilling its cardinal international climate mitigation obligation.

1 International Covenant on Civil and Political Rights: Article 27

The ICCPR is the only treaty to which New Zealand is a party that has been interpreted as protecting indigenous rights to land in a way which might have implications for New Zealand's international mitigation obligation. Other treaties concerning indigenous land rights protection to which New Zealand is a party have little practical significance for its international climate change mitigation obligation. For example, the Convention on the Elimination of All Forms of Racial Discrimination's protection of the right of the collective ownership of property is unlikely to affect New Zealand's fulfilment of its climate change mitigation obligation because a very small area – less than 700 hectares of land – in New Zealand is held under the collective ownership regime of Māori customary title.[119] Moreover, there exist treaties such as the International and Tribal Peoples Convention 1989, otherwise known as International Labour

[118] Seth Korman "Indigenous Ancestral Lands and Customary International Law" (2010) 32(2) U Haw L Rev 391 at 394.

[119] Ministry of Justice "Your Maori Land" (15 July 2021) Ministry of Justice https://maorilandcourt.govt.nz/.

Organisation Convention 169, which impose obligations on states to protect indigenous cultural rights including rights regarding land, but to which New Zealand is not a party. Thus, the ICCPR is the only treaty, to the author's knowledge, that requires traversing for the purpose of outlining international law regarding the rights of indigenous peoples which is relevant to the fulfilment of New Zealand's international climate change mitigation obligation.

Firstly, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) outlines rights of minority groups to the enjoyment of their culture, religion and language. It is generally accepted that indigenous peoples come within the definition of minority groups for the purposes of Article 27.[120] New Zealand is bound by the ICCPR, having ratified it in December 1978, and having affirmed its commitment to it in 1990 by the implementation of domestic rights legislation, the New Zealand Bill of Rights Act 1990.[121] Article 27 of the ICCPR outlines that:[122]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Thus, the rights of the minority group extend to the enjoyment of its culture. Because this right is relatively vague, it will be useful to consider how it has been interpreted by the United Nations Human Rights Commission (HRC). In its General Comment 23, the HRC outlined its interpretation of minorities' right to the enjoyment of their cultures under Article 27 of the ICCPR:[123]

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in

[120] Alexandra Xanthaki "Indigenous Cultural Rights in International Law" (2000) 2(3) Eur J L Reform 343 at 343; and Geir Ulfstein "Indigenous Peoples' Right to Land" (2004) 8 Max Planck Yrbk UN L 1 at 8; and UN Human Rights Commission, above n 120, at [7].

[121] Ministry of Justice "International Covenant on Civil and Political Rights" (19 August 2020) Ministry of Justice www.justice.govt.nz; and New Zealand Bill of Rights Act 1990, Title.

[122] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 27.

[123] UN Human Rights Commission, above n 120, at [7].

> reserves protected by law. The enjoyment of these rights may require positive measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

HRC general comments are made to aid states in the fulfilment of their reporting obligations under human rights treaties.[124] Thus, general comments are not binding, but they are authoritative in that they represent the HRC's interpretation of the scope of states' obligations under relevant treaty provisions.[125] To this extent, it is relevant that the HRC recognises that in the case of indigenous peoples, a particularly important way in which culture manifests itself is through a certain way of life which relies on the use of land resources.[126] Accordingly, this forms the basis for the HRC's interpretation that Article 27 may require "positive measures of protection" by states and that indigenous peoples have the right to "effective participation" in decision-making affecting the use of their lands.[127] What the right to effective participation involves is relatively uncertain.[128] The HRC in its view in the *Mahuika* case in 2000 outlined that fulfilling the effective participation requirement could be done by the state engaging in "broad consultation" with the indigenous group.[129] Regarding positive measures of protection, these refer to legislative, judicial and administrative acts on behalf of the state which protect the enjoyment of the stipulated rights.[130]

Moreover, the Inter-American Commission on Human Rights, relying particularly on Article 27 of the ICCPR, has affirmed the existence of the right of indigenous peoples to the enjoyment of their culture at international law.[131] Further, the Commission takes the view that the relationship of indigenous peoples with their ancestral and communal lands is a key part of the

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[124] Paul Comrie-Thomson and Scott Davidson "Human Rights" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis NZ Ltd, Wellington, 2020) 633 at 660.

[125] Mine Yildirim "Conscientious Objection to Military Service: International Human Rights Law and the Case of Turkey" (2010) 5(1) Religion & Hum Rts 65 at 67.

[126] Ulfstein, above n 120, at 8.

[127] UN Human Rights Commission, above n 120, at [7]; and Geir Ulfstein, above n 120, at 11.

[128] Ulfstein, above n 120, at 11.

[129] At 11; and Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000) at [9.8].

[130] Aniko Szalai "Article 27 of the ICCPR in Practice, with Special Regard to the Protection of the Roma Minority" (2015) Hungarian Y B Int'l L & Eur L 115 at 119.

[131] James S Anaya and Robert A Williams "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001) 14 Harv Hum Rts J 33 at 50.

right of indigenous peoples to their culture.[132] Accordingly, the HRC and the Inter-American Commission on Human Rights have both taken the view that states' obligations to protect indigenous peoples' right to culture "necessarily includes the obligation to protect traditional lands because of the inextricable link between land and culture in this context."[133] This is important because it recognises that New Zealand must ensure its efforts aimed at fulfilling its key climate change mitigation obligation are consistent with the rights of Māori including those in respect of their traditional lands.

Separate from New Zealand's obligations constituted under the ICCPR, the existence of any relevant rule at customary international law may add to, or help to refine, the obligations of states in the area of indigenous rights. Therefore, in order to assist in determining the context within which New Zealand must fulfil its international mitigation obligation, this paper now turns to consider the customary international law regarding indigenous rights.

2 Customary International Law

Alongside treaties, customary international law is a primary source of international law.[134] On a traditional conception, customary international law exists where states undertake a general and consistent practice believing that they are legally obliged to do so.[135] Customary international law is, prima facie, automatically binding on all states.[136] In New Zealand, customary international law is recognised at common law.[137] This part now canvasses the potential existence of a customary international law norm regarding the protection of indigenous rights in respect of traditional lands in order to further outline the context within which New Zealand must fulfil its international mitigation obligation.

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[132] At 50.

[133] At 52.

[134] Statute of the International Court of Justice, art 38; and Korman, above n 118, at 396.

[135] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) Judgment,* [1969] ICJ Reports 3 at 44; and Claire Charters "Developments in Indigenous Peoples' Rights Under International Law and Their Domestic Implications" (2005) 21(4) NZULR 511 at 523; and Anthea Elizabeth Roberts "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95(4) Am J Int'l L 757 at 758.

[136] Charters, above n 135, at 523.

[137] At 523.

Firstly, Toki outlines that authorities such as the articles of the ICCPR, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Inter-American Court of Human Rights decision of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* are often cited as support for the assertion that custom recognising "the rights of indigenous peoples over traditional lands" exists.[138] However, Toki, noting the "exacting" approach that determining customary international law requires, outlines that the vital factor preventing the existence of the norm's legal status is that it lacks certainty.[139] This is because it is not clear what the custom entails, for example, which lands are subject to the custom and exactly which rights exist in relations to lands, and thus what is required of states cannot be determined.[140] Nevertheless, Toki recognises that if any custom does exist, the practice of many states suggests it would be a "narrow, moral duty" on states to recognise the rights of indigenous peoples to their lands. Toki takes the view that fulfilment of such a right could be done by the state, where relevant, consulting indigenous peoples as "interested parties".[141]

Charters, taking a middle position between the traditional and modern approaches to deducing custom, asserts that such a lesser norm protecting the rights of indigenous peoples to their lands does exist at customary international law.[142] Charters asserts that "state practice and opinio juris on indigenous peoples' land rights… appear[s] to establish a narrow indigenous peoples' right to recognition of their relationship with their lands."[143] Charters bases her assertion on the almost universal acceptance by states that indigenous peoples have special rights in respect of their traditional lands expressed in the, at the time, Draft UNDRIP and Organisation of American States Proposed Declaration on the Rights of Indigenous Peoples.[144] Since Charters expressed this view, both UNDRIP and the American Declaration on the Rights of Indigenous Peoples have been adopted almost universally by states in their respective organisations.[145]

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[138] Kiri Toki "Maori Rights and Customary International Law" (2012) 18 Auckland U L Rev 250 at 253.

[139] At 253.

[140] At 253.

[141] 254-5.

[142] Charters, above n 135, at 526.

[143] At 531.

[144] At 527.

[145] Lorie M Graham and Siegfried Wiessner "Indigenous Sovereignty, Culture, and International Human Rights Law" (2011) 110(2) South Atl Q 403 at 405; and United Nations Department of Economic and Social Affairs "United Nations Declaration on the Rights of Indigenous Peoples – Historical Overview" (10 May 2021) United Nations; and Indian Law Resource Centre "The American Declaration on the Rights of Indigenous Peoples" Indian Law Resoure Centre https://indianlaw.org (Note: no publication date was available for this source. The information was retrieved on 2 October 2021).

Further, Charters points to some state practice, including in New Zealand, Canada, South Africa, the Philippines, and throughout Central and South America, which demonstrates acknowledgement by states of a narrow duty to recognise the relationship of indigenous peoples with their traditional lands.

Finally on this point, Korman's view is that there "is a *consensus* that natives' ancestral lands must be protected – though the specifics remain undefined and left to individual states."[146] Korman outlines that such a consensus exists because state practice indicates a general understanding that states must afford indigenous peoples protections beyond those afforded to normal citizens, and that such protections "in some way relate to aboriginal lands".[147] Korman draws attention to the near-universal international support for UNDRIP as well as the opinions of international adjudicatory bodies such as the HRC and of domestic courts, including in post-colonial states, as evidence of both state practice and opinio juris for this conclusion.[148] Nevertheless, Korman asserts that such a consensus has not yet crystallised into customary international law due to the hesitancy of "specially affected" post-colonial states such as the United States and New Zealand to endorse UNDRIP, the lack of evidence that the United States looks to international law for guidance on the treatment indigenous land rights, as well as the lack of jurisprudence on the topic in many states.[149]

Accordingly, it is not settled whether any right of indigenous peoples in respect of their traditional lands exists at customary international law. It is important to note that the approach taken to determining custom is likely to be determinative as to its existence in this context. If one takes a traditional approach to custom, as Korman does, the rights of indigenous peoples in respect of their traditional lands is not likely to meet the required threshold. This is because, under the traditional approach, custom emerges where states undertake a general and consistent practice believing that they are legally obliged to do so.[150] This was the approach adopted by the International Court of Justice in the *North Sea Continental Shelf* case in 1969.[151] Based on Korman's analysis, state practice regarding respect for indigenous rights relating to land is not

[146] Korman, above n 118, at 462 [emphasis added].
[147] At 460-461.
[148] At 460-461.
[149] At 398, 462.
[150] *North Sea Continental Shelf,* above n 135, at 44; and Charters, above n 135 at 523; and Roberts, above n 135, at 758.
[151] Charters, above n 135 at 525; and Korman, above n 118, at 403.

yet sufficiently general and opinio juris is not sufficiently clear to result in the right becoming a norm of customary international law.[152]

In contrast, if a more modern approach to custom is taken, as by Charters, the threshold is likely to be met. This is because, under the modern approach, custom is established by statements which outline a common understanding which is, in turn, confirmed by state practice.[153] On this view, customary law arises "when a preponderance of states and other authoritative actors converge on a common understanding of the norms' contents and generally expect future behaviour in conformity with those norms".[154] On this view, the consensus along with the body of confirmatory state practice outlined by Charters and Korman would be sufficient to establish a narrow right at customary international law recognising the relationship of indigenous peoples with their traditional lands.

Although there undoubtedly exists some uncertainty regarding what such a right, if it exists, would involve, this in itself is not fatal to its emergence as a rule of customary international law.[155] As Charters outlines: "All rights reflect an abstract principle at some level."[156] Korman analogises the rule's lack of specificity to the customary international legal principle regarding the right of prisoners of war to certain treatment.[157] The existence of this principle shows a comprehensive guide to the content of a rule is not required for it to attain customary international law status, but rather that a skeletal "base concept" can suffice.[158]

In sum, this part has sought to ascertain the existence and nature of the rights of indigenous peoples in respect of their traditional lands which bind New Zealand. This part has shown that while it is not certain whether any right of indigenous peoples in respect of their traditional lands exists at customary international law, Article 27 of the ICCPR does outline rights in this respect. According to Article 27 of the ICCPR, New Zealand must respect the right regarding the relationship between Māori and their traditional lands in fulfilling its principal climate change mitigation obligation. The HRC interpreted this as, firstly, requiring effective

[152] *North Sea Continental Shelf,* above n 135; and Charters, above n 135 at 523; and Roberts, above n 135, at 758.
[153] Charters, above n 135 at 523-526; and Roberts, above n 135, at 758.
[154] James S Anaya cited in Charters, above n 135, at 524.
[155] Charters, above n 135 at 531-532; and Korman, above n 118, at 461.
[156] Charters, above n 135 at 531-532.
[157] Korman, above n 118, at 461.
[158] At 461.

participation of indigenous peoples in decisions which affect them, which could be fulfilled by "broad consultation" with Māori.[159] Secondly, the HRC outlines that in fulfilling the obligation New Zealand may be required to take "positive measures of protection".[160] This would involve legislative, judicial and administrative acts on behalf of the state which protect the enjoyment by Māori of their relationship with their traditional lands.[161] On the basis that these two requirements form the legal duty on states to recognise the right regarding the relationship of indigenous peoples to their traditional lands, this paper now proceeds to consider whether New Zealand is discharging this international law duty to Māori in fulfilling its cardinal climate change mitigation obligation.

VI New Zealand: Overcoming the Tension with an Integrated Approach

This paper now analyses New Zealand climate change legislative and policy framework in order to show that in the area of international climate change mitigation, New Zealand intends to take an approach aiming to ensure the fulfilment of its obligation does not breach its concurrent international law duty to respect the relationship between Māori and their traditional lands. In order to show this, this part assesses New Zealand's climate change framework against its obligations in regard to the relationship of indigenous peoples and their lands at international law, as outlined in the previous part. Ultimately, this part shows that New Zealand's climate change legislation enables the development of policy which balances its international mitigation obligation with recognition of the rights of Māori in respect of their traditional lands. The author notes that the analysis in this part will primarily be the author's own. While the author seeks to enrich the analysis of this part by giving the views of relevant actors and organisations, the very recent nature of the establishment of New Zealand's climate change framework means this is often not possible.

A New Zealand's Domestic Legal and Policy Climate Change Framework

[159] *Apirana Mahuika et al. v. New Zealand,* above n 129, at [9.8]

[160] UN Human Rights Commission, above n 120, at [7]; and Ulfstein, above n 120, at 11.

[161] Szalai, above n 130, at 119.

The Climate Change Response Act 2002 was enacted in order to allow New Zealand to fulfil its international legal obligations under the UNFCCC and the Kyoto Protocol.[162] The Act allowed for the Minister of Finance to manage and trade internationally the carbon credits held by New Zealand representing its "target allocation" for greenhouse gas emissions under the Kyoto Protocol.[163] The Act also established a registry to track holdings and transfers of carbon credits.[164] The Act underwent a serious of amendments between 2005 and 2016 primarily in relation to the Emissions Trading Scheme.[165]

In 2017, New Zealand experienced a change in government which heralded in a new approach to climate change policy development which drew particularly from the United Kingdom and European Union models.[166] The overarching aim in this policy development has been to increase New Zealand's domestic mitigation goals.[167] To this end, legislators developed the Climate Change Response (Zero Carbon) Amendment Act 2019 (Amendment Act); the content of which virtually replaces that of the 2002 Act.[168] The Amendment Act overhauls the original Act in order to ensure consistency of New Zealand's climate change legislation with the Paris Agreement.[169]

A key part of the Amendment Act was the creation of the independent Climate Change Commission (Commission). Section 5A of the Amendment Act established the Commission.[170] The purposes of the Commission are to firstly, provide independent and expert

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[162] Ministry for the Environment "Climate Change Response Act 2002" Ministry for the Environment https://environment.govt.nz/ (Note: no publication date was available for this source. The information was retrieved on 23 September 2021).

[163] Ministry for the Environment, above n 162, and Anna-Marie Skellern "The Climate Change Response Act 2002: The Origin and Evolution of S 3A - The Treaty Clause" (2012) 10(2) NZJPIL 167 at 182.

[164] Ministry for the Environment, above n 162; and Environment Guide "Climate Change Response Act 2002" Environment Guide (April 18, 2018) www.environmentguide.org.nz.

[165] Environment Guide, above n 164; and Klaus Bosselmann "Achieving the Goal and Missing the Target: New Zealand's Implementation of the Kyoto Protocol" (2005) 2(2) Macquarie J Int'l & Comp Envtl L 75 at 92; and Tor Håkon, Jackson Inderberg and Ian Bailey "Changing the record: Narrative policy analysis and the politics of emissions trading in New Zealand" (2019) 29(6) EPG 409 at 412.

[166] David Hall "Ardern's government and climate policy: despite a zero-carbon law, is New Zealand merely a follower rather than a leader?" *The Conversation* (online ed, Auckland, 5 October 2020).

[167] Håkon, Inderberg and Bailey, above n 165, at 412.

[168] Ministry for the Environment, above n 162; and Climate Change Response (Zero Carbon) Amendment Act 2019 Schedule 5.

[169] Climate Change Response (Zero Carbon) Amendment Act 2019, s 3.

[170] Section 5A.

advice to the Government on climate change mitigation and adaptation, and secondly, to monitor and review the progress of successive governments towards New Zealand's mitigation and adaptation objectives.[171] The overarching mitigation target under the Amendment Act is for New Zealand to reach by 2050 and sustain thereafter net zero greenhouse gas emissions, excluding for biogenic methane which is subject to a lesser reduction target.[172]

On 31 May 2021, the Commission delivered its first set of advice to the Government.[173] This advice included recommendations for the first three proposed emissions budgets, covering the period from 2022 – 2035,[174] as well as on the first emissions reduction plan which must consist of policies and strategies for meeting emissions reduction targets outlined by the budgets.[175] The Government has until 31 December 2021 to set its emissions budgets covering the period from 2022 – 2035 and release its first emissions reduction plan.[176] If the Government's proposed emissions budgets depart from the Climate Change Commission's recommendations, the Minister in charge must respond to the Commission explaining in writing the reasons for the departure and outlining an alternative emissions budget.[177] This written response must be presented to the House of Representatives as well as made available to the public.[178] In preparing emissions reduction plans, the Minister must "consider" the relevant recommendations given by the Commission.[179]

Accordingly, the Climate Change Commission's policy advice forms the baseline position for the Government's determination of emissions budgets as well as its plan for reducing emissions in order to meet those budgets. Having outlined the background to New Zealand's climate change framework, an evaluation now follows to demonstrate that the relevant legislation and

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[171] Section 5B.

[172] Section 5Q.

[173] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (Climate Change Commission, May 2021); and Climate Change Commission "Commission's first draft advice published and consultation open" (February 2021) Climate Change Commission www.climatecommission.govt.nz/.

[174] Climate Change Commission "Our final advice delivered to Government" (May 2021) Climate Change Commission www.climatecommission.govt.nz.

[175] Climate Change Commission, "Commission's first draft advice published and consultation open" above n 173; and Climate Change Response (Zero Carbon) Amendment Act 2019, s 5ZG.

[176] Climate Change Commission, above n 174.

[177] Climate Change Commission, above n 174; and Climate Change Response (Zero Carbon) Amendment Act 2019, ss 5ZB(3), 5ZB(4).

[178] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5ZB(3)(c).

[179] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5ZI(1)(a).

policies display an approach which aims to ensure the fulfilment of New Zealand's mitigation obligation does not breach its concurrent international law duty to respect the right regarding the relationship between Māori and their traditional lands.

B Right of Effective Participation

Article 27 of the ICCPR and perhaps customary international law espouse a narrow right regarding the relationship of indigenous peoples to their lands and a corresponding duty on New Zealand to respect that right.[180] In order to respect the right regarding the relationship of indigenous peoples with their traditional lands, the effective participation of indigenous peoples in decisions affecting the use of their lands is required.[181] The UN Human Rights Commission has interpreted this as requiring the state to undertake "broad consultation" with Māori regarding decisions affecting the use of their lands.[182]

Firstly, various provisions of the Climate Change Response (Zero Carbon) Amendment Act 2019 seek to ensure the effective participation of Māori in decision-making. Regarding emissions reduction plans, s 5ZI of the Amendment Act specifically requires the Minister to ensure consultation with iwi and Māori has been adequate.[183] This requirement facilitates the effective participation in decision-making of Māori including under emission reduction plans which conceivably would include any mitigation policies which might affect the relationship of Māori with their traditional lands. Further, as outlined by s 3A, s 5ZI of the Amendment Act envisions consultation with Māori as fulfilling the Crown's obligation to give effect to the principles of the Treaty of Waitangi.[184] As a key Treaty of Waitangi principle, which governs the relationship between the New Zealand government and Māori, is partnership,[185] this strengthens the view that consultation in this instance is required to be broad, rather than

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[180] International Covenant on Civil and Political Rights, above n 122, art 27; UN Human Rights Commission, above n 120, at [7]; Ulfstein, above n 120, at 11; Toki, above n 138 at 254-255; and Charters, above n 135 at 531.
[180] Korman, above n 118, at 462.
[181] UN Human Rights Commission, above n 120, at [7]; and Ulfstein, above n 120, at 11.
[182] *Apirana Mahuika et al. v. New Zealand,* above n 129, at [9.8]; and Ulfstein, above n 120, at 11; and Toki, above n 138 at 254-255.
[183] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5ZI(1)(b).
[184] Section 3A.
[185] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664; and Grant Morris *Law Alive: the New Zealand Legal System in Context* (3rd ed, Oxford University Press, Melbourne, Oxford University Press, 2019) at 86.

narrow. As the New Zealand Court of Appeal outlined in the landmark *New Zealand Maori Council v Attorney-General* case in 1987: the Treaty of Waitangi signifies an obligation of "partnership" between the Crown and Māori, which requires those parties to act "with the utmost good faith" towards each other.[186] The Court also stated in establishing the partnership principle that "the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties."[187] Thus, it is difficult to imagine a situation where this kind of partnership principle was given effect to by the New Zealand Government in the absence of it undertaking a process with Māori that would equate to broad consultation. Therefore, the fact that consultation with Māori regarding emissions reduction plans seek to give effect to the Treaty of Waitangi principle of partnership accords with the broad nature of consultation required to give effect to the right of indigenous peoples at international law to effective participation in decisions affecting their traditional lands. Thus, at a legislative level, New Zealand's actions signal consistency with its international obligations.

Secondly, the Climate Change Commission's recommendations to the Government indicate that New Zealand's baseline policy intends to ensure the effective participation of Māori in decisions affecting the use of their lands. Recommendation six in chapter twelve of the Commission's final advice is that:[188]

> the Government commit to: Working in partnership with Iwi/Māori and local government to develop a strategy to ensure the principles of Te Tiriti o Waitangi/The Treaty of Waitangi are embedded in subsequent emissions reduction plans.

The recommendation outlines that this strategy should include specified outcomes which "align with the principles of protection, partnership [and] participation".[189] Therefore, this recommendation by the Commission accords with the legislation's intent that the way in which emissions reductions plans are developed give effect to the Treaty principles. As discussed, where the Government gives effect to the Treaty principle of partnership, this fulfils New Zealand's obligation to respect the right of indigenous peoples to effective participation in decisions affecting their traditional lands at international law.

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[186] *New Zealand Maori Council v Attorney-General*, above n 185, at 664.
[187] At 664.
[188] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa*, above n 173, at 228.
[189] At 228.

Recommendation 26 of the Commission's final advice is that:[190]

> In the context of the transition to a low-emissions society… that central and local government work with Iwi/Māori to develop a mechanism to build authentic and enduring partnerships that results in:
> 2. Equitable decision-making with Iwi/Māori at all levels, through Māori representation on local, regional, and national bodies, and robust engagement and consultation process with Iwi/Māori….
> 4. The development of climate change policy that draws on mātauranga Māori as well as western science.

Accordingly, recommendation 26 aims to establish a mechanism through which the Government can build meaningful partnerships with Iwi/Māori. The recommendation lists the envisioned results of such partnerships. Implementation of this recommendation would give effect to the to the right of indigenous peoples to effective participation in decisions affecting their lands in the climate change context because it would result in the incorporation of Māori into decision-making at all levels, including in local government where the decisions regarding whether projects with mitigation benefits but potentially detrimental effects on the relationship of Māori with their traditional lands should be allowed are often determined. Further, recommendation 26's intention that the partnership result in the use of mātauranga Māori in the development of climate change policy allows for the effective participation of Māori because it sanctions the use of traditional knowledge in decision-making. This would ensure a high degree of effectiveness in the participation of Māori, as it would allow Māori to draw on traditional rather than western science as bases for views on the effects of climate change mitigation measures on their relationship with their traditional lands. Accordingly, if the New Zealand Government achieved this part of the recommendation, it would go beyond the required standard of undertaking "broad consultation" with indigenous peoples in respect of decisions affecting the use of their traditional lands.[191]

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[190] At 334.

[191] *Apirana Mahuika et al. v. New Zealand,* above n 129, at [9.8]; and Ulfstein, above n 120, at 11; and Toki, above n 138 at 254-245.

Therefore, at a legislative and policy level, New Zealand's efforts to mitigate climate change signal consistency with its international law obligations in respect of ensuring effective participation of indigenous peoples in decisions affecting the use of their traditional lands.

C Positive Measures of Protection

The UN Human Rights Commission's interpretation suggests that in order to recognise the right regarding the relationship of indigenous peoples with their traditional lands, the New Zealand Government may be required to undertake "positive measures of protection".[192] This would involve legislative, judicial and administrative acts by the Government which protect the enjoyment by Māori of their relationship with their traditional lands.[193]

Firstly, procedural provisions of the Climate Change Response (Zero Carbon) Amendment Act 2019 are important in laying the foundation for New Zealand to take an approach which involves positive measures of protection allowing for enjoyment by Maori of their relationship with their traditional lands. Under s 5G(2) of the Amendment Act, "Before nominating a person for appointment [as a member of the Change Commission Commission]",[194] "the nominating committee must— (b) consult any person or group who may have an interest in being a member of the Commission, including— (i) iwi and Māori representative organisations".[195] Accordingly, this is a measure aimed at facilitating iwi and Māori representation at the place where the country's climate change related policy is formulated. A second procedural section, s 5A, outlines that the Minister, in recommending members for appointment at the Commission, must:[196]

> have regard to the need for the Commission to have members who, collectively, have—
> …
> (d) technical and professional skills, experience, and expertise in, and an understanding of innovative approaches relevant to,—
> …

[192] UN Human Rights Commission, above n 120, at [7]; and Ulfstein, above n 120, at 11.
[193] Szalai, above n 130, at 119.
[194] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5G(2).
[195] Section 5G(2)(b).
[196] Section 5H.

> (ii) the Treaty of Waitangi (Te Tiriti o Waitangi) and te ao Māori (including tikanga Māori, te reo Māori, mātauranga Māori, and Māori economic activity)

As such, the legislation enacted makes efforts to ensure there is Māori representation and adequate Māori-related knowledge at the Climate Change Commission. This representation and knowledge is important to enable the Commission to know where and in what form positive measures to protect the relationship of Māori with their traditional lands will be required. This is because, in order for the Commission to recommend such positive measures of protection, it must know where such measures will be required, and in what form. Having members who collectively have knowledge of the Māori world, including of tikanga Māori (Māori customary law) enables the Commission to be cognizant of instances where positive measures of protection will be required and allows this to inform its policy advice. Upon receiving the Commission's advice, the Government will thus also become informed of where positive measures of protection that allow for recognition of the relationship of Māori to their traditional lands may be required. The author notes the views of many Māori that Māori representation at the Commission should be higher. At the select committee stage of the then Climate Change Response (Zero Carbon) Amendment Bill's passage, some Māori submissions called for at least half of Commission's members to be Māori or to have knowledge of te ao Māori.[197] Further, NGO Oxfam submitted that the committee in charge of nominating Commission members should be required by legislation to be comprised of at least two "suitably qualified representatives of iwi and Māori representative organisations".[198] Oxfam took the view that this is necessary to ensure Māori have greater input into climate change decision-making.[199] Neither the measures called for by Māori generally or by Oxfam were implemented in the final version of the Amendment Act.[200] Nevertheless, the Amendment Act's current form, particularly the requirement that the Commission have members with skills and expertise in relation to te ao Māori and the Treaty of Waitangi allows for the Commission and consequently the Government to be cognizant of situations where positive measures in order to recognise the relationship of Māori with their traditional lands will be required.

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[197] Ministry for the Environment *Zero Carbon Bill consultation: Summary of submissions* (Ministry for the Environment, ME 1386, October 2018) at 32.

[198] Oxfam New Zealand *Submission to the Environment Select Committee on the Climate Change Response (Zero Carbon) Amendment Bill* (Oxfam New Zealand, 2019) at 4.

[199] At 4.

[200] Climate Change Response (Zero Carbon) Amendment Act 2019, ss 5F, 5H.

Secondly, s 5ZG of the Amendment Act outlines that emissions reduction plans "must include – (c) a strategy to mitigate the impacts that reducing emissions and increasing removals will have on… iwi and Māori".[201] As such, this provision aims to reduce the impacts of climate mitigation measures on Māori. Although on its face, it is not obvious that this strategy would include the impact of mitigation measures on the relationship of Māori with their traditional lands, the provision's status as one enacted in order to recognise the Crown's responsibility to give effect to the Treaty of Waitangi principles, as outlined by s 3A of the Amendment Act, assists in its interpretation.[202] The Court of Appeal in 1987 famously recognised the Treaty principle requiring active protection of Māori by the Crown as forming a central part of the relationship between the New Zealand Government and Māori.[203] The Court stated that the duty on the Crown in this regard is one of "active protection of Māori people in the use of their lands and waters to the fullest extent practicable."[204] Section 5ZG's purpose must be interpreted in light of its relationship to s 3A regarding Treaty principles, and therefore the strategy it mandates must be taken as encompassing the relationship of Māori with their traditional lands. Thus, while not yet developed or implemented, the strategy mandated by s 5ZG is a direct way in which New Zealand's climate change legislation provides for the state to take positive measures of protection regarding the relationship of Māori with their lands in pursuing its mitigation goals.

Thirdly, New Zealand's success in ensuring the effective participation of Māori in decisions regarding mitigation which might affect the use of their traditional lands, as discussed in the previous section, helps New Zealand to fulfil its duty to take positive measures to protect the enjoyment by Māori of their relationship with their traditional lands. This is because incorporating Māori in decision making processes enables the state to know what Māori view as important in protecting their connections with traditional lands, and thus enables the state to take effective positive measures of protection. This can be seen in the Climate Change Commission's addition of a Chapter addressing the "the key concerns raised by Iwi/Māori submissions" in direct response to consultation with Māori where they expressed disappointment in the Commission's lack of attention to Māori-specific issues.[205] This

[201] Section 5ZG(3)(c).
[202] Section 3A.
[203] *New Zealand Maori Council v Attorney-General*, above n 185, at 664.
[204] At 664.
[205] Climate Change Commission *Māia tonu nei: a low emissions future for Aotearoa*, above n 173, at 17, 26.

disappointment was also expressed by Generation Zero spokesperson Pranaya Thaker and Iwi Chairs Forum climate spokesperson Mike Smith.[206] Thus, consultation with and views expressed by Māori essentially led to the Commission's addition of the Māori-focused chapter in its final advice.[207] The recommendations in the additional chapter are pivotal in displaying New Zealand's intention to act consistently with the requirement to take positive measures to protect the enjoyment by Māori of their relationship with their traditional lands. Thus, the New Zealand Government's fulfilment of the limb requiring the effective participation of Māori in decision-making assists in its fulfilment of limb requiring it to take positive measures of protection.

Recommendations 26 and 27 outline the Commission's policy which gives effect to the obligation to take positive measures to protect the relationship of Māori with their traditional lands. Recommendation 26 is that:[208]

> central and local government work with Iwi/Māori to develop a mechanism to build authentic and enduring partnerships that results in:
>
> 1. Recognition and active protection of Iwi/Māori rights and interests.

Thus, recommendation 26 envisions partnership between the New Zealand Government and Māori as leading to both the recognition and active protection of Māori rights and interests. Thus, fulfilment of the first limb which requires the effective participation of Māori in decisions affecting the use of their traditional lands acts as an enabler for the Government to then take positive measures to protect the enjoyment of the relationship that Māori have with those lands. Further, it is noteworthy that the recommendation refers to active protection of Māori interests as well as rights. The use of the term 'interests' displays an intention to recognise the relationship of Māori with their traditional lands even where they may not be able to exercise unqualified 'rights' in respect of the lands. Moreover, recommendation 27 is that the Government:[209]

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[206] Hamish Cardwell "Climate Change Commission sends final report to government" *Radio New Zealand* (online ed, Wellington, 31 May 2021).

[207] Climate Change Commission *Māia tonu nei: a low emissions future for Aotearoa*, above n 173, at 17, 26.

[208] Climate Change Commission *Māia tonu nei: a low emissions future for Aotearoa*, above n 173, at 334.

[209] Climate Change Commission *Māia tonu nei: a low emissions future for Aotearoa*, above n 173, at 336.

> Work with Iwi/Māori to develop a strategy to advance a Māori-led approach to an equitable transition for Iwi/Māori and the Māori economy. The strategy should focus on:
>
> 2. Creating opportunities and mechanisms for Iwi/Māori to actively participate in co-decision making, co-design, investment in infrastructure and new clean technology, knowledge contribution, and leadership as Aotearoa takes action to address climate change.
> 3. Funding research and development in mātauranga Māori to enable developing policy, strategy, technology and innovation to be informed from an equitable knowledge base.

The development of a specific strategy which entails a Māori-led approach to climate change mitigation measures for Māori would equate to a positive measure of protection for the enjoyment of the relationship of Māori with their traditional lands. This is because the strategy would be led by Māori, and hence by those who are cognizant of the relationship between Māori and their traditional lands and hence the impact that climate change mitigation measures might have on that relationship. This would, in turn, allow for further positive measures to be taken to protect Māori where necessary. Thus, the Climate Change Commission's recommendations to the Government indicate that New Zealand's baseline policy intends to ensure positive measures are taken to protect the relationship of Māori with their traditional lands.

Therefore, New Zealand's legislative and policy framework which aims to mitigate climate change is consistent with its international law obligations to take positive measures to protect the relationship of Māori with their traditional lands.

D New Zealand's Position – Summary

In sum, regarding its international climate change mitigation, New Zealand intends to take an approach aiming to ensure the fulfilment of its obligation does not breach its concurrent international law duty to respect the relationship of Māori with their traditional lands. In order to fulfil this duty, New Zealand must ensure the effective participation of indigenous peoples in decisions affecting the use of their lands, as well as take positive measures to protect the

enjoyment by Māori of their relationship with their traditional lands.[210] New Zealand's legislative climate change framework displays its commitment to fulfil those constituent parts of its obligation to Māori in realising its climate change mitigation obligation. Further, if the New Zealand Government adopts the policy recommended to it by the Climate Change Commission, this would put beyond all doubt its commitment to respecting the rights of Māori at international law in pursuing climate change mitigation. Thus, New Zealand's legislative and policy framework is a shining example of how a state might fulfil its climate change mitigation obligations without prejudicing the rights of indigenous peoples.

VII Conclusion

Addressing climate change and respecting indigenous rights are vitally important yet potentially competing objectives. This paper has shown that, in the area of international climate change mitigation obligations, New Zealand intends to take an approach which ensures the fulfilment of its obligations does not detrimentally affect indigenous rights. The New Zealand Government has begun to do this by integrating in its decision making legislation which enables the development of policy that balances its international mitigation obligation with the protection of Māori rights. Firstly, this paper outlined the increasing importance of climate change mitigation for states. Next, this paper analysed the cardinal international climate change mitigation on states from a New Zealand perspective. This paper then explored the potential of fulfilment of that obligation to detrimentally affect indigenous rights both generally and from a New Zealand perspective, finding that negative impacts on the relationship of indigenous peoples with their traditional lands was a common theme. The likely obligations on New Zealand at international law to protect indigenous rights in relation to their traditional lands were then identified. Finally, this paper outlined, through an evaluation of New Zealand's law and baseline policy, that New Zealand intends to take an approach to mitigation which respects the rights of Māori regarding their traditional lands, and that in fact, it has already begun to do so.

[210] UN Human Rights Commission, above n 120, at [7]; and Ulfstein, above n 120, at 11.

Word count

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