HANNAH HOUGHTON

THE NATURE OF THE OBLIGATION ON NEW ZEALAND GOVERNMENT TO KEEP FOSSIL FUELS IN THE GROUND FOR FUTURE GENERATIONS

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Faculty of Law

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Abstract

Climate change has been recognised by world leaders as posing a global and existential threat to humanity. However, government inaction has meant that this threat is failing to be addressed and the world is nearing the cusp of irreversible and catastrophic environmental harm. Previous legal scholarship has examined discrete areas of law including international environmental law, human rights and domestic regimes in an attempt to impose obligations on governments to take climate action. This paper challenges this siloed thinking and shows that it is necessary to consider the various sources of legal obligations and principles as a whole to derive any tangible duty of climate action. The question it frames is whether the New Zealand government owes a duty to future generations to keep fossil fuels in the ground. Examining the various sources of domestic and international obligations, this paper concludes that such a duty does exist. To uphold international obligations, human rights and tikanga, and act through a climate emergency 'lens' the government must keep fossil fuels in the ground. It is hoped that this paper underlines the legal imperative on government to take climate action and encourages a more holistic and long-term perspective in climate policy.

Fossil fuels
Future generations
Climate change
Government

I Introduction

Climate change may be "the biggest threat modern humans have ever faced."[1] Human activities have caused approximately 1.1C global warming above pre-industrial levels.[2] There is global consensus that warming must be limited to 1.5C to avert the most severe environmental consequences.[3] However, the trajectory set by current national mitigation targets implies a warming of 1.5C by approximately 2035, 2C by 2055 and 3-4C towards the end of the century.[4] Climate scientists have underscored that this is not a viable future for societies. Indeed, the World Economic Forum has named 'climate action failure' as the top threat facing humanity.[5] To limit warming to 1.5C requires "rapid, deep and sustained" reductions in greenhouse gas emissions (GHGs), including reducing carbon emissions by 45% by 2030 and net zero by 2050.[6] There is a narrow window for opportunity in what the international community has termed this 'critical decade'.[7] However, global emissions continue to increase and the global demand for coal, oil and gas continues to grow.[8] These fossil fuels account for 81% of the world's energy and are responsible for more than ¾ global emissions.[9] The continued operation of existing fossil fuel infrastructure alone would use up the entire carbon budget for 1.5C warming and over half that for the 2C target.[10] Welsby et al found that to limit warming to 1.5C nearly 60% oil and gas and 90% coal to must remain unextracted.[11] The International Energy Agency, a "typically conservative" body, has stated there can be no new fossil fuel development if the world is to reach net zero by 2050.[12]

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[1] United Nations Security Council "Climate Change 'Biggest Threat Modern Humans Have Ever Faced', World-Renowned Naturalist Tells Security Council, Calls for Greater Global Cooperation" (press release, 23 February 2021) UN Doc SC/14445.
[2] UNFCCC *Glasgow Climate Pact*, Conf of Parties, 26th Sess, 1/CMA.3 (13 November 2021).
[3] IPCC "Summary for Policymakers" in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press, Cambridge, 2018) 3 at 7.
[4] IPCC "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* (Cambridge University Press, Cambridge, 2018) 3 at 14.
5 World Economic Forum *The Global Risks Report 2022* (17th ed, World Economic Forum, Geneva, 2019) at 7.
[6] *Glasgow Climate Pact*, above n 2, at [17]; and IPCC *Global Warming of 1.5*℃, above n 3, at 12.
[7] *Glasgow Climate Pact*, above n 2, at [4].
[8] International Energy Agency *Global Energy Review 2021* (IEA, Paris, 2021)
[9] Dan Welsby and others "Unextractable fossil fuels in a 1.5C world" (2021) 597 Nature 230.
[10] Dan Tong and others "Committed emissions from existing energy infrastructure jeopardize 1.5C climate target" (2019) 572 Nature 373.
[11] Welsby, above n 9, at 230.
[12] International Energy Agency *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA Publications, Paris, 2021), at 26.

Fossil fuel dependence is the "fundamental core" of the climate crisis, yet there has been a crucial disconnect between fossil fuel production and climate goals.[13] International law provides no clear framework to limit fossil fuel production.[14] The international environmental regime is largely silent regarding fossil fuels and any focus is limited to demand-side measures. This has begun to change with a recent movement towards supply-side policies and broader de-legitimisation of fossil fuels.[15] The "Keep it in the Ground" movement has attracted significant scholarship,[16] and increasing international commitment including Costa Rica's ban on oil exploration, France's ban on new exploration and extraction and the Powering Past Coal Alliance.[17] New Zealand joined this growing mass of states in 2018, banning new offshore fossil fuel exploration.[18] However, in 2021 the government granted two new onshore exploration permits.[19] This decision provokes the question – notwithstanding the legislative loopholes that allow permits to continue to be granted for onshore exploitation, is there an obligation on the New Zealand government to keep fossil fuels in the ground?

This paper addresses this question, focusing on whether the obligation is owed to future generations. Climate policy has long been inhibited by the "short-termism" or "presentist bias" of government.[20] Former Prime Minister Sir Geoffrey Palmer has stated that regarding climate change, "[p]olicy makers have discounted the future in favour of the present, not wishing to face up to the real and adverse political consequences that effective action will require."[21] This paper attempts to reframe the perspective by arguing the government owes climate obligations to future generations. It is hoped this will initiate change to climate policy by provoking long-

[13] Steven Bernstein and Matthew Hoffmann "Decarbonisation: The Politics of Transformation" in Andrew Jordan and others (eds) *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press, Cambridge, 2018) 248 at 248.
[14] Harro van Asselt "Governing fossil fuel production in the age of climate disruption: Towards an international law of 'leaving it in the ground'" (2021) 9 Earth Syst Gov 100118.
[15] Van Asselt, above n 14, at 2.
[16] See Peter Newell and Andrew Simms "Towards a fossil fuel non-proliferation treaty" (2020) 20(8) Climate Policy 1043; Nicolas Gaulin and Philippe Le Billon "Climate change and fossil fuel production cuts: assessing global supply-side constraints and policy implications" (2020) 20(8) Climate Policy 888; Monika Ehrman "A Call for Energy Realism: When Immanuel Kant Met the Keep it in the Ground Movement," (2019) 2019(2) Utah L Rev 435; Fergus Green and Richard Denniss "Cutting with both arms of the scissors: the economic and political case for restrictive supply-side climate policies" (2018) 150 Climatic Change 73; and Fergus Green "The logic of fossil fuel bans" (2018) 8 Nature Clim Change 449.
[17] Newell and Simms, above n 16, at 1044.
[18] Crown Minerals (Petroleum) Amendment Act 2018.
[19] New Zealand Petroleum & Minerals "Two new onshore petroleum exploration permits granted" (press release, 29 June 2021).
[20] *Jonathan Boston and Thomas Stuart "Protecting the rights of future generations: are constitutional mechanisms an answer" (2015) 11(2) Policy Quarterly 60 at 60.*
[21] Geoffrey Palmer "Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law" (2018) 49 VUWLR 191 at 193.

term thinking and shifting the balance of priorities so future interests are not continually outweighed by short-term gains. This paper reviews domestic and international sources of obligations including international law, human rights, tikanga Māori, statute and public law. It concludes that when interpreted with an evolutionary lens, the principles and legal obligations found in various sources do place a duty on the New Zealand government to keep fossil fuels in the ground for future generations.

II Source and Nature of the Obligation

A International Law

A State's obligations under international law are an amalgam of binding legal obligations under treaties and custom, normative principles, and the elucidation of both by international courts and tribunals. In New Zealand, international law is only directly enforceable where incorporated into domestic legislation, although the courts apply a presumption of interpretation consistent with international obligations.[22] International environmental law has remained largely silent on the exploitation of fossil fuels. However, when the fundamental obligations of the regime are read together with customary principles, the framework for a duty owed to future generations to keep fossil fuels in the ground arises.

1 International Treaties

The United Nations Framework Convention on Climate Change (UNFCCC) is the foundation of international climate change law.[23] Established in 1992, this treaty aims to stabilise greenhouse gases "at a level that would prevent dangerous interference with the climate system."[24] When pursuing this objective, article 3 requires Parties to be guided by the key principles of precaution, sustainable development, and protection of the climate system for the benefit of present and future generations. The broad framework of the UNFCCC does not create

[22] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 674.
[23] United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).
[24] Article 2.

justiciable duties but its overarching objective and principles create the foundation of the international climate regime and inform the interpretation of subsequent instruments.

The Paris Agreement was agreed under the UNFCCC in 2015 and provides the enforceable framework for State climate obligations.[25] Its purpose is to enhance the objective of the UNFCCC and "to strengthen the global response to the threat of climate change … by holding the increase in global average temperature to well below 2C … and pursuing efforts to limit warming to 1.5C."[26] The primary mechanism to achieve this is the requirement to submit and report on Nationally Determined Contributions (NDCs).[27] States are required to undertake NDCs of the "highest possible ambition",[28] "represent[ing] progression over time" and "with the view to achieving the purpose as set out in article 2".[29] To achieve the Agreement's overall objective, Parties aim "to reach global peaking of greenhouse gas emissions as soon as possible… and to undertake rapid reductions thereafter in accordance with best available science," so as to achieve net zero emissions in the second half of the century.[30] Subsequent agreements of treaty parties are also part of the context for interpretation.[31] The Glasgow Climate Pact, adopted by almost 200 countries at COP26, "expresses alarm and utmost concern" about the current state of climate change,[32] recognises "rapid, deep and sustained reductions" in emissions are required to limit warming to 1.5C,[33] and identifies fossil fuels as integral for addressing climate change – the first time an international legal text has done so.[34] It is within this entire framework that State decisions and discretions under the Paris Agreement must be interpreted. States have an obligation to implement the Paris Agreement in good faith and in light of its purpose and context.[35] Action which directly threatens the achievement of the Agreement's aim breaches this obligation. For emission targets to be of the highest ambition, progressive and consistent with temperature goals, fossil fuel production – the biggest source of GHG emissions – must be considered and aligned with climate goals. The

[25] Paris Agreement UN Doc FCCC/CP/2015/10/Add 1 (opened for signature 22 April 2016, entered into force 4 November 2016).
[26] Article 2.
[27] Article 3.
[28] Article 4.
[29] Article 3. See also Christina Voigt and Felipe Ferreira "'Dynamic differentiation': the principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement" (2016) 5(2) TEL 285.
[30] Article 4
[31] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31.
[32] At [3].
[33] At [17]
[34] At [20].
[35] Vienna Convention on the Law of Treaties, above n 31, at art 26 and art 31.

continued exploitation of fossil fuels commits States to a pathway inconsistent with temperature goals and jeorpardises the purpose of the international climate regime, being the prevention of dangerous climate change. A State cannot act in good faith by continuing to support the main cause of the issue the Paris Agreement was created to address. The lack of explicit reference to fossil fuels in the treaty text is therefore no barrier to finding a duty to keep fossil fuels in the ground.

International legal obligations are owed to other States or the international community of States as a whole. Accordingly, this duty to keep fossil fuels in the ground cannot be owed directly to future generations but it should be understood as being owed in the context of future generations. The principles of precaution, sustainable development and intergenerational equity that underlie the UNFCCC and Paris Agreement necessarily contemplate the interest of future generations and all treaty obligations must be interpreted in light of this responsibility.

2 Customary International Law

Customary international law constitutes "evidence of a general practice accepted as law."[36] The customary principle of sovereignty over natural resources is at the foundation of international law. Sovereignty is not unqualified but subject to recognised limits such as human rights and the rule not to cause significant transboundary harm (so-called 'no-harm rule').[37] In the context of environmental law, where numerous treaties have declared that protection of the environment is a common responsibility and global concern, an even more restrictive understanding of the principle is required.[38] The Rio Declaration, a non-binding declaration but regarded as an authoritative articulation of environmental principles, expressly states sovereignty as qualified by the obligation not to cause significant harm to the environment of other States or areas beyond national jurisdiction.[39] This 'no harm rule' is a customary

[36] Statute of the International Court of Justice, art 38.
[37] See generally Anél Ferreira-Snyman "Sovereignty and the Changing Nature of Public International Law: Towards a World Law?" (2007) 40(3) CILSA 395; Henry Shue "Limiting Sovereignty" in *Fighting Hurt: Rule and Exception in Torture and War* (Oxford University Press, Oxford, 2016) 173; and Samantha Besson "Sovereignty" in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online ed, 2011) 1472.
[38] See generally United Nations Convention on the Law of the Sea 1833 UNTS 399 (opened for signature 10 December 1982, entered into force 1 November 1994), art 136; UNFCCC, above n 23, preamble; Paris Agreement, above n 25, preamble; and Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), preamble.
[39] Rio Declaration on Environment and Development 31 ILM 874 (1992), principle 2.

obligation supported by significant authority.[40] States must take all reasonable and necessary steps to prevent or minimize the risk of significant environmental harm. Cook and Viñuales argue that the extension of the no harm rule from transboundary contexts to areas beyond national jurisdiction means the obligation now exists irrespective of where the harm occurs.[41] The pervasive and dispersed nature of climate change therefore poses no barrier to an obligation of no harm. States have an obligation to prevent environmental harm to both the global climate system and other State territories from their GHG emissions. The adverse impacts of climate change outlined in Section I are undeniably "significant" harm so as to trigger the rule's operation. A State's obligation is one of due diligence.[42] The duty of due diligence is a customary law principle in its own right but also denotes the conduct required when implementing other substantive obligations.[43] The standard of due diligence is variable based on the gravity of the potential harm, the capabilities of the State, and the state of knowledge at the time.[44] In fact, "[t]he content of 'due diligence' obligations … may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[45] In the climate context, the contextual parameters outlined in Section I – IPCC reports that "deep and sustained cuts" including no further fossil fuel extraction are required to achieve the 1.5C target, evidence of irreversible changes to weather patterns and ecosystems, and global consensus that climate change is caused by anthropogenic activities, particularly fossil fuel production – must be taken into account in determining what conduct of a State is diligent. It is difficult to see how States could meet their due diligence obligation to prevent environmental harm without the phase-out of fossil fuels. States have at least implicitly recognised this by imposing various restrictions on fossil fuel consumption including carbon taxes and emissions

[40] See *Trail Smelter Arbitration (United States v Canada) (Judgment)* (1938 and 1941) 3 RIAA 1905; *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4 at 22; *Draft Articles on the prevention of Transboundary Harm from Hazardous Activities* [2001] vol 2, pt 2 YILC 146, art 3; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 66, at [29]; *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* [2010] ICJ Rep 14; and Rio Declaration on Environment and Development, above n 39, principle 2.
[41] Kate Cook and Jorge Vinuales *International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities* (online ed) at [44].
[42] *Draft Articles on the prevention of Transboundary Harm from Hazardous Activities,* above n 40, art 3.
[43] See Alice Ollino *Due diligence obligations in international law* (Cambridge University Press, Cambridge, 2022); and Katja Samuel "The Legal Character of Due Diligence: Standards, Obligations, or Both?" (2018) 1 Central Asian Yearbook of International Law (forthcoming).
[44] Jorge Viñuales "Due Diligence in International Environmental Law: A Fine-grained Cartography" in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds) *Due Diligence in the International Legal Order* (Oxford University Press, Oxford, 2020) 111 at 124-126.
[45] *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area (Advisory Opinion), Order of 1 February 2011,* ITLOS Reports 2011, at [117].

reporting. However, the irreversibility and urgency of the climate threat mean this is insufficient to meet the standard of due diligence. Reasonable, not token, steps are required to prevent further significant environmental harm and evidence shows this requires minimal further fossil fuel extraction to avoid reaching 1.5C warming. This obligation persists despite a margin of prediction or scientific uncertainty because the precautionary principle is a recognised element of due diligence.[46]

The precautionary principle requires States to act where there are threats of serious or irreversible damage even in the absence of full scientific certainty.[47] Whether the precautionary principle is a standalone customary obligation, as well as a part of due diligence, is contentious. That debate is outside the scope of this article, but regardless of the conclusion reached, the precautionary principle is a feature of numerous instruments New Zealand has committed to. Both the UNFCCC and Rio Declaration call for States to adopt a precautionary approach to environmental harm. The precautionary principle requires States to be proactive in mitigation measures and refrain from actions such as fossil fuel extraction that contribute to the risk of exceeding climate tipping points, despite uncertainty as to the specific details of how much and when this will occur. Neither the Rio Declaration nor UNFCCC constitute a binding obligation on States to follow a precautionary approach, given that the former is non-binding and the latter couched in permissive broad language. Nevertheless, the precautionary principle forms part of the legal context informing State conduct, particularly considering that the legally binding duties of the Paris Agreement operate under the UNFCCC framework to "enhance the implementation of the Convention", "being guided by its principles."[48] The precautionary principle also remains part of the customary obligation of due diligence binding on all States. Disregarding a precautionary approach could breach a State's due diligence obligation, which in itself is a component of other substantive duties such as to prevent significant transboundary environmental harm.

Sustainable development and the interrelated concept of intergenerational equity have become defining principles of international environmental law. Sustainable development denotes "development that meets the needs of the present without compromising the ability of future

[46] *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, above n 45, at [131].
[47] See Rio Declaration on Environment and Development, above n 39, principle 15; and United Nations Framework Convention on Climate Change, above n 23, art 3(3).
[48] Paris Agreement, above n 25, preamble and art 2.

generations to meet their own needs."[49] Intergenerational equity is a central component of this, but also constitutes an independent principle that places a duty on current generations to protect the environment for future generations.[50] Despite being core concepts within the international environmental framework, these principles lack the consistent formulation and opinio juris required to achieve the status of customary law.[51] Nonetheless, they have significant normative influence, playing an important role in the reasoning of international tribunals,[52] and underlying treaty regimes. Sustainable development and intergenerational equity generally appear in treaties as guiding principles or policy rather than enforceable rules. The UNFCCC includes both in its article 3, which is understood as an articulation of general legal standards with guiding character rather than binding obligations of action.[53] The Paris Agreement articulates its purpose and objectives "on the basis of equity" and "to promote sustainable development"; and sustainable development is the primary objective of the non-binding Rio Declaration.

Sustainable development and intergenerational equity contemplate a convergence of factors – the economy, environment, poverty, health – without prescribing how the balance should be struck between these, and between present and future generations. There is scope for different opinions on where the balance lies. However, these principles do impose a bare minimum. States must *consider* the interests of future generations and development cannot *compromise* the ability of future generations to meet their basic needs. The evidence that continued fossil fuel production will lead to exceeding temperature targets and disastrous environmental and societal consequences, as well as an onerous burden on future generations to undertake rapid and drastic emission cuts, means that any genuine consideration of the interests of future generations would require ending fossil fuel extraction as the most effective means to prevent further GHG emissions. Fossil fuels have been historically isolated from the sustainable development conversation, and wider international environmental regime, because they have

[49] Gro Harlem Brundtland *Report of the World Commission on Environment and Development: Our Common Future* UN Doc A/42/427 (20 March 1987), at [1].
[50] Lydia Slobodian "Defending the Future: Intergenerational Equity in Climate Litigation" (2020) 32(3) Geo Intl Envtl L Rev 569 at 571.
[51] Peter Lawrence "Current international law, intergenerational justice and climate change" in *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Publishing, Cheltenham, 2014) at 115.
[52] Lawrence, above n 51, at 116-122.
[53] Daniel Bodansky "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18(2) Yale J Intl L 451 at 501.

been considered essential for development and an embedded feature of economies.[54] This is no longer a justifiable position. Scientific evidence has established that the continued use of fossil fuels compromises not only the development of future generations but their very subsistence in the context of exacerbated climate change.[55] The interests of present generations are also compromised by maintaining reliance on fossil fuels. A managed decline in fossil fuel production would enable communities and economies to be supported so that key developmental priorities are met and a just transition achieved.[56] An unmanaged and rapid transition poses a dire threat to the economy, government and social welfare, in the context of an already irreversibly damaged environment. Sustainable development and intergenerational equity therefore necessitate that States plan for and implement the phase-out of fossil fuels within a short timeframe. These principles do not impose binding obligations of conduct either under custom or treaty law. However, their fundamental role in the international environmental law framework and its interpretation by tribunals means the obligations they impose form an integral part of the legal context in which State obligations are understood, and in that sense, there is a broad obligation for States to act consistently with them.

3 Conclusion

International law does not impose an express legal obligation to keep fossil fuels in the ground. However, when the body of treaties, principles and custom are considered as a whole, there is a broad direction for States to refrain from fossil fuel extraction. The principles of precaution, sustainable development and prevention of significant environmental harm all require the phase-out of fossil fuels. The duty of States to implement treaties in good faith reinforces the existence of such an obligation, as necessary to act consistently with the purpose and commitments of the regime. Although not justiciable, there may also be a practical duty arising from the necessity of reducing fossil fuels to meet internationally agreed emission targets. This international context is relevant to the interpretation of domestic law, particularly legislation enacted to implement these international commitments.

[54] Michael Lazarus and Harro van Asselt "Fossil fuel supply and climate policy: exploring the road less taken" (2018) 150 Climatic Change 1 at [5].
[55] See IPCC "Summary for Policymakers" in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2018) 3
[56] Anabella Rosemburg "Strengthening just transition policies in international climate governance" (policy analysis brief, The Stanley Foundation, 2017).

B Human Rights Law

The link between climate change and human rights has garnered increasing attention in the past decade. Academics and tribunals alike have advocated for a rights-based approach to climate change and there is growing scholarship on this topic.[57] This section is not a comprehensive discussion of the field but focuses specifically on human rights obligations in the climate context and whether they extend to future generations.

1 International Human Rights

The relationship between climate change and human rights is now widely recognised. Various human rights bodies have issued reports and statements on the threat climate change poses to the enjoyment of various human rights protected by international treaties.[58] Recognition of this relationship has been reciprocated by environmental law. The Paris Agreement explicitly references human rights and the need to limit global warming to protect human health and welfare.[59] The Stockholm Declaration and Rio+20 also affirm the importance of human rights.[60] Within New Zealand, there has been judicial recognition of this connection.[61] Climate change and associated environmental degradation threaten basic human rights to sanitation,

[57] See generally Annalisa Savaresi "Climate change and human Rights: Fragmentation, interplay, and institutional linkages" in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, London, 2018) 31; Julie Fraser and Laura Henderson "The human rights turn in climate change litigation and responsibilities of legal professionals" 40(1) NQHR 3; Peter Lawrence "International human rights law, intergenerational justice and climate change" in *Climate Change and International Law* (Edward Elgar, Cheltenham, 2014) 132; *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* UN Doc A/HRC/10/61 (15 January 2009); and Yannick Glemarec "Aligning National Interests and Global Climate Justice: The Role of Human Rights in Enhancing the Ambition of Nationally Determined Contributions to Combat Climate Change" (2019) 12 *Fudan J Hum Soc Sci* 309.

[58] See UN Human Rights Council *Human Rights and Climate Change* UN Doc A/HRC/RES/41/21 (23 July 2019); Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities *Statement on Human Rights and Climate Change* UN Doc HRI/2019/1 (14 May 2020); UN Committee on Economic, Social and Cultural Rights *Climate change and the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C.12/2018/1 (31 October 2018); UN Human Rights Committee *General comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* UN Doc CCPR/C/GC/36 (30 October 2018); and UN Committee on the Rights of the Child *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)* UN Doc CRC/C/GC/15 (17 April 2013)

[59] Paris Agreement, above n 25, preamble.

[60] UN General Assembly *United Nations Conference on the Human Environment (Stockholm Declaration)* UN Doc A/RES/2994 (15 December 1972), principle 1; and *The Future We Want (Rio+20 Outcome Document)* GA Res 66/288 (2012), at [8].

[61] See *AD (Tuvalu) [*2014] NZIPT 501370-371 at [28]; and AF (Kiribati) [2014] NZIPT 800413 at [64].

food, health, adequate standard of living, freedom to choose residence, and ultimately the right to life and self-determination.[62] The rights of future generations are at even greater risk. Not only will environmental degradation significantly worsen as global warming continues,[63] climate mitigation measures will become increasingly costly and burden the exercise of human rights.[64]

States have the legal obligation to respect, protect and fulfil all human rights of its citizens. To fulfil this duty States must refrain from actions that interfere with the enjoyment of human rights, protect individuals from third-party abuses and take positive action to facilitate the enjoyment of basic rights.[65] It is an obligation of due diligence; States must take reasonable measures to prevent foreseeable harm to, and achieve the full realisation of, these rights to the maximum extent of their available resources.[66] Environmental harm has been recognised as a relevant threat to human rights that States must protect against.[67] However, opinion diverges on what specific State action is required by general human rights obligations regarding climate change and fossil fuels. A Joint Statement issued by five human rights bodies stated that States' failure to take measures to prevent foreseeable harm caused by climate change, including the phase-out of fossil fuels, would violate human rights obligations.[68] Some UN-mandated reports suggest the obligation includes assessing the impacts of fossil fuel projects, and may go as far as to end fossil fuel subsidies, cease further exploration and investment in fossil fuels, and ensure a just transition away from their use.[69] These sources have soft law status but are nevertheless of significant influence.

A rights-approach to climate change challenges the orthodox structure of human rights law. Human rights obligations are generally owed by States to their own citizens and violations

[62] John Knox *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/31/52 (1 February 2016).
[63] IPCC *Global Warming of 1.5°C*, above n 3, at 9.
[64] United Nations Environment Programme *Climate Change and Human Rights* (UNON Publishing, Nairobi, 2015) at 8.
[65] OHCHR "International Human Rights Law" United Nations Human Rights Office of the High Commissioner <<http://www.ohchr.org>>.
[66] John Knox *Report of the Special Rapporteur on Framework Principles on Human Rights and the Environment* UN Doc A/HRC/37/59 (5 March 2018) at 6; and UNEP *Climate Change and Human Rights* (UNON Publishing, Nairobi, 2015) at 13.
[67] Knox, above n 66, at 5.
[68] *Joint Statement on Human Rights and Climate Change*, above n 58.
[69] David Boyd *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment* UN Doc A/74/161 (15 July 2019) at 77; and Obiora Okafor *International solidarity and climate change: Report of the Independent Expert on human rights and international solidarity* UN Doc A/HRC/44/44 (1 April 2020) at 54.

established after the harm has occurred.[70] In contrast, the source of climate change is global, its adverse effects universal and largely comprised of projections about future harm. The initial discord between climate change and human rights law has proved not to be an irreconcilable barrier but rather the impetus for significant legal developments. Courts and human rights tribunals have shown willingness to adapt the existing legal framework to find climate cases justiciable and enforce legal responsibility on States to take climate action.[71] This has included a broad understanding of causation, holding States responsible regardless of whether the State directly caused the environmental harm giving rise to the specific human rights violation, because "human rights law requires each State to do more than merely refrain from interfering with human rights itself; it also requires the State to undertake due diligence to protect against such harm from other sources."[72] The scope of State human right obligations has also been extended to include extraterritorial harm.[73] Most significantly for this paper, the standing of future generations has been upheld by national and international tribunals.[74] The rights of future generations to life, health and essential resources have been enforced by courts and found to impose legal obligations on governments. The Columbian Supreme Court grounded these rights in the concept of the environment as a natural resource shared by all inhabitants of the Earth, including future generations who will inherit these resources.[75] The common heritage of mankind is a strong theme in international environmental law.[76] By drawing on such general international principles as the basis for rights owed to future generations, these cases contribute to the international jurisprudence surrounding the environmental regime. Therefore although

[70] Knox, above n 62, at 9-10.
[71] See generally *Minors Oposa v Secretary of the Department of Environment and Natural Resources* The Philippines Supreme Court (1994) 33 ILM 173; *Future Generations v Ministry of Environment and Others* Corte Suprema de Justicia [Supreme Court], abril 4 2018, Radicación 11001-22-03-000-2018-00319-0, Gaceta Judicial (No. 10, p. 120) (Colom); BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18; *Juliana v United States* 217 F Supp 3d 1224 (DC Or, 2016); *VZW Klimaatzaak v Kingdom of Belgium and others* Brussels Court of First Instance (17 June 2021) 2015/4585/A; and *The State of the Netherlands v Urgenda Foundation* The Supreme Court of the Netherlands (20 December 2019) 19/00135.
[72] John Knox "Human Rights Principles and Climate Change" in Cinnamon Carlarne, Kevin R. Gray, and Richard Tarasofsky (eds) *Oxford Handbook of International Climate Change Law* (Oxford University Press, Oxford, 2016) 213 at 220.
[73] John Knox *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* UN Doc A/HRC/25/53 (30 December 2013) at 17.
[74] See *Minors Oposa v Secretary of the Department of Environment and Natural Resources,* above n 71; *Future Generations v Ministry of Environment and Others*, above n 71; BVerfG, above n 71; and *Juliana v United State*s, above n 71.
[75] *Future Generations v Ministry of Environment and Others*, above n 71, at 20.
[76] See generally United Nations Convention on the Law of the Sea, above n 38, art 136; UNFCCC, above n 23, preamble; Paris Agreement, above n 25, preamble; and Convention on Biological Diversity, above n 38, preamble.

these cases have only persuasive influence on New Zealand, they contribute to the broader fabric of law and principle that does inform New Zealand's obligations.

The rights of future generations are not formally recognised in any human rights instrument New Zealand is party to. However, the broader legal context in which New Zealand's human rights obligations are interpreted support the conclusion that they can be owed to future generations, for future harms, as opposed to being confined to a present obligation towards existing citizens. The foundation of human rights law is that rights are universal and arise from the inherent dignity and equal worth of human beings.[77] Upon this fundamental principle of equity, human beings possess and are entitled to the recognition of rights regardless of when they happen to be born.[78] Further, all human rights duties are grounded in "the future rights of persons living in the future" (even if this is the immediate future) because they operate to protect against future harm to interests.[79] Therefore whether the victim of the harm is alive at the time the duty arose is irrelevant to its existence. Various environmental treaties recognise the obligation to protect the environment for future generations, implying a right of future generations to essential life resources.[80] Explicit reference to meeting the needs of future generations is also included in domestic statutes.[81] In New Zealand, the existence of this obligation is reinforced by tikanga Māori which places emphasis on obligations towards future generations.[82] In litigation, the rights of future generations have been tightly associated with the rights of children, with action taken by minors on behalf of themselves and future generations.[83] It is recognised that children are disproportionately impacted by climate change, both due to their vulnerable physiology and the burden of this environmental damage on their future lifestyle.[84] The obligation to protect child rights, therefore, involves contemplation of

[77] Peter Lawrence "Content of justice-based obligations towards future generations in the context of climate change" in *Justice for Future Generations* (Edward Elgar Publishing, Cheltenham, 2014) 67.
[78] Peter Lawrence "The basis of an obligation towards future generations in justice and ethics in the context of climate change" in *Justice for Future Generations* (Edward Elgar Publishing, Cheltenham, 2014) 29 at 40.
[79] Derek Bell "Does anthropogenic climate change violate human rights?" (2011) 14(2) CRISPP 99 at 107.
[80] Convention on Biological Diversity, above n 38, art 2; Convention on International Trade in Endangered Species of Wild Fauna and Flora 993 UNTS 243 (opened for signature 3 March 1973, entered into force 1 July 1975), preamble; and United Nations Framework Convention on Climate Change, above n 23, art 3.
[81] Resource Management Act 1991, s 5; Environment Act 1986, long title; and Climate Change Response Act 2002, s 5ZQ.
[82] Discussed in section C.
[83] See *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, above n 71; *Future Generations v Ministry of Environment and Others*, above n 71; and *Juliana v United States*, above n 71.
[84] OHCHR *Frequently Asked Questions on Human Rights and Climate Change* (United Nations Publications, Geneva, 2021) at 24.

future harm, evoking future-based rights which is consistent with owing rights to future generations.

The above discussion has regarded climate change as environmental harm that violates existing human rights. There has also been some recent recognition of a direct human right to the environment. In July, the UN General Assembly passed a resolution recognising the right to a healthy environment as an autonomous and essential human right.[85] This recognition was not legally binding but is of normative significance, being the first time such a right has been explicitly recognised at the global level. An increasing number of countries have incorporated explicit environmental rights into their constitutions, though there is no enforceable standalone right in New Zealand yet.[86] The right to a healthy environment has also been conceptualised as an intrinsic right, an inherent part of the human rights doctrine that is an essential condition for the fulfilment of other enumerated rights. The International Court of Justice has recognised the protection of the environment as "a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself."[87] Other judicial support includes the seminal *Juliana* case in which a climate system capable of sustaining human life was considered "fundamental to a free and ordered society";[88] and *Minors Oposa* where a healthy environment was among such "basic rights" as are "assumed to exist from the inception of humankind" and as such "need not even be written in the Constitution."[89] The articulation of these environmental rights, either standalone or underlying the human rights doctrine, support the rights of future generations. Hiskes argues that environmental rights presume obligations to the future because environmental harms exist primarily as future events.[90] However, neither an autonomous standalone human right nor an intrinsic underlying right to a healthy environment are supported by wide state practice and opinio juris to be customary international law which would bind New Zealand. The recent UNGA resolution does however demonstrate this is an area of current development.

[85] *Resolution on the Human Right to a Clean, Healthy and Sustainable Environment* GA Res A/RES/76/300 (2022).
[86] David Boyd *The Status of Constitutional Protection for the Environment in Other Nations* (David Suzuki Foundation, Vancouver, 2013) at 5.
[87] *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)*, separate opinion of Judge Weeramantry, (1997) ICJ Rep 7 at 91.
[88] *Juliana v United States*, above n 71, at 32.
[89] *Minors Oposa v Secretary of the Department of Environment and Natural Resources,* above n 71, at 187.
[90] Richard Hiskes "The intergenerational promise of environmental human rights" (2016) 15(2) JHR 229 at 229.

2 Domestic Human Rights

The Bill of Rights Act 1990 (BORA) enshrines the fundamental rights and freedoms of people living in New Zealand. The statute forms part of New Zealand's constitution. However, it is not entrenched law; the courts cannot invalidate government action inconsistent with any guaranteed right, though these rights should only be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[91] BORA includes no explicit right to a healthy environment. Overseas, particularly under the European Convention of Human Rights (ECHR), the right to life has been used to enforce climate-based obligations.[92] However, there are significant barriers to a similar outcome in New Zealand. Firstly, the right to life in BORA is framed as a negative obligations ("no one shall be deprived of life") rather than the apparently broader formulation of the ICCPR and ECHR "right to life" which requires positive measures to be taken by the State. The Human Rights Committee has stated that the right to life "should not be interpreted narrowly" and requires to States to take positive action against "foreseeable and preventable threats and life-threatening situations."[93] In fact, "[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[94] The New Zealand High Court recently stated that the different formulation does not materially change the substance of the right to life in New Zealand. The government has a positive obligation to protect the lives of New Zealanders from serious risk of harm.[95] However, s 8 has never been interpreted so broadly so as to include an indirect threat to life like facilitating greenhouse gas emissions.[96] This narrow interpretation and enforcement of the BORA framework reflects the constitutional climate of New Zealand. The deference to Parliamentary supremacy and absence of a written constitution means that the judiciary tends to adopt a restricted discretion and conservative interpretation in high policy and novel legal contexts like climate change.[97]

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[91] Section 5.
[92] See *The State of the Netherlands v Urgenda Foundation*, above n 71; *Milieudefensie et al. v Royal Dutch Shell PLC*, District Court of The Hague (26 May 2021) C/09/571932/HA ZA 19-379; and *Notre Affaire à Tous and Others v France*, Paris Administrative Court (3 February 2021) Nos. 1904967, 1904968, 1904972, and 1904976/4.
[93] UN Human Rights Committee *General Comment No.* 36, above n 58, at [3], [6] and [25].
[94] At [62].
[95] *Wallace v Attorney-General* [2021] NZHC 1963 at [279-280] and [383].
[96] Charles Owen "Climate Change in New Zealand: Constitutional Limitations on Potential Government Liability" (LLB (Hons) Dissertation, University of Otago, 2016) at 24.
[97] See Sir Geoffrey Palmer "Can Judges Make a Difference? The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law" (2018) 49 VUWLR 191.

The silence of BORA regarding the natural environment has led the Lawyers for Climate Action to campaign for the inclusion of the right to a sustainable environment.[98] The inclusion of such a right would significantly strengthen the government's environmental obligations. Existing legislation would have to be interpreted consistently with this right,[99] any new legislation would have to comply with it,[100] government agencies would have to engage with this right in decision-making, and the right to a sustainable environment would have priority over competing interests subject to justified limitation or express legislation to the contrary.[101] Despite the legal and environmental merits, a constitutional right to the environment likely lacks the political feasibility to become a legal reality.

3 Conclusion

International human rights law imposes an obligation on States to protect human rights from foreseeable environmental harm, whether caused by the State or private actors. This broadly supports an obligation to phase out fossil fuels, being the biggest contributor to global warming and thus a foreseeable source of significant environmental harm. However, whether there is an enforceable obligation in a strict legal sense depends on the international and regional human rights instruments a State is party to and to a significant extent judicial willingness to take broad interpretations of causation, jurisdiction and standing. The domestic human rights framework in New Zealand does not contribute significantly to finding a rights-based obligation on the government to address climate change. Further, whether human rights obligations extend to future generations is not settled. Human rights principles, environmental treaties, tikanga Māori and the development of environmental rights support the existence of this obligation. However, whether the New Zealand courts would be prepared to take such a step is questionable given its traditionally conservative role in holding the government to account. The best conclusion may be that human rights impose a broad direction and ethical obligation on the government to keep fossil fuels in the ground to protect future generations.

[98] Letter from Lawyers for Climate Change to the Minster for Climate Change, the Minister of Justice and the Attorney-General regarding the Proposal to amend the New Zealand Bill of Rights Act 1990 by recognising the right to a sustainable environment (25 November 2019).
[99] Bill of Rights Act 1990, s 6.
[100] Section 7.
[101] Proposal to amend the New Zealand Bill of Rights Act 1990 by recognising the right to a sustainable environment, above n 98, at 8.

This obligation can provide normative guidance in policy, have a role in court reasoning and interpretation, and forms part of the broader context in which the State must consider its duties.

C Tikanga Māori

1 Tikanga

Tikanga Māori is the normative system that guides and provides the foundation for Māori society. It consists of both law and social norms; a "set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or individual."[102] At the heart of this system is whanaungatanga, commonly translated as 'kinship' but better understood as the right and responsibility to maintain relationships with people, the environment, and the spiritual world all of which are connected through whakapapa (genealogy) links.[103] This whakapapa originates in the Māori creation myth with Papatūānuku and Ranginui. The Earth Mother and Sky Father created the natural world, and every element of the environment, living and non-living, is imbued with mauri (life force) that can be traced back to these original ancestors.[104] Humankind is therefore inextricably connected to the environment by whakapapa and whanaungatanga. These kinship bonds give rise to the obligation of kaitiakitanga, the right and responsibility to care for the mauri of the environment and maintain it for future generations.[105] The Waitangi Tribunal has observed that "Māori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves as not owning the land but being owned by it … As users … they were required to propitiate the earth's protective duties."[106] Māori regarded themselves as kaitiaki, guardians of the environment for future generations.[107] Use of the environment and its resources was done in a way that fulfilled kin relationships.[108] Fossil fuel exploitation, as the main source of GHG emissions, causes irrevocable change to the natural world and compromises the ability of future generations to live prosperously and safely in the

[102] Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, August 2000) at 3.
[103] Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) at 237.
[104] Mihiata Pirini and Rhianna Morar "Climate Change and the Claiming of Tino Rangatiratanga" [2021] NZWLJ 86 at 88; and Andrea Tunks "Tangata Whenua Ethics and Climate Change" (1997) 1 NZJ Envtl L 67 at 71.
[105] *Ko Aotearoa Tēnei,* above n 103, at 237.
[106] Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23–24.
[107] *Ko Aotearoa Tēnei,* above n 103, at 284.
[108] *Ko Aotearoa Tēnei,* above n 103, at 269.

environment. Kaitiakitanga prohibits this use of the environment because it jeopardises whanaungatanga relationships with the environment and the community, of which te ao Māori includes future generations.[109] This relationship with the environment, founded on ancestral connection and obligations of care, is fundamentally different from a European worldview in which the environment is property to be divided among individuals and exploited. Nonetheless, both have their place in New Zealand's environmental law regime.

2 Recognition in New Zealand legal system

The Western legal tradition remains the predominant source of law in modern New Zealand. However, recent jurisprudence recognises tikanga as a valid source of rules in New Zealand law. A detailed analysis of the legal status of tikanga is outside the scope of this paper,[110] but appropriate is an identification of the main sources of a tikanga-based obligation on the New Zealand government as it pertains to fossil fuels.

The trio of legislation regulating fossil fuel exploitation – the Resource Management Act (RMA), Exclusive Economic Zone Act (EEZ) and Crown Minerals Act (CMA)– contain largely procedural directions toward tikanga Māori. The RMA requires all persons exercising functions and powers under the Act to "have particular regard to" kaitiakitanga and "recognise and provide for" the relationship of Māori with ancestral land and other taonga as a matter of national importance.[111] The RMA and CMA require decision-makers to take into account Te Tiriti o Waitangi whilst the EEZ contains a prescriptive Treaty provision that identifies particular sections as giving effect to Treaty principles.[112] The Supreme Court recently held that Treaty clauses require broad and generous construction.[113] Under the EEZ, this involved

[109] Nichola Harcourt "Rapua ngā tohu (seeking the signs)—Indigenous knowledge-informed climate adaptation" in Miguel Sioui (ed) *Indigenous Water and Drought Management in a Changing* World (Elsevier, Amsterdam, 2022) 267 at 268-269.
[110] See for example Sarah Down and David Williams "Tikanga Māori: An integral strand of the common law of New Zealand" [2021] RMLA 19; and Joseph Williams "Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev 1.
[111] Sections 6(e) and 7(a).
[112] Resource Management Act 1990, s 8; Crown Minerals Act 1991, s 4; and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 12.
[113] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

considering tikanga-based customary rights and interests as "existing interests" and as "other applicable law" when making decisions on consents.[114]

Te Tiriti imposes obligations of partnership and active protection of taonga on the Crown.[115] In a climate context, these principles require the Crown to meaningfully engage with and consider Māori interests and tikanga in decisions that have environmental significance. The associated effects of climate change – weather pattern change, rising sea levels and pollution – threaten Māori customary land and cultural sites, which are largely coastal, and reduce the ability of iwi to live in accordance with tikanga and matauranga Māori.[116] The Crown has an obligation to actively protect these physical and cultural taonga from climate-related destruction. The Waitangi Tribunal has stated that the Crown's obligation extends to active protection of the exercise of kaitiakitanga towards the environment, as a fundamental component of te ao Māori and "inseparable from the protection of Māori culture itself."[117] Continued fossil fuel exploitation is antithetical to kaitiakitanga, irreversibly damaging the environment and future generations towards whom kaitiakitanga obligations are owed. However, within the environmental legislative framework, Te Tiriti and tikanga-based obligations are only of procedural nature. Decision-makers must consider Māori interests but the weight afforded to these interests is discretionary. The kaitiakitanga obligation to keep fossil fuels in the ground to protect future generations would be one of multiple social, cultural and economic factors balanced. However, these statutory schemes must be read within the wider legal context. Recent case law suggests that tikanga Māori may hold a more prominent role in our legal system. The Supreme Court recently recognised the constitutional significance of Te Tiriti and that its obligations cannot easily be dismissed.[118] Tikanga has been recognised as a valid source of law, operating as a value of the common law but sometimes itself "will *be* the law."[119] The exact legal status of tikanga-based obligations remains unsettled. Nonetheless, these jurisprudential developments suggest that tikanga Māori is not a mere consideration for

[114] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 113, at [154]-[155] and [169].
[115] Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2002).
[116] Manaaki Whenua Landcare Research *He huringa āhuarangi, he huringa ao: a changing climate, a changing world* (Landcare Research, Auckland, 2021) at v–vii.
[117] *Ko Aotearoa Tēnei,* above n 103*,* at 237.
[118] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 113, at [151]
[119] See *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142 at [103]; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]; *Re Edwards (on behalf of Te Whakatōhea) (No 2)* [2021] NZHC 1025 at [144]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 113, at [169].

public decision-makers to tickbox under environmental legislation. There is an obligation to meaningfully engage with tikanga-based interests and duties, which may extend to compliance in some circumstances. The fundamental duty under tikanga Māori towards future generations and to protect the environment supports a broad obligation on New Zealand government to refrain from fossil fuel extraction for the protection of future generations.

D Domestic Law

Legislation is the primary source of legal obligations on the New Zealand government. The core of New Zealand's climate change regime is the Climate Change Response Act (CCRA) and its 2019 Zero Carbon Amendment.[120] The consenting process for fossil fuels adds an additional layer of regulation consisting of the Crown Minerals Act, RMA and EEZ. Any interpretation of an obligation on the New Zealand government arising from this legislation should be informed by the international and tikanga Māori obligations canvassed above.

1 Climate Change Legislation

The Climate Change Response Act established the institutional and legal framework for New Zealand to meet its obligations under the UNFCCC.[121] Its primary mechanism for doing so is the establishment of an emissions trading scheme. The Zero Carbon Amendment Act introduced the target of net zero carbon emissions by 2050.[122] However, it also included a privative clause restricting judicial review of government emission targets to declaratory remedy only.[123] The 2050 target and emission budgets have the legal weight of permissive considerations only and are not enforceable in a court of law.[124] Section 5ZC lists a number of factors the Minister must "have regard to" when determining an emissions budget. This includes key opportunities for emissions reductions in New Zealand; scientific advice; the distribution of impacts from generation to generation; and New Zealand's international obligations. The Act also obliges the government to "take into account" the economic, social, health, environmental and cultural effects of climate change on Māori.[125] This statutory

[120] Climate Change Response Act 2002.
[121] Section 3.
[122] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5Q.
[123] Section 5ZM.
[124] Section 5ZM(1) and s 5ZN.
[125] Section 3A.

recognition of the relevance of international law, Māori interests and intergenerational equity provides an avenue for the arguments of the above sections to be imported into the legislative framework and obligations on government.

The climate regime was placed under scrutiny in *Thomson,* a judicial review challenging the government's emission targets.[126] The court found that climate policy was justiciable subject matter and, in particular, NDCs were justiciable, despite being a target set pursuant to international obligations and not under domestic legislation.[127] The court placed significant weight on New Zealand's commitments under the UNFCCC and Paris Agreement, and their commitment to urgent action based on the best available scientific knowledge.[128] This meant the government had an obligation to review emission targets upon publication of a new IPCC report, which is a mandatory consideration for climate policy.[129] Procedural obligations, such as that found in *Thomson*, are likely the extent of the enforceable obligations on government under the domestic climate regime. The CCRA's statutory bar to enforcing emissions budgets and targets significantly restricts the prospect any substantive duty, including to leave fossil fuels in the ground.

2 Crown Minerals Act

All fossil fuel exploration and exploitation require a permit issued under the Crown Minerals Act 1991. The Crown Minerals (Petroleum) Amendment Act 2018 banned new offshore oil and gas activities and restricted onshore permitting to the Taranaki region only.[130] However outside of this express obligation, the Act lacks any reference to environmental, climate or intergenerational equity issues. The Court declined to read in such considerations in the recent *Students for Climate Solutions* judicial review, strongly rejecting any environmental potential of the Act.[131] Decisions under s 25 to issue fossil fuel permits must be consistent with the purpose of the Act, which is to promote mining.[132] This purpose and the wider statutory framework meant that climate change, including emissions targets and New Zealand's international obligations, were irrelevant considerations decision-makers could not take into

[126] *Thomson v Minister for Climate Change* [2017] NZHC 733, [2018] 2 NZLR 160.
[127] At [133] - [134].
[128] At [91].
[129] At [94].
[130] Section 23A
[131] *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116.
[132] At [115].

account.[133] The court's treatment of the CMA as a purely "economic" Act, disregarding any environmental relevance, is arguably an outdated perspective in light of the present scientific understanding, the state of the climate, and the government's declaration of climate emergency.[134] Whilst not necessarily reflecting judicial dismissal of climate concerns,[135] this case does reinforce an orthodox and conservative approach towards climate change, leaving substantive issues to Parliament and limiting the courts to questions of lawfulness and process.[136]

3 Resource Management Act

The RMA regulates the management of natural and physical resources in New Zealand, including consent for fossil fuel mining.[137] The purpose of the Act is "to promote the sustainable management of natural and physical resources" which includes sustaining the potential of the environment "to meet the reasonably foreseeable needs of future generations."[138] Persons carrying out powers under the Act must "have particular regard to" matters including kaitiakitanga; the ethic of stewardship (being a responsibility of guardianship for the future); the efficiency of the end use of energy; the effects of climate change; and the benefits derived from development and use of renewable energy.[139] The implications of these factors has been discussed in preceding sections – kaitiakitanga and intergenerational equity imposing an obligation to protect the environment for future generations, and the 'effects of climate change' posing an urgent and foreseeable threat to human rights. Due regard to these considerations and the Act's purpose of sustainable management strongly supports a duty to keep fossil fuels in the ground. However, to date this duty has been obviated by s 104E which expressly precludes consent authorities from considering the effects of GHG emissions on climate change when assessing consent applications.[140] Accordingly, previous decision-makers have approved fossil fuel projects on the logic that no consideration can be made of downstream emissions.[141] An amendment coming into force in November will repeal this

[133] At [62].
[134] Discussed in section E.
[135] In fact, see [114].
[136] At [74], [79] and [115].
[137] Resource Management Act 1990.
[138] Section 5.
[139] Section 7.
[140] Section 104E
[141] See *West Coast ENT Inc v Buller Coal Limited* [2013] NZSC 87, [2014] 1 NZLR 32.

statutory bar, allowing consent authorities and regional councils to have regard to the climate effects of GHG emissions.[142] This amendment aligns the RMA with the CCRA, particularly its provision that any decision-maker may take into account emissions budgets, targets and reduction plans.[143] The RMA's purpose, relevant considerations and Te Tiriti provision have created the latent potential for a duty to keep fossil fuels in the ground. The imminent removal of the statutory bar to considering climate effects in consent applications unleashes this potential and allows it to be directed at fossil fuel applications and projects.

4 Tort Law

Other authors have comprehensively analysed the potential of tort law and litigation in New Zealand to enforce climate obligations.[144] The weight of the opinion is that tort law is unlikely to impose a substantive obligation on the government to take mitigation action. The recent Australian *Sharma* judgment reinforced this conclusion, unanimously overturning a decision that the government owed Australian children a novel duty of care to avoid causing climate-related harm when deciding whether to approve the expansion of a coal mine.[145] The court emphasised the inappropriateness of tort law in the political context of climate policy and the conceptual difficulty of imposing a duty of care in circumstances where breach, causation and damage are yet to arise and there lacks a direct relationship between the Minister, the harm arising from climate change and children as the victims. This issue is subject to imminent determination in New Zealand, with the pending Supreme judgment of *Smith v Fonterra*.[146]

5 Conclusion

It is beyond doubt that to meet New Zealand's emissions targets and international obligations, fossil fuel extraction must stop. However, the above discussion shows it is equally true that there is no enforceable domestic legal obligation to do so, nor even to achieve emission targets.

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[142] Resource Management Amendment Act 2020, ss 19, 20, 35 and 36.
[143] Section 5ZN.
[144] See generally Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper presented to Asia Pacific Judicial Colloquium, Singapore, May 2019); Caroline Foster "Climate Change Litigation in New Zealand" in Franceso Sindico and Makane Moïse Mbengue (eds) *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer Nature, Switzerland, 2021) 225; and Pooja Upadhyay "Climate Claimants: The Prospects of Suing the New Zealand Government for Climate Change Inaction" (2019) 23 NZJ Envtl L 187.
[145] *Minister for the Environment v Sharma* [2022] FCAFC 35.
[146] *Smith v Fonterra* [2022] NZSC 35.

This legal lacuna must be addressed if our international and domestic commitments are to be taken seriously. *Thomson* demonstrated that the courts are willing to be involved and find legal obligations on the government to address climate change. The recent *Students for Climate Change* decision reflected a more reserved judicial attitude, emphasising that the lead should be taken from Parliament. It is hoped that the upcoming RMA amendment will provide the opportunity and impetus for such climate action and enforcement of a duty to keep fossil fuels in the ground.

E Public Law: Declaration of Climate Emergency

In 2020, the New Zealand Government joined 38 other countries to declare a "climate emergency".[147] These declarations are a strong political stance; recognising the comprehensive scientific evidence, the severity of global climate change, and acknowledging the responsibility of governments to act in response. Less clear is the legal effect of these declarations. Declarations of climate emergency occupy an ambiguous place between constitutional measure and mere political rhetoric.[148]

The New Zealand government's declaration of a climate emergency both procedurally and substantively diverges from the declaration of a state of emergency in law. It was issued as a motion in the House rather than by the executive under emergency legislation.[149] The declaration was accompanied by policy statements but none of the measures typically associated with an emergency response like evacuations or emergency legislation. However, the non-conformity of the declaration of climate emergency with procedural frameworks does not necessarily negate its public law tenor. Public law scholars have described climate change as a 'legally disruptive phenomenon' because it challenges legal concepts, doctrines and assumptions.[150] Climate emergency declarations are one site of such legal disruption. They do not conform with the orthodox legal understanding of a state of emergency, being a temporary departure from normal governance and exercise of exceptional measures to counteract an existential threat.[151] Yet at the same time, climate change conforms to the essential requirement

[147] (2 December 2020) 749 NZPD (Declaration of Climate Emergency – Motion, Jacinda Arden).
[148] Jocelyn Stacey "The Public Law Paradoxes of Climate Emergency Declarations" (2022) 11(2) TEL 291 at 291
[149] See Civil Defence Emergency Management Act 2002, s 73.
[150] Elizabeth Fisher, Eloise Scotford and Emily Barritt "The Legally Disruptive Nature of Climate Change" (2017) 80(2) MLR 173 at 174.
[151] Stacey, above n 149, at 298–299. .

of emergency government, being an urgent threat that requires drastic measures to counteract. There is scientific consensus that "clearly and unequivocally[,] planet Earth is facing a climate emergency."[152] The world is precariously close to climate thresholds beyond which abrupt, unpredictable and catastrophic change will occur.[153] Urgent action is required to counteract this threat, including drastic reductions in emissions and a radical shift in commercial and social behaviours including transport, land-use, production and consumer cycles.[154] The major and urgent upheaval of extant norms necessary to prevent climate disaster may require the use of centralised emergency state powers.

Understanding the climate emergency as a legitimate form of emergency government means that New Zealand's declaration should be considered a quasi-legal measure that imposes some form of emergency conduct or state, though not at the level of a mandated state of emergency. At minimum, this involves the climate emergency being a "lens" through which the law and its operation is considered. Examples may include whether decision-makers decide to take into account the emissions budget,[155] or the weighting of factors under environmental statutes. The declaration of a climate emergency also legitimizes more extreme measures such as a total ban on fossil fuel extraction that might overwise be counterweighed by economic or political objection. Ultimately, the declaration of a climate emergency strengthens the obligations outlined in sections a–d which, synergistically, reinforce the legitimacy of operating as a state of emergency.

III Conclusion

There is no express legally binding duty the New Zealand government owes to future generations to keep fossil fuels in the ground that can be identified from domestic or international sources. However, these legal regimes do not exist in isolation and therefore a "reductionist" perspective does not provide the final answer.[156] To focus solely on domestic

[152] William Ripple and others "World Scientists' Warning of a Climate Emergency" (2020) 70(1) Bioscience 8 at 8.
[153] See David Armstrong McKay "1.5°C global warming could trigger multiple climate tipping points" (2022) 377 Science 6611; Johan Rockstrom and others "Planetary Boundaries: Exploring the Safe Operating Space for Humanity" (2009) 14(2) Ecology and Society 32; and David Spratt and Philip Sutton *Climate Code Red: The Case for Emergency Action* (Scribe Publications, Melbourne, 2008) at 4.
[154] Bruce Lindsay "Climate of Exception: What Might a Climate Emergency Mean in Law?" (2010) 38 FLR 255 at 260.
[155] As empowered under the Climate Change Response Act, s 5ZN.
[156] Van Asselt, above n 14, at 5.

or environmental law fails to recognise the relevance of tikanga, human rights, international principles and public law that also define climate action and State conduct. When interpreted with an evolutionary lens, the principles and legal obligations found in various sources do impose a duty on the New Zealand government to keep fossil fuels in the ground. With increased climate litigation and indications of judicial responsiveness to climate issues,[157] a court may be prepared to read together the strands of international law, human rights law, domestic statute and tikanga Māori to find a broad duty on the government to keep fossil fuels in the ground, or at least inform domestic obligations to find it unreasonable not to. It would take a brave court to make such a decision given New Zealand's constitutional climate, therefore the focus should be on other legal areas to strengthen this duty. It is proposed that tikanga Māori has the most potential as an area of legal development. Tikanga inherently contemplates obligations to future generations and long-term perspectives in environmental management. The te ao Māori view of the natural world as interconnected and interdependent can address the multi-faceted nature of climate change as an environmental, social, economic, cultural and health issue. Kaitiakitanga obligations strongly support a duty to keep fossil fuels in the ground. The obligation to uphold kaitiakitanga and protect Māori culture is already imposed on the government through domestic legislation and Te Tiriti. Further, there is significant development and strengthening of tikanga as a body of law currently occurring, independent of the climate context.[158] These developments can be harnessed to strengthen climate obligations on the government without significant legal disruption and or requiring law reform purely premised on climate concerns. It is imperative that the duty to keep fossil fuels in the ground be strengthened and complied with - for the sake of future generations and our future planet.

[157] *Thomson v Minister for Climate Change*, above n 127, at [133]–[134].
[158] Discussed in section C.

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