

CLIMATE CRISIS AS A CATALYST TO ADVANCE INDIGENOUS RIGHTS

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Abstract

Climate change is the most grievous threat of the 21st century and disproportionately affects politically marginalised communities such as Indigenous peoples. As custodians of approximately 80% of the planet's biodiversity, Indigenous cultures have practised sustainable management of ecosystems and resources over millennia providing vital pathways for humanity to better mitigate accelerating climate change impacts. This article argues that a rights-based approach is an important legal avenue to help better protect and advance Indigenous peoples' rights and the biodiversity in their regions. The challenge is to develop a framework that incorporates Indigenous rights into international human rights law while obtaining judicial buy-in by domestic legal systems and nations. Drawing from international legal instruments to better protect and bolster Indigenous rights, and using Aotearoa New Zealand as a case study, this paper identifies how rights of Indigenous communities can be enhanced while serving the global goals of climate change mitigation and adaptation.

Keywords

Aotearoa New Zealand, climate change, human rights, Indigenous rights, Māori

Introduction

Climate change is widely regarded as the most grievous existential threat of the 21st century. If humanity is unable to curb carbon, nitrous oxide, fluorinated gases and methane emissions below requirements stipulated by the 2015 Paris Agreement—which aims to keep rising temperatures below 1.5 degrees centigrade—then the planet will experience compounding ecological catastrophes (Intergovernmental Panel on Climate Change [IPCC], 2021). This includes long-term

droughts, water shortages, intensive fires, rising sea levels, ocean acidification, extreme flooding and enhanced rates of sun-influenced cancer, as well as spread of tropical, pollen and vector-borne diseases (IPCC, 2019; Norton-Smith et al., 2016). Other impacts include ongoing power outages, rising conflicts resulting from resource scarcity, and the forced climate migration of up to 1 billion people by 2050 and 2 billion by 2100 (Geisler & Currens, 2017; International Organization for Migration, 2015).

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Climate change also disproportionately impacts socially and politically marginalised communities, despite their having lower per capita and overall greenhouse gas emissions than more privileged communities and industrialised nations (Begay & Gursoz, 2018). This includes over 370 million Indigenous people that inhabit some of the planet's most profoundly affected regions. To illustrate, Alaska and the Arctic regions, which are the home ranges of Indigenous peoples such as the Sami, Inuit, Yupik and Aleut, are experiencing twice the temperature increase the rest of the planet is (Begay & Gursoz, 2018; Hossain, 2013). As custodians of approximately 80% of the planet's biodiversity throughout their traditional territories, Indigenous cultures have practised sustainable management of ecosystems and resources over millennia, which provides vital pathways for humanity to better mitigate accelerating climate impacts (United Nations [UN] Department of Economic and Social Affairs, 2021).

The Preamble of the 2015 Paris Agreement stipulates:

Acknowledging that climate change is a common concern of humankind, 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, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity. (UN Framework Convention on Climate Change [UNFCCC], 2015, p. 1)

In this vein, a rights-based approach to climate change might provide a key legal avenue to help protect and advance Indigenous peoples' rights and the biodiversity their regions protect. The challenge is to develop an overarching framework that not only incorporates Indigenous rights into international human rights law but obtains judicial buy-in by domestic legal systems and nations worldwide (Office of the High Commissioner for Human Rights [OHCHR], 2015). This article canvasses various international legal instruments and rights mechanisms to provide Indigenous lawyers and activists with a raft of options to help bolster Indigenous rights, in particular Māori rights in Aotearoa New Zealand.

The impacts of colonisation and climate change upon Indigenous peoples

Indigenous peoples have suffered substantial impacts upon their cultural identity and sovereignty due to the impacts of colonisation. For example, the advent of institutional land grabs driving people from their land, rising pollution levels affecting hunter-gathering practices, and enforced cultural assimilation via the removal of children to western education facilities have ultimately prevented Indigenous communities from acquiring intergenerational knowledge vital to their cultural identity (Norton-Smith et al., 2016). Furthermore, the creation and enforcement of individualised property rights has chained Indigenous inhabitants to the foreign notions of wage-earning jobs, mortgages, taxes and rental fees—resulting in poverty, alcohol abuse, prison and even suicide (Pearl, 2018). Indeed, Indigenous peoples constitute an estimated 5–6% of the world's population yet represent nearly 15% of impoverished communities (Pearl, 2018). Furthermore, in Canada, Indigenous people make up 32% of imprisoned inmates (with Indigenous women constituting 48%) despite comprising just 5% of the population, and in Australia the rate is 30%, despite Aborigines comprising just 3.3% of inhabitants (Penal Reform International, 2022).

Extractive industries like mining, fracking and drilling also have a long history of displacing Indigenous communities. Extreme extractive methods have culminated in thousands of Indigenous deaths through the contamination of drinking water and food sources (Begay & Gursoz, 2018). In the case of tribes in Brazil, Colombia, Peru and the Philippines, individuals are being murdered by logging and mining companies at an average of four activists per week; these deaths demonstrate cultural and ethnic genocide almost unimpeded by national and state governments (Watts & Greenfield, 2020).

Anthropogenic climate change can be seen as an extension of colonisation, especially as neoliberal cultures prioritise finances over environmental protection, impacting otherwise sustainable Indigenous regions (Pearl, 2018). For example, a lack of legal recourse resulted in Indigenous communities being unable to prevent Chevron drilling in their home regions in Ecuador; nor were they able to stop the Dakota Access Pipeline, despite worldwide protest (Pearl, 2018).

Paradoxically, efforts to mitigate climate change also detrimentally impact Indigenous communities. Significantly, the land acquired

for forest reclamation projects to offset carbon emissions and the building of solar and wind turbine farms and hydroelectric dams is often in ecologically sensitive and Indigenous areas. Such mitigation efforts can be perceived as continuing colonisation, especially when Indigenous communities are forced to relocate (Renkins, 2019). For example, countries like China are guilty of relocating Indigenous communities without compensation to build hydroelectric projects, and the Indonesian and Malaysian governments do not even acknowledge ownership of the forests inhabited by Indigenous communities as they are transitioned to palm oil plantations (Cooke et al., 2017).

The environmental injustice of climate change will have intergenerational impacts upon the culture, identities and sovereignty of Indigenous communities worldwide (Begay & Gursoz, 2018). For example, Tuvalu, Kiribati and the Marshall Islands are projected to be among the first Pacific Island nations to become uninhabitable by rising sea levels. Forced migration makes these communities more vulnerable to discrimination, in addition to their losing the territorial basis of their statehood, despite having contributed only 0.04% of total carbon emissions (Norton-Smith et al., 2016).

Yet, it is challenging for Indigenous communities to engage in the traditional democratic process successfully given the relative inequity and political invisibility resulting from long-standing global resistance to self-determination (Hossain, 2013; Pearl, 2018). Such negative impacts upon their political status and legal rights have become systemically entrenched and have extended further into the health and economic arenas. For example, Māori in Aotearoa experience higher morbidity and mortality rates as well as lower life expectancy than non-Māori by seven years (Jones, 2019). With their household income being 78% of the national average, Māori are prone to higher rates of diabetes, cancer and respiratory and cardiovascular disease, as well as worsened access to quality health care (Jones et al., 2014). Māori are also more likely to work outdoors, resulting in enhanced skin cancer rates and impacts from heat and air pollution (Jones, 2019). Furthermore, sea-level rise threatens papakāinga and urupā. Important traditional resources such as kaimoana are at increasing risk of contamination due to ocean pollution and acidification (Awatere et al., 2021; Bailey-Winiata, 2021; Te Aho, 2020). Pollen-induced respiratory diseases and allergies are also heightened by climate change, with wetter

weather causing higher levels of household mould (Jones, 2019).

These dire health statistics are but one of over 20 socioeconomic indicators of inequity, which also include disproportionate incarceration rates: over 50% of male prison occupants are Māori, and the percentage is even higher for female prisoners (62%), despite Māori constituting only 16.7% of the population (Department of Corrections, 2021). Until recently, prisoners were prevented from participating in the political voting process in New Zealand, further silencing the Indigenous voice. Recent political activism has led to voting rights being granted to those serving sentences under three years (Department of Corrections, 2021).

Indigenous approaches to climate action

The sustainable management of ecosystems practised by Indigenous cultures provides vital pathways for humanity to better navigate mitigation measures to curb climate impacts. For example, Brazilian forests managed by Indigenous tribes have shown 27 times lower emissions compared with regions outside their protected areas (International Labour Organization [ILO], 2016). In Myanmar, the forest is directly tied to the lives of individuals. Indigenous women attach the umbilical cord of their baby to a bamboo stick in a tree, which is never to be cut down. If the tree is logged, the action is believed to threaten the life of the person (Knapman & Leth, 2020). Incorporating Indigenous voices such as this into climate discussions, policy and legal actions can enhance protection for vulnerable areas and communities. This can also mitigate food insecurity, as shown by Peruvian Indigenous communities tripling the cross-pollination of potatoes to over 650 native species following an Indigenous conference sharing planting and cross-breeding techniques, despite the challenges of climate change (Swiderska, 2020).

Forest biodiversity creates significant economic value estimated at US\$150 trillion in the form of carbon storage, food provisioning, and air and water filtration, which is approximately twice the planet's total gross domestic product (World Economic Forum, 2020). The decline in ecosystem functionality equates to US\$5 trillion annually in the form of lost natural ecosystem services. Additionally, US\$44 trillion of economic value generation is highly or moderately dependent on nature (World Economic Forum, 2020). Given that Indigenous territories house up to 80% of the planet's biodiversity, and such regions are vital carbon sinks, Indigenous peoples' sovereignty over

these lands must be protected (Begay & Gursoz, 2018). This is particularly important as Indigenous communities know which trees to replant to promote vital regrowth, especially in areas impacted by private agricultural, transport, forestry and mining industries (Norton-Smith et al., 2016).

There is therefore an urgent need for the immediate insertion of Indigenous worldviews into environmental policy and for tribal sovereignty and self-determination to be supported in all future climate change initiatives—especially where relocation is involved (Norton-Smith et al., 2016). This will necessitate the use of the international legal instruments and rights mechanisms to enhance the rights of Indigenous communities and amplify their voice in governmental policy and judicial decision-making. The international legal instruments we review below can be useful in achieving these goals.

International legal instruments to help enhance Indigenous rights

UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is an important legal instrument on offer for Indigenous communities. Passed by the UN General Assembly in 2007, it addresses the lack of legal protection for Indigenous rights worldwide (UN General Assembly, 2007). The Preamble underlines the concern regarding the impact that colonisation has had on Indigenous communities, in particular the destruction and dispossession of their territories (Charters, 2006). Relevant to our purposes here, Article 26 states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. (UN General Assembly, 2007, p. 10)

Briefly, UNDRIP provides a framework of minimum standards for the well-being and dignity of

Indigenous communities globally. It addresses cultural rights, identity, language, health, education and employment, as well as promoting Indigenous peoples' full and effective participation in all matters that concern them. Discrimination is deemed unlawful, and UNDRIP encourages cooperation and harmonious relations between Indigenous peoples and governments. Finally, it affirms Indigenous peoples' individual and collective rights to remain distinct and pursue their own economic, social and cultural priorities (Pearl, 2018).

Indigenous rights under Article 3 also include an entitlement to self-determination, which extends to addressing issues related to climate change and thus necessitates meaningful political engagement, especially if government actions impact upon the right to health as stipulated by Article 18 (Jones et al., 2014). This implies that tribes, such as Māori iwi, would need to be consulted on all aspects related to climate change, including agricultural, transport and fossil fuel policy, as well as the Emissions Trading Scheme (Jones et al., 2014). This is important when recognising that Māori spend 7% more than non-Māori on household electricity bills and 12% more on transport fuels, which is projected to rise further under the new Emissions Trading Scheme (Ministry for the Environment, 2008).

Globally, the recognition of UNDRIP in domestic legal systems remains inadequate despite the emergence of some legal movements acknowledging the need for reform (Tsosie, 2013). Within the United States, for example, Indigenous peoples are grouped into Native American tribes, Alaska Native peoples and Native Hawaiians, yet only Native American and Alaskan Natives are federally recognised and can thus exercise a certain level of sovereign control to develop laws within their reservations (Tsosie, 2013). Given that climate change effects stem from actions outside their sovereign boundaries, placing Indigenous rights within the wider ambit of international human rights is necessary. This is especially important for Indigenous tribes whose sovereignty is not formally recognised, such as Native Hawaiians (Tsosie, 2013).

New Zealand was one of four countries that initially refused to recognise UNDRIP in 2007, together with Australia, the United States and Canada, as it was deemed inconsistent with the principles and workings of the Treaty of Waitangi under Helen Clark's Labour-led government (O'Sullivan, 2021). Te Tiriti o Waitangi, signed in 1840 by Māori chiefs and the British Crown, is

New Zealand's founding document and it has both an English and a te reo Māori version. The Māori language version, signed by the Māori chiefs, granted the British Crown a strictly limited governing authority over their own subjects and promised that Māori would secure continuing sovereignty over their whenua and taonga. It also conferred the rights of British citizens onto Māori. Given the limited legal status of the Treaty, the empowerment of Māori rights is largely subject to the political whims of the government in power. The initially dismissive view of UNDRIP by the Helen Clark government was upended by the coalition partnership between the National Party and Māori Party in 2010, when the Māori Party leader Dr Pita Sharples pushed for and succeeded in securing its formal recognition. However, given that UNDRIP is a declaration, and not a binding convention, Prime Minister John Key of the National Party stipulated that its requirements were "purely aspirational" and would be implemented only within the current legal and constitutional frameworks of New Zealand (MacKay, 2014, p. 78).

Some academics see the "aspirational argument" as disingenuous, especially given that UNDRIP was passed by the UN General Assembly with strong language obliging states to uphold these rights (Charters et al. 2019, p. iii). Furthermore, participating nations spent over 20 years negotiating and drafting these rights into one transparent and formalised instrument. Such nations would never have invested this time if it was only going to be perceived as purely aspirational (Charters & Stavenhagen, 2009; Gunn, 2013; Xanthaki, 2009).

John Key's statement underpins the main debate regarding the utility of UNDRIP, which is whether its non-binding status is advantageous to the empowerment of Indigenous rights or detrimental due to the varying levels of commitment displayed by endorsing states. Some academics perceive UNDRIP as ultimately ineffective because key Indigenous rights are rigorously qualified and thus made subservient to state sovereignty (Hampton, 2020). For example, the Declaration's mandate to accumulate evidence of injustices against Indigenous communities and provide non-binding recommendations to states, via the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the UN Permanent Forum on Indigenous Issues, can be wholly ignored by government authorities (Hampton, 2020). Furthermore, the cumbersome paperwork submissions required under this process, as well as the exorbitant financial cost for Indigenous delegates

to participate in person at hearings, potentially limit its global impact.

There is, however, a funding organisation called the UN Voluntary Fund for Indigenous Populations which offers grants to support tribes to participate in the annual hearings in Geneva and New York (OHCHR, n.d.a.). Furthermore, the UN Special Rapporteur on the Rights of Indigenous Peoples can also investigate complaints of rights breaches (OHCHR, n.d.b.). These breaches have occurred twice in New Zealand (Adcock, 2013; Charters & Stavenhagen, 2009; Johnstone, 2011). The first was the visit by Roldofo Stavenhagen in 2005 to assess the breach of custodial Māori rights with Helen Clark's Labour government's passing of the Foreshore and Seabed Act 2004. Stavenhagen's successor, James Anaya, also visited in 2010 to point out continuing inequalities between Māori and non-Māori.

Nine years after New Zealand endorsed UNDRIP, a government action plan to assess Aotearoa's progress towards its implementation was instigated (Te Aho, 2020). A delegation from EMRIP visited New Zealand to establish a technical working group and produced He Puapua, a report stating that "Aotearoa has reached a maturity where it is ready to undertake the transformation necessary to restructure governance to realize rangatiratanga Māori" (Charters et al., 2019, p. iii).

He Puapua advocates the entrenchment of the seven Māori electoral seats and that only Māori can ever determine their holders (Charters et al., 2019). It also recommends the formation of an Upper House in Parliament, which would scrutinise legislation for compliance with Te Tiriti o Waitangi, and the making of Waitangi Tribunal decisions binding rather than recommendatory. Mirroring UN processes, He Puapua also recommends appointing a Treaty rights commissioner and establishing an Indigenous court, as well as requiring adequate Māori representation on the Climate Change Commission and other resource bodies such as fisheries and the Resource Management Act, which is in the process of being reformed. He Puapua stipulates greater participation of Māori co-governance in the areas of water policy, corrections and health—the latter already completed. With regard to Māori freehold land, there is a recommendation of freedom from council rates enjoyed by conservation and university estates, and the reception of royalties for certain resources such as petroleum, water and minerals. Finally, the recommendations also include the compulsory teaching of te reo Māori

in schools (Charters et al., 2019). Notably, Prime Minister Jacinda Ardern has already ruled out the report's proposal for another, Māori-based tier of Parliament (Moir, 2021).

He Puapua will now form the basis of a new proposal for the wider New Zealand public to have their say on the direction Aotearoa takes regarding Māori rights. A final document would then be brought before Cabinet outlining next steps for incorporating an Indigenous worldview into governmental policy and practice. It is especially important for Māori lawyers and academics to contribute to this proposal to outline final recommendations that not only are realistic for the nation as a whole but also ensure systemic inequities faced by Māoridom are adequately addressed. All recommendations must also be grounded in international law to help establish sound government policy and justified application by the domestic judiciary. Below we note other international legal instruments that can be built upon the declaratory workings of UNDRIP.

Universal Declaration of Human Rights

Article 2 of the Universal Declaration of Human Rights (UDHR) stipulates that the notion of human rights belongs to each and every person “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (UN General Assembly, 1948, p. 2). This overarching principle is ushered in by Article 28 of the Declaration, which states “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (UN General Assembly, 1948, p. 8). Such rights are also extended to provide the community with the underlying duty to allow for the free and full development of everyone's personalities, thus opening up these protections to all cultures and credos (McFarland, 2015).

Eleanor Roosevelt's vision for the UDHR was for it to be a covenant and thus binding to all who ratified it; however, irreconcilable cultural differences between key wartime nations meant it ended up as simply a declaration of guiding ideals. The process of transforming the UDHR into international law has been notoriously slow, initially due to the Cold War and the fact that many new nations that had joined the UN after independence from their colonial rulers went on to become dictatorships that portrayed little respect for human rights as they attempted to develop their impoverished economies (McFarland, 2017).

Interestingly, Article 22 of the UDHR stipulates:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. (UN General Assembly, 1948, p. 7)

Furthermore, Article 25 provides that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family” (UN General Assembly, 1948, p. 8). These articles indicate that wealthier nations have a responsibility to help nations whose poverty dictates that they are not able to fulfil these human rights by themselves, which can extend to Indigenous communities. Such a responsibility sets the foundation for industrialised nations being required to help other countries reach their climate change mitigation and carbon emissions goals.

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

Based on the UDHR's non-binding ideals, two covenants were drawn up in 1966 to cover the different types of human rights to be included in an eventual International Bill of Human Rights. The International Covenant on Civil and Political Rights (ICCPR) covered first-generation rights, such as freedom of speech, religion and congregation, procedural fairness, and security rights such as not being subject to arbitrary arrest and discrimination, and the International Covenant on Economic, Social and Cultural Rights championed second-generation rights such as healthcare, education, welfare, and employment. Both covenants gave international legal grounds to the UDHR's non-binding ideals and eventually secured the required ratification of 35 member states in 1976 to become a part of international law. Today over 160 of the UN's member nations have ratified the covenants, although their binding authority is at question because like many UN covenants they provide for reservations, whereby a country can ratify the document but specify which articles it would like to be excluded from (McFarland, 2017). Importantly, both covenants also provide for peoples to have the right to self-determination, which was not provided under the UDHR, thus giving greater sovereign recognition to smaller, recently independent nations as well Indigenous communities throughout the world.

With regard to enforcement, the UN utilises the Human Rights Council (UNHRC) to conduct regular reviews of every member state's human rights record, as well as the International Criminal Court (ICC) at The Hague to investigate serious breaches of human rights—in particular genocidal actions by governments. With genocide and ethnic cleansing measures estimated to have killed over 170 million people in the 20th century alone, the ICC came into force in 2002, with specific criminal tribunals being created for Rwanda, Yugoslavia, Indonesia, Sierra Leone and Cambodia. As the criminal tribunals traditionally came into effect after the occurrence of the tragic events, the UN was ostensibly powerless to stop genocidal atrocities in real time (McFarland, 2015). Therefore, the UN adopted the “Responsibility to Protect” doctrine in 2005, which gave it the ability to intervene with military force as a last resort when all other diplomatic or other lesser preventative measures have been exhausted (McFarland & Zamora, 2020).

However, because individuals or groups do not have a “right of petition” to submit “human rights grievances instigated by their country's government, only countries that have ratified the conventions can bring forth allegations, and only against other countries that have also ratified them” (McFarland & Zamora, 2020, p. 27). Furthermore, the veto power of permanent members of the UN Security Council often politicises human rights atrocities and prevents the UN from intervening, as was the case in Syria where Russia's involvement on the side of the Assad regime meant it was always going to veto UN involvement, not to mention its current role in the invasion of Ukraine. These limitations lessen the overall benefit for Indigenous communities, whose quest for self-determination and protection from genocidal atrocities are often stymied by the representative powers of the ruling state's sovereignty (Hossain, 2013). Having said this, Indigenous rights are most commonly addressed under Article 27 of the ICCPR, which provides for the right for minority groups to “enjoy their own culture” (UN General Assembly, 1966, p. 14) and forms the basis of many Indigenous claims brought before the UNHRC. It must be noted that the UNHRC has never explicitly denied the right to self-determination for Indigenous peoples in any of its previous case communications.

UN Millennium Development Goals and Sustainable Development Goals

The 2030 Agenda for Sustainable Development, formerly the UN Millennium Development Goals, focuses on ending hunger and poverty, advancing health, advancing gender equality and education, and promoting the well-being of the environment (UN General Assembly, 2015). Given its pledge to leave no one behind, it called on Indigenous communities to engage actively in its implementation, follow-up and review (UN General Assembly, 2015). For example, Target 13a implements the commitment of developed countries to the UNFCCC, which provides for US\$100 billion to address the needs of developing countries in the context of meaningful mitigation actions to help operationalise the Green Climate Fund (ILO, 2016). As of July 2020, the Fund had only secured US\$10.3 billion from pledges by 49 countries (Green Climate Fund, 2020).

Furthermore, Target 13b promotes mechanisms for increasing effective climate change-related planning and management in developing countries and small-island states, with a focus on women, youth, and local and marginalised communities. Under these guiding mandates, the rights and self-determined developmental needs of Indigenous communities can be bolstered (Errico, 2017; Gilbert & Lennox, 2019). Regional entities have taken on the challenge of upholding human rights through the use of legal instruments such as the European Court of Human Rights, the Inter-American Court on Human Rights and the African Court on Human and Peoples' Rights. The remaining two regions, represented by the Arab League and the Association of Southeast Asian Nations, do not currently have judicial enforcement systems (McFarland, 2015). Many non-governmental organisations such as the Red Cross, Human Rights Watch and Amnesty International also effectively influence key governing bodies and provide help during gross human rights atrocities and environmental crises.

The 2015 Paris Agreement

The 2015 Paris Agreement specifically addresses the importance of Indigenous peoples' traditional knowledge in the context of climate change mitigation. Article 7.5 states:

Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided

by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socio-economic and environmental policies and actions, where appropriate. (UNFCCC, 2015, p. 6)

The Paris Agreement adopts a people-centred approach and recognises the adverse effects of climate change on the effective enjoyment of human rights. For example, the Preamble to the Paris Agreement calls on states when taking action to address climate change to “respect, promote and consider their respective obligations on human rights” (UNFCCC, 2015, p. 1). This makes it a useful tool for Indigenous communities to rely upon when advocating for a breach of their rights due to negative impacts on their lands or the need to relocate. Interestingly, the recent report by the Climate Change Commission in Aotearoa has linked emission targets set forth by the Paris Agreement and detailed in the Climate Change Response (Zero Carbon) Amendment Act 2019 with the Treaty of Waitangi. In particular, Recommendation 6 of the report states the government should commit to working in partnership with Māori to ensure Treaty principles are included in emissions reduction plans (Awatere et al., 2021; Climate Change Commission, 2021).

Free, prior and informed consent

Free, prior and informed consent (FPIC) is a requirement designed to lessen potential conflict by compelling consent to be obtained from Indigenous communities by governments and corporations in advance of the approval of any project affecting their territory or resources. It is not a standalone right in itself, but an expression of a wider set of human rights protections to help secure Indigenous peoples’ sovereignty. Consent must be obtained without coercion or manipulation, and all relevant, comprehensible and factual information must be supplied in sufficient time for the Indigenous group to make a fully considered decision on the proposed activity (Renkins, 2019). If the project is contrary to Indigenous desires, consent can be withheld. The principle of FPIC is most strongly asserted in UNDRIP, in particular Article 10, which focuses on the relocation of Indigenous communities from their tribal land, but it is also mentioned explicitly in Articles 11, 19, 28 and 29 (UN General Assembly, 2007). This *Indigenous consultancy* concept has also been established in other international covenants, such as the ILO Convention 169 discussed below.

UNDRIP, however, is arguably more comprehensive in upholding the participatory rights of Indigenous peoples (Renkins, 2019).

ILO Convention 169 on the Rights of Indigenous Peoples and Tribal Populations

Adopted by the UN in 1989, ILO Convention 169 is a legally binding instrument enforceable by the courts which has so far been ratified by 22 states (International Labour Office Geneva, 2013). Eighteen states that have not yet ratified ILO 169 are signatories to an older version, the ILO Convention 107; New Zealand has not ratified either version. ILO Convention 169 promotes Indigenous peoples’ rights over their land, education and health, and bestows a requirement on governments to consult with Indigenous peoples regarding measures that affect them. It also guarantees Indigenous peoples’ participation in decision-making processes. (International Labour Office Geneva, 2013). While the ILO Convention 169 does not explicitly recognise the right to self-determination and has not yet been ratified by New Zealand, it can still be utilised as a comparative example of an international legal instrument employed by other nations to help bolster Indigenous rights.

The Sendai Framework for Disaster Risk Reduction 2015–2030

The Sendai Framework for Disaster Risk Reduction 2015–2030 adopts a people-centred approach to reducing the impact of disasters that are likely to arise with climate change (UN International Strategy for Disaster Risk Reduction, 2015). Notably, the framework recognises the need for governments to engage Indigenous communities in the assessment, development and implementation of their disaster risk reduction plans—as stated in the Preamble and Priorities for Action 24(1) and 36(a)(v). The framework was endorsed by the UN General Assembly in 2015, and outlines four priorities: understanding, strengthening risk governance, investing in resilience and proactive recovery responses (UN International Strategy for Disaster Risk Reduction, 2015). It provides clear targets that can be utilised to ensure that Indigenous views are incorporated into all stages of climate change mitigation and adaptation.

UN Guiding Principles on Business and Human Rights

With growing human rights concerns with regard to global business activities, in particular the exploitation of Indigenous communities through

development projects, the UN has stipulated guiding principles to help ensure corporate initiatives are respectful and rooted in socially sustainable globalisation, and to hold the business community accountable (OHCHR, 2011; Lohorung & Rai, 2020; Rohr, 2014). Unanimously endorsed by the UNHRC in 2011, these guiding principles provided the first global standard for preventing and addressing the risk of adverse human rights impacts connected to business activities, in particular when corporate social responsibility and effective remedies for breaches are lacking (Haalboom, 2012; Rohr, 2014).

Rights of Nature approach

The Rights of Nature approach directly confronts capitalism by placing the natural environment as a living, human-like entity with legal rights like those attributed to corporations (Knaub, 2018). The idea of enhancing Nature's rights has evolved gradually, with the main focus initially being on human and subsequently Indigenous rights. Nature's rights were officially recognised in the Ecuadorian Constitution in 2008, and similar rights have also been attributed to the Gangotri and Yamunotri glaciers in India (Knaub, 2018).

The Rights of Nature approach would make people potentially liable for destroying the environment, just as they would be liable for committing a crime against a human in civil or criminal law. For example, introducing a duty to protect the environment in New Zealand tort law would be "opening up the possibility of successfully suing corporations for harm to the climate" (Hook et al., 2021, p. 195). Indeed, the idea of charging companies with "corporate manslaughter" for environmental wrongs is undoubtedly worthy of greater academic research, especially to ensure companies compensate communities affected by industrial contamination or fallout from resource extraction negligence.

As an expansion of the Rights of Nature approach, ecocide is defined as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts" (Stop Ecocide Foundation, 2021, p. 5). The lawyers framing the ecocide movement propose an amendment to the Rome Statute that underpins the workings of the ICC (Crook et al., 2018). Such green criminology initiatives require a two-thirds majority of the 123 state parties to the Rome Statute to pass, and adoption by each member state. Once passed, additional challenges arise given the ineffective

prosecution record by the ICC, and the fact that major countries such as the United States, China, India and Russia are not member states (Hesketh, 2021). Other countries' domestic judiciaries, however, have instituted similar groundbreaking initiatives. For example, in May 2021, the Dutch courts ordered Royal Dutch Shell to slash its carbon emissions or be in breach of human rights (Boffey, 2021). Recently, a court made a landmark determination that plans by Clive Palmer's company to dig Galilee mine, Australia's largest thermal coalmine in central Queensland, would infringe upon the environment and the rights of future generations due to climate change risks (Hinchliffe & Smee, 2022). In Aotearoa, Lawyers for Climate Action NZ intend to hold decision-makers to account and recently had an unsuccessful case against the Climate Change Commission (Green, 2022).

Acts of ecocide could potentially be considered genocide, and thus enforceable by the UNHRC and the ICC, if environmental destruction impacts the health and livelihood of an Indigenous community who are reliant upon the land for survival and well-being (Crook et al., 2018). Article 29(1) of UNDRIP recognises Indigenous people's right "to the conservation and protection of the environment and the productive capacity of their lands or territories and resources" (UN General Assembly, 2007, p. 11). The article also notes that states and national governments are therefore required to "establish and implement assistance programs for Indigenous peoples for such conservation and protection, without discrimination" (UN General Assembly, 2007, p. 11). The imposition of such Rights of Nature legal enforcement mechanisms is a useful way to address humanity's ongoing impact upon the environment (Knaub, 2018).

Discussion and conclusions

The above international legal instruments and rights mechanisms provide useful legal authority for Indigenous interests. Indeed, the Waitangi Tribunal and domestic judiciary in New Zealand, including the Supreme Court, have utilised UNDRIP and the aforementioned international instruments in the furtherance of their decisions (Charters, 2017; Johnstone, 2011). These affirmations have extended to parliamentary select committee statements and reports before international human rights bodies as well as through the establishment of entities to monitor New Zealand's compliance with UNDRIP (Charters, 2017). Furthermore, the soft law underpinnings

of UNDRIP can be more advantageous than binding treaties because they encourage more broader endorsement by the nations involved and force an ongoing dialogue between Indigenous communities and state officials regarding how exactly the rights should be interpreted, applied and evolved (Hampton, 2020).

However, this places the interpretations at the mercy of the current government, which may perceive any increase in Indigenous sovereignty as separatist, discriminatory and potentially racist towards non-Indigenous communities (Erueti, 2017). In such cases, it would be challenging to forward Indigenous aims with much enthusiasm, unless international human rights mechanisms such as EMRIP and the Special Rapporteur directly criticise governmental actions leading to public outcry and judicial activism. One case that has secured substantial public interest was brought by Mike Smith, Chair of the Climate Change Iwi Leaders Group, against the government for its failure to act promptly on climate change. Arguing for the rights of all Māori on behalf of the Treaty of Waitangi and New Zealand Bill of Rights Act 1990, the aim of this case is to get a declaration from the courts stipulating that the Crown will be in breach of its duties unless it reduces total emissions by half by 2030 and to zero by 2050. If successful, this use of an Indigenous rights framework can advance the public need for climate change mitigation under an otherwise unresponsive government (Awatere et al., 2021).

Unfortunately, mainstream climate change mitigation measures tend to be sought from within the paradigm of capitalist, industrial and economic systems, which promote the commodification and exploitation of the earth's natural systems. Until critical mass is achieved around alternative policies, government will be unlikely to pursue them. Nonetheless, Māori climate campaigners from the Whānau-ā-Apanui tribe in the East Cape of Aotearoa successfully spearheaded historic legislative change to stop future deep-sea oil drilling permits in 2018 (Abel, 2018). This is why the incorporation of an Indigenous worldview is critical in policy-making, alongside movements such as the School Climate Strikes which have influenced governments around the world to officially acknowledge the global climate crisis.

Given that UNDRIP recognises the rights of Indigenous peoples to their ongoing spiritual relationship with their traditional territories (Article 25) and stipulates their rights to conservation and protection of the environment (Article 29) (UN General Assembly, 2007), tribal entities should

always be actively involved in setting priorities about climate change decision-making processes, especially those affecting the health and well-being of the community. Recent scholarship showing greater connection of Māori with the natural environment provides further empirical support for this contention (Cowie et al., 2016; Lockhart et al., 2019; Tassell-Matamua et al., 2021). In Aotearoa, the rights to participate in discussions and to hold governing authorities to account when delivering mitigation and adaptation programmes are guaranteed under Te Tiriti o Waitangi, which promises Māori tino rangatiratanga—the English version does not.

Indigenous communities have shown an incredible track record of sustainable ecosystem management throughout millennia (Ellis et al., 2021). It is therefore vital for a more impactful role of Indigenous communities in decision-making and policy formulation in both the public and private sectors, especially when it comes to addressing climate change. Although we have been unable to delve into important critiques of international human rights in relation to Indigenous communities, it is worth noting that Indigenous scholars have discussed conceptual difficulties of state-centric and individualistic approaches to international human rights (Anaya, 2004; Corntassel, 2012). For example, the rights mechanisms described in this article are derived from state-centric forums unlike the inherent rights that Indigenous peoples exercise upon their lands, culture and community—responsibilities that have built up over millennia due to their long-standing relationships to their homelands and that came into existence well before the development of the state system (Corntassel, 2012). Notwithstanding these critics and issues, the various rights mechanisms and international legal instruments outlined in this article can still be utilised as a framework to better advocate for Indigenous rights and territorial protections. Having Indigenous voices at all decision-making tables is critical if our species is going to safely navigate through this century of crisis.

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Glossary

Aotearoa	Māori name for New Zealand
He Puapua	a 2019 report commissioned by the New Zealand Government to inquire upon appropriate measures to achieve the goals set out by the United Nations Declaration on the Rights of Indigenous Peoples; literally, a break—usually referring to a break in the waves
iwi	tribe
kaimoana	seafood, fisheries
papakāinga	traditional villages
taonga	resources, cultural treasure
te reo Māori	the Māori language
Te Tiriti o Waitangi	Māori version of the Treaty of Waitangi
tino rangatiratanga	sovereignty, self-determination, self-governance
urupā	burial grounds
Whānau-ā-Apanui	Māori Tribe based in the East Coast region of New Zealand
whenua	land

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