KU LEUVEN

FACULTY OF LAW AND CRIMINOLOGY

Academic year 2023 - 2024

AT THE MERCY OF THE STATE

How nature's rights can reinstall (Indigenous) commons: a Te Urewera case study

Promotor: Prof. dr. Gleider HERNÁNDEZ

Supervisor: Mevr. Evelien WAUTERS

Corrector: Prof. dr. Bert KEIRSBILCK

Master's thesis submitted by

Joanna WILS

as part of the final examination for the degree of

MASTER OF LAWS

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"Law is all about relationships, particularly how we relate to Earth and how we relate to each other."

Erin Matariki CARR, Tūhoe/Ngāti Awa[1]

[1] Research Fellow at the University of Auckland, Aotearoa New Zealand. In CARR, E. M., "The Resurgence of Māori Law", *Bioneers Talk* 2023, 18 min 57 sec, via https://www.youtube.com/watch?v=4wVFNmPvHEg (consulted for the last time on May 24th 2024). Erin Matariki CARR expressed at 13 min 44 sec that *"law is all about relationships: how do we relate to Earth and how do we relate to each other?"*. Over email, CARR refined her statement to this quote.

Abstract

This master's thesis researches the governance aspect of New Zealand's Te Urewera Act. It answers the following question: *'What does a commons evaluation of the Te Urewera Act demonstrate about Rights of Nature's (RoN) potential to contribute to the reinstatement of (Indigenous) commons?'* The research starts with a descriptive chapter, comprising an introduction to the Te Urewera Act, its historical background, the RoN movement and the commons framework, followed by a thorough legal analysis of the Act. Then, the paper determines the way in which the Te Urewera framework can be classified as a commons. Further on, Elinor OSTROM's eight design principles for sustainable commons institutions are applied to the legal framework, revealing continued state involvement. The paper explains this particular feature through the founding principles of international law, and their continued influence on the international legal framework. Building on these findings, the concluding chapter communicates the role of the RoN aspect in Te Urewera's governance structure and the general potential of RoN for the reinstatement of (Indigenous) commons. The research paper concludes with a call to consider RoN and commons together more often, especially in the context of international law.

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Lastly, I wish to thank my family and friends for their kind support and love.

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Abbreviations

CPR, common-pool resource

DOC, Department of Conservation

IACtHR, Inter-American Court of Human Rights

ICJ, International Court of Justice

IEL, International environmental law

ILO, International Labour Organisation

ITLOS, International Tribunal for the Law of the Sea

NGO, Non-governmental organisation

RoN, Rights of Nature

UDRME, Universal Declaration on the Rights of Mother Earth

UN, United Nations

UNCLOS, United Nations Convention on the Law of the Sea

UNDRIP, United Nations Declaration on the Rights of Indigenous Peoples

UNFCCC, United Nations Framework Convention on Climate Change

UNGA, United Nations General Assembly

Māori terminology[2]

Aotearoa, land of the long white cloud. This is a Māori name for the state of New Zealand.

Ewe whenua, place of origin and return, homeland.

Hapū, the most significant and basic political unit in Māori society. Related *hapū* form *iwi*.

Iwi, tribe. This is the largest social and political unit in Māori society and consists of related *hapū*.

Kaitiaki, guardians, caregivers.

Kia whakatōmuri te haere whakamua, I walk backwards into the future with my eyes fixed on my past.

Ngā Tamariki o te Kohu, Children of the Mist. This is a name that Tūhoe give themselves.

Mana, spiritual power, authority.

Mana motuhake, self-determination, separate identity, autonomy.

Mauri, life force.

Pākehā, New Zealanders of (primarily) European descent.

Rūnanga, tribal council. It is convened to discuss issues of concern to *iwi* or the community.

Tangata whenua, local people.

Te Mowai, cutting the land adrift.

Tikanga Māori, the Māori system of values, customs, rules, practices and conventions that have developed over time and which are tightly connected to their social context.

Tūhoetanga, a term that is hard to translate, referring to the identity of Tūhoe and their connection to Te Urewera.

[2] These translations do not aim to be perfectly complete, but want to guide readers who have their first encounter with the Māori language. Comprehensive translations can be found in the Māori dictionary via https://www.maoridictionary.co.nz/.

Introduction

1. Praise for communal forest management is on the rise. Last year, NASA published images showing that the forested areas in Nepal almost doubled in size in just under 25 years. These results were largely attributed to the decision to hand over forest management to local communities.[3] This year, the Guardian published an article on the forests of Mexico. More than half of these Mexican forests are under community management, and they show impressive results in terms of biodiversity, wildfires and poverty reduction.[4] In general, research finds that community forest governance has many beneficial effects.[5]

2. At the same time, relations between national governments and Indigenous populations continue to cause tensions around the globe, with issues ranging from culture to nature and land ownership. The United States of America, the Philippines and Norway are only a few countries in which tensions have arisen last year.[6] These challenges invite legal systems to search for creative solutions.

3. This research paper analyses such a creative solution: the Te Urewera Act of 2014. This Act aims to restore the relationship between New Zealand and the Indigenous Tūhoe population through reforming the governance structure over the forest of Te Urewera, the homeland of Tūhoe. The Act transformed the former national park of Te Urewera into an entity with a legal

[3] E. CASSIDY, "How Nepal Regenerates Its Forests", *NASA earth observatory* 2023, via https://earthobservatory.nasa.gov/images/150937/how-nepal-regenerated-its-forests (consulted for the last time on May 23rd 2024); K. DEEP SINGH, and B. SHARMA, "How Nepal Grew Back Its Forests", *The New York Times* 2022, via https://www.nytimes.com/2022/11/11/world/asia/nepal-reforestration-climate.html (consulted for the last time on May 23rd 2024).

[4] L. FARTHING, "Fewer wildfires, great biodiversity: what is the secret to the success of Mexico's forests?", *The Guardian* 2024, via https://www.theguardian.com/global-development/2024/may/01/fewer-wildfires-great-biodiversity-what-is-the-secret-to-the-success-of-mexicos-forests (consulted for the last time on May 23rd 2024).

[5] FOOD AND AGRICULTURE ORGANISATION OF THE UNITED NATIONS, *Forty Years of Community-Based Forestry: A review of its extent and effectiveness*, 2016, FAO Forestry Paper No. 176, via https://www.cbd.int/financial/doc/fao-communityforestry2016.pdf, 57; H. W. FISCHER, A. CHHATRE, A DUDDU, N. PRADHAN and A. AGRAWAL, "Community forest governance and synergies among carbon, biodiversity and livelihoods", *Nature Climate Change* 2023, Vol. 13, 1340-1347, via https://www.nature.com/articles/s41558-023-01863-6 (consulted for the last time on May 23rd 2024); *A contrario*: E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 23.

[6] N. BERGLUND, "State snubs Sami again, protests loom", *NewsInEnlish.no* 2023, via https://www.newsinenglish.no/2023/05/01/state-snubs-sami-again-protests-loom/ (consulted for the last time on May 23rd 2024); L. FRIEDMAN, "Biden Administration Expected to Move Ahead on a Major Oil Project in Alaska", *The New York Times* 2023, via https://www.nytimes.com/2023/03/10/climate/biden-willow-oil-alaska.html (consulted for the last time on May 23rd 2024); S. SAX, "Scramble for clean energy metals confronted by activist calls to respect Indigenous rights", *Mongabay* 2023, via https://news.mongabay.com/2023/04/scramble-for-clean-energy-minerals-confronted-by-calls-to-respect-indigenous-rights/ (consulted for the last time on May 23rd 2024).

personality of its own, inscribing itself in the wider transnational Rights of Nature (RoN) developments. It made New Zealand the world's third jurisdiction to adopt RoN in its national legislation, after Ecuador and Bolivia.[7] However, the Te Urewera Act differs fundamentally from the Ecuadorian and Bolivian legislation, as it confers rights only to one specific region. This makes New Zealand the pioneer in what has been called the 'Legal Personhood Model' (*infra*, 45).[8] This research paper takes the governance structure of this remarkable Act as its central research object.[9]

[7] Constitution of the Republic of Ecuador, 20 October 2008; Ley de Derechos de la Madre Tierra (Bolivian Mother Earth Rights Law), No. 071, 21 December 2010; Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien (Bolivian Mother Earth Framework Law) , No. 300, 15 October 2012.
[8] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 141.
[9] Some of the most interesting observations on Te Urewera's governance system can be found in M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 74-87.

I. Research design

1. Research question

4. Researchers on RoN such as Mihnea TĂNĂSESCU have already drawn attention to the prevalent governance aspect of the Te Urewera Act.[10] More generally, the literature on RoN seems to move away from purely rights-based thinking, focussing rather on matters of environmental governance and responsibilities.[11] This paper wishes to go one step further by conducting a thorough analysis of the Te Urewera governance model from a commons perspective.[12] The reason for this commons analysis is twofold.

5. Firstly, this analysis relies on the preliminary finding that the Te Urewera Act shares similarities with the economic concept of the 'commons'. The Te Urewera Act and commons institutions both think beyond private and public ownership. Both of them challenge the dichotomy between the state and the market, and propose a different framework (*infra*, 23 and 49). Moreover, Te Urewera's management plan 'Te Kawa' indicates a reconnection with the past. The document speaks of *"unlearning"* and *"relearning"*.[13] In this way, it expresses the ambition to return to a former way of governance by Tūhoe, which existed without notions of public or private property.[14] Moreover, under the influence of political scientist Elinor OSTROM, commons have become intertwined with questions of self-governance.[15]

[10] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 87.
[11] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 50 and 65-67.
[12] This 'commons perspective' refers to an economic mode of analysis based on criteria of successful commons governance. These criteria were found in the literature, and more specifically in Elinor OSTROM's work.
[13] Te Kawa o Te Urewera, 2017, 8, consultable via https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera (consulted for the last time on May 23rd 2024).
[14] B. WOOLFORD ROA, "The long dark cloud of racial inequality and historiographical omissions: the New Zealand Native Land Court", *MAI Journal: A New Zealand Journal of Indigenous Scholarship* 2012, Vol. 1, (3) 4. Specific information on the way in which resource use was organised in Te Urewera before the arrival of Europeans can be found in Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1, 112-115. In areas where the needs of many converged, the priority was to ensure that everyone had access and that relations remained amicable.
[15] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 34.

6. Secondly, the literature on commons is searching for *"an architecture of law and policy that can support [them]"*.[16] Commons currently do not correspond to a legal concept, and therefore largely lack protection under legal frameworks.[17] Commons scholars Burns WESTON and David BOLLIER suggest that the state carves out *"open spaces"* for commons to flourish,[18] international law professor Olivier DE SCHUTTER emphasises the need for a *"constitutional framework"*.[19] In the context of Indigenous peoples, the literature has stressed the importance of reinstalling commons in a way that respects the traditions and organisational principles of the peoples involved.[20] All of these concerns make it particularly relevant to evaluate the role of RoN in the Te Urewera Act. Through employing a theoretical framework from the commons literature, this research evaluates the added value of RoN frameworks for attempts to restore or instate commons.

7. This paper envisions to answer the following question: *'What does a commons evaluation of the Te Urewera Act demonstrate about RoN's potential to contribute to the reinstatement of (Indigenous) commons?*' This question can be broken down into several sub-questions, which are addressed in turn: (1) What makes the Te Urewera Act so unique and in what context was it enacted? (2) In what constitutive ways (if any) does the governance system installed by the Te Urewera Act resemble a classic commons? (3) Which characteristics of long-enduring commons can be found in Te Urewera? (4) How can possible deviations be explained? (5) Can these deviations be overcome? (6) How does the RoN framework support or complicate a commons logic? These six questions aim to respectively describe, categorise, evaluate, explain, describe and theorise.

8. This paper evaluates the governance system under the Te Urewera Act through commons criteria. It takes into account Te Urewera's history of colonisation and public enclosure, which made the region a source of conflict between the Crown and Tūhoe. Leaning on this contextualisation and the history of international law, this paper tries to explain the special

[16] B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 179.
[17] U. MATTEI and A. QUARTA "Principles of Legal Commoning", *Revue juridique de l'environnement* 2017, Vol. 49, No. 1, (67) 69 and 80. The (lack of) protection under the international legal framework will be addressed below (*infra*, 156).
[18] B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 228.
[19] O. DE SCHUTTER, 'From Eroding to Enabling the Commons: The Dual Movement in International Law' in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (231) 254-255.
[20] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 153.

features of the Te Urewera Act. Then, more generally, it communicates the role that RoN can play for the reinstatement of (Indigenous) commons. In other words, the case study of Te Urewera constitutes the basis for a more general conclusion on the potential of RoN in the reinstatement of commons, and more specifically in a context of governance struggles between Indigenous peoples and states. In doing so, this research paper adds information to the figurative 'institutional toolbox' of historian Tine DE MOOR (*infra*, 55), in which different institutional arrangements are collected that all fit different resources, conditions and locations.[21]

9. This research question relies on a case study, as the variety of RoN initiatives is so diverse (*infra*, 39) that it is difficult to draw general conclusions.[22] Nevertheless, as shown in the wording of the question, the relevance of this paper goes beyond the case of Te Urewera. Through confronting a RoN implementation with a commons framework, this paper not only adds to the literature on the Te Urewera Act, but more generally, to the literature on RoN and commons. Apart from minor references and suggestions, the literature on RoN and the literature on commons remain fairly separate.[23] This research paper attempts to bridge that gap.

2. Method

10. This master's thesis conducts a qualitative study on the Te Urewera Act in New Zealand. It focuses on the governance aspects that are enclosed in the legal framework and approaches them from a commons perspective. To achieve this, the research consists of descriptive, categorising, evaluative, explanatory and theorising chapters.

11. This research paper starts with a descriptive chapter (II). First, the Te Urewera Act is briefly introduced, after which the historical background of the Te Urewera region and its Tūhoe

[21] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011*, Vol. 19, (422) 431.
[22] M. PETEL, "The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature", *Transnational Environmental Law*, 2024, (1) 23.
[23] Most of the sources that were found while researching this paper are either focused on commons or on RoN. Very little sources elaborate on a possible coexistence or cross-pollination between commons and RoN. However, there are some sources which make brief crossovers. Maria Rosaria MARELLA suggested turning the object of commons into a subject in M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 81. Ugo MATTEI briefly ventures the question when he suggests *"subjectivity"* for *"larger living communities that include humans and non-humans"* in his chapter U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 229. In M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 140-141, Mihnea TĂNĂSESCU suggests that commoners, amongst others, may be allies for RoN proponents. Burns WESTON and David BOLLIER suggest a commons perspective as an alternative to intergenerational rights or RoN in B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 76. None of these texts engage with the idea in a thorough or systematic manner.

people is outlined. This section covers the period of colonisation, the creation of the Te Urewera national park and the political realisation of the Te Urewera Act in 2014. As will become clear (*infra*, 28), the region was particularly affected by Crown policies on land ownership. Since this paper is mainly concerned with land governance, this historical section focuses on the status of the land of Te Urewera, rather than trying to offer a general overview of the early influence of common law in New Zealand.[24] This historical description heavily relies on the findings of the Waitangi Tribunal[25], complemented by secondary literature.

12. In the next section, the RoN movement is introduced. This section draws attention to the variety in RoN philosophy, implementations and legal foundations, and draws from secondary literature. Then follows a historical and economic introduction to 'commons'. This introduction relies on basic insights found in economic literature and evokes both pioneering authors and critique from contemporary scholars. Once the research reaches the legal analysis of the Te Urewera Act itself in the last part of the descriptive chapter, it detaches itself from the secondary literature. This last part follows the structure of the Act, highlighting aspects that are relevant from a commons perspective and complementing that information with relevant passages from the Te Urewera management plan Te Kawa.

13. After the descriptive chapter follows the categorising chapter (III) which draws on the economic concepts of 'commons' and 'common-pool resources'. Following the example of OSTROM, this paper defines 'commons' in their wide sense as a governance institution that brings together a common-pool resource, a community and the practice of commoning. This chapter explains these elements and determines to what extent the Te Urewera governance structure corresponds to it. All of this is to establish the way in which the Te Urewera Act and its Te Kawa can be classified under the conceptual framework of commons. Similarities and differences between traditional commons and Te Urewera are highlighted while paying attention to the RoN aspect and Te Urewera's political and historical context of enclosure.

14. In an evaluative chapter (IV) the Te Urewera Act is discussed in the light of OSTROM's design principles. OSTROM found these criteria through observing successful commons institutions (*infra*, 51). They allow to evaluate the long term commons potential of a governance

[24] Readers interested in the relationship between the legal system of the state and Indigenous *tikanga* can find more information on it in N. COATES, "The Recognition of Tikanga in the Common Law of New Zealand", *New Zealand Law Review* 2015, Vol. 1, 1-34.
[25] The Waitangi Tribunal functions as a commission of inquiry. Its creation and work is explained below (*infra*, 35).

institution and therefore fit the aim of this research project to evaluate the potential of a RoN implementation. The criteria will be elaborated on below (*infra*, 95), but can already briefly be introduced. They are (1) clearly defined boundaries, (2) congruence between appropriation and provision rules and local conditions, (3) collective-choice arrangements, (4) monitoring, (5) graduated sanctions, (6) conflict-resolution mechanisms, (7) minimal recognition of rights to organise, and for common-pool resources that are part of larger systems: (8) nested enterprises.

15. In this evaluation exercise, attention is paid to the role of RoN. As some of the criteria are rather encompassing and since fieldwork was impossible, these principles primarily function as points of reference to scrutinise the implementation of RoN in Te Urewera. Further operationalisation of the criteria is also part of the research itself, as it partly depends on the findings of previous chapters. OSTROM's extensive explanations of the criteria are important guidance. The evaluation through these criteria is made very explicitly, in a transparent and thoroughly motivated manner. To close the evaluative chapter, this paper highlights the deviating, remarkable characteristics of the Te Urewera governance system seen from a commons perspective. It turns out that these deviations could largely be traced back to continued state involvement.

16. The intention of the following chapter (V) is to explain these deviations. To do this thoroughly, the chapter does not only address Te Urewera's history of enclosure but mostly the role of international law. To describe the relation between international law and commons, this explanatory chapter turns to critical theory on international law, relying specifically on a doctoral thesis on commons in international law by jurist Samuel COGOLATI,[26] and the articles that legal scholars Usha NATARAJAN and Julia DEHM have compiled on nature in international law.[27] This chapter both contextualises the initial enclosure of Te Urewera within international law and elaborates on the state of international (environmental) law at the time of the adoption of the Te Urewera Act.

17. Then, these findings about international law are confronted with new developments. The next chapter (VI) describes the place of commons and RoN in international law, to assess whether the current international framework can be used to strengthen commons institutions and RoN. Existing initiatives that try to make international law more accommodating for

[26] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 317 p.
[27] U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, 392 p.

commons and RoN are examined. This analysis comes to the conclusion that neither concepts have a strong position, after which a call is made to bridge the gap between the separate bottom-up advocacy movements.

18. Building on all these findings, the last chapter (VII) theorises on the potential of RoN to reinstate commons governance. It brings the previous findings together and assesses the potential of RoN to install commons and restore the governance of Indigenous peoples over lands that have been enclosed. This section lists the ways in which the Te Urewera Act has achieved changes in governance that lean towards commons governance, despite the international legal framework under which it exists. The following section then points towards the risks of employing the Legal Personhood Model of RoN to reinstall commons, as illustrated by the Te Urewera Act. To do this, the theory on commons and the findings on the Te Urewera analysis are brought together. Here, the central research question is fully answered.

19. As mentioned, this research wants to take into account the historical and political context of Te Urewera. This requires a minimal understanding of Indigenous thinking. As it was not possible to extensively interview the Indigenous Tūhoe population of Te Urewera, this paper relies on primary sources such as the management plan or secondary literature that is directly based on conversations with Tūhoe.[28] This offers a glimpse of insight into the matter, but a full internal perspective is not acquired. As not all the rules on governance and decision-making can be found in written sources, Tūhoe scholar Erin Matariki CARR was contacted. She was so kind to answer questions on the governance system and explain that certain working methods are not public (*infra,* 112). This implies that the research is not able to grasp the governance system down to the last detail. The paper is transparent about this.

20. A similar matter concerns the Māori language. Even though the majority of resources are available in English, these documents often contain a myriad of words in the Māori language. Out of respect for the language, and because the words often cannot be translated one-to-one into English, certain central Māori terms are used throughout the text. Upon their first mention, a translation appropriate to the context is provided. The translation comes from the Māori dictionary Te Aka, unless indicated otherwise. Readers who wish to understand these concepts

[28] Two important sources in this regard are B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, 1-17 and C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, 578-595.

in their full richness are invited to visit the website of the dictionary.[29] At the beginning of this document, a Māori terminology index offers a brief overview of the Māori terms and phrases that are used throughout the text.

21. Lastly, for citations, it is important to preface that not all cited sources have page numbers. Some online articles from the Māori Law Review, for example, consist of continuous text. In these cases, the page number in the citation has been determined by requesting a printable PDF of the webpage. The page number in the citation corresponds to the page number on the PDF.

[29] Te Aka Māori Dictionary, via https://www.maoridictionary.co.nz/ (consulted for the last time on June 8th 2024).

II. The Te Urewera Act contextualised

1. A peculiar legal novelty

22. On the remote east coast of the North Island of Aotearoa[30] New Zealand lies a mountainous forest which covers about 2,127 km². This area is the homeland of Tūhoe, an *iwi*[31] that traces their ancestral lineage to Te Urewera and calls themselves *Ngā Tamariki o te Kohu*, 'the Children of the Mist'.[32] In 2014, this region received a particular legal status. Since the Te Urewera Act of 2014, the Te Urewera ecosystem constitutes a separate legal entity which is officially considered to govern itself. Te Urewera has all the rights, duties and liabilities of legal persons, which are exercised by a Board in the name of, and on behalf of Te Urewera itself.[33] Furthermore, the Act recognises Te Urewera as a living, spiritual being.[34] This arrangement of a self-owning legal entity was a radically new approach towards institutionalised participation in governance.[35] The document itself refers to a *"unique approach"*.[36]

23. The Te Urewera Act is the result of negotiations between the state of New Zealand and the local Tūhoe population who share a conflictual history. It transformed a previously publicly owned national park into a separate legal entity which is neither publicly nor privately owned.[37] In this way, neither the government nor Tūhoe gained full ownership and authority over the region. *"Te Urewera may never again be owned by people"*, is written in Te Kawa, the management plan of Te Urewera.[38]

[30] Aotearoa is a Māori name for the state of New Zealand. It means 'land of the long white cloud', as explained in J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 220. More information on the term can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=aotearo.
[31] An *iwi* is the largest social and political unit in New Zealand Māori society. It can be translated as 'tribe' and consists of different related *hapū*. More on tribal organisation can be found in R. TAONUI, "Tribal organisation - The significance of iwi and hapū", *Te Ara - the Encyclopedia of New Zealand* 2005, 1.
[32] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 581 and 584. In Te Kawa o Te Urewera, 2017, 43 Te Urewera is described as *"the homeland and the heartland of Tūhoe people"*.
[33] Section 11 Te Urewera Act, 26 July 2014.
[34] Section 3(2) Te Urewera Act, 26 July 2014; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 578.
[35] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 74.
[36] Section 3(9) Te Urewera Act, 26 July 2014.
[37] Section 12 Te Urewera Act, 26 July 2014.
[38] Te Kawa o Te Urewera, 2017, 24.

24. Te Kawa was established by the governance Board which represents Te Urewera's interests, and contains principles to guide the Board in its responsibility. In its early pages, the document makes clear that it is not concerned with the management of land, but with the management of people in relation to the land.[39] This suggests that the Te Urewera Act is concerned with more than classic nature conservation. The Act mentions the resolution of grief of Tūhoe as one of its main aspirations.[40] The Waitangi Tribunal (*infra*, 35) has clarified that this grief and anger can only be understood if one knows the ways in which Tūhoe aspirations of self-governance were rendered impossible by the Crown.[41] Therefore, to fully understand the Te Urewera Act, this paper takes a step back to provide an overview of the recent history of the region, its people and the Act itself. The next section elaborates on the conflictual history between the Crown and Tūhoe and the eventual creation of the Act.

2. The history of Te Urewera[42]

2.1 *"Cutting the land adrift"*[43]

25. A millennium ago, the islands of New Zealand were discovered by Polynesians.[44] This made that long before the arrival of *Pākehā*[45] in the early nineteenth century, Māori people were already living in the region of Te Urewera. Due to the remote character of their homeland Te Urewera, Tūhoe remained isolated and economically independent from *Pākehā* during the first decades of European colonisation.[46]

[39] Te Kawa o Te Urewera, 2017, 7.
[40] Section 3 (10) Te Urewera Act, 26 July 2014.
[41] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1, xliv.
[42] A more extensive and detailed overview of the history of Te Urewera and its people can be found in Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1-8. These reports can be accessed via https://www.waitangitribunal.govt.nz/tribunal-reports/by-district/#UreweraThumb (consulted for the last time on June 2nd 2024). The Office for Māori Crown relations has also published documents on the history of Te Urewera, which can be found on https://www.tearawhiti.govt.nz/te-kahui-whakatau-treaty-settlements/find-a-treaty-settlement/ngai-tuhoe/#Ngai_Tūhoe_DOS_DOC (consulted for the last time on May 24th 2024) .
[43] Te Kawa o Te Urewera, 2017, 44.
[44] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 208.
[45] Pākehā is a Māori term used to indicate New Zealanders of (primarily) European descent. The term does not normally have a negative connotation, and will be used in this paper to make a distinction between the original Māori inhabitants and New Zealanders of European descent. More information on the term can be found via https://maoridictionary.co.nz/search?keywords=pakeha .
[46] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 581; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 1.

26. In 1840, the Treaty of Waitangi was signed by the British Crown[47] and hundreds of Māori chiefs.[48] This bilingual treaty of cession[49] is considered the foundation for the Crown's sovereignty in the territory of New Zealand, and therefore the foundation of the state of New Zealand. This document also formed the foundation of the Crown's exclusive right of pre-emption to acquire land from Māori.[50] Tūhoe did not sign the Treaty, but that did not prevent the Crown from asserting its sovereignty over the region.[51] While its isolation initially guarded the Te Urewera region from major Crown intrusions, this changed in the mid-1860s when the rugged wilderness of Te Urewera gradually developed into a haven for people fleeing government forces. This elicited invasions from the Crown, which did not shy away from using a scorched-earth policy in an attempt to dismantle all possible support networks. Eventually, Tūhoe were forced to capitulate.[52]

[47] It is important to highlight that the underlying entity of 'the Crown' changed throughout the history of Te Urewera as New Zealand incrementally gained independence from the British Crown. New Zealand was a Crown colony from 1840 onwards, after which it became a self-governing colony under the Constitution Act, 30 June 1852, an Act that established several important state institutions. From 1907 onwards, New Zealand was a dominion in the British Commonwealth of nations. Full independence was eventually reached in 1986 through the Constitution Act, 13 December 1986. Connections to the British courts continued up until the early twenty-first century. A short overview of New Zealand's history can be found on the website of Te Ara – The Encyclopedia of New Zealand via https://teara.govt.nz/en/self-government-and-independence. The precise legal notion of 'the Crown' remains uncertain. This is explained in M. SUNKIN and S. PAYNE, "The Nature of the Crown: An Overview" in M. SUNKIN and S. PAYNE (eds.), *The Nature of the Crown: A Legal and Political Analysis*, Oxford, Oxford University Press, 1999, (1) 1-2. The lack of clarity about the concept combined with New Zealand's gradual acquisition of independence makes it hard to determine with precision when the British Crown developed into the New Zealand Crown. The 1852 Constitution Act could be decisive in this respect.

[48] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 581.

[49] The treaty consists of three articles which do not hold the exact same meaning in the English version and the Māori version. Whereas the Māori version assures that sovereignty is retained by Māori tribes, the English version vests sovereignty in the Crown. The Māori version gives the impression that it offers much more than it asks for in return. This is explained in R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 213; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 75-76.

[50] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 214 and 216.

[51] Section 8(1) Tūhoe Claims Settlement Act, 27 July 2014; Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1, xxxiii-xxxiv; R. P. BOAST, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", *Victoria University of Wellington Law Review* 2006, Vol. 37, (547) 548; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 144; R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 209-214; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 1.

[52] Section 8(3) Tūhoe Claims Settlement Act, 27 July 2014; Te Kawa o Te Urewera, 2017, 44; Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1, 279-282; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 582; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 1-2; J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 221.

27. The terms of the capitulation were of great importance for Tūhoe, as, in 1871, Native Minister Donald MCLEAN would have granted Te Urewera regional autonomy and local chiefs authority within their own districts. In response to this, together with another *iwi*, Tūhoe formed *Rūnanga*[53], a tribal council, with the name 'Te Whitu Tekau' to organise collective decision-making for Te Urewera. While Tūhoe would cling to this promise of autonomy, the government considered it nothing more than a temporary expedient in times of difficult negotiations. The Crown's refusal to acknowledge Tūhoe autonomy and Tūhoe's refusal to accept different terms, resulted in a stalemate.[54]

28. The Crown would continue its effort to acquire land and install the rule of English common law. The Native Land Court that had been established in the 1860s would be the main instrument in this pursuit of dispossession. The Crown now waived its right of pre-emption, and the official purpose of the Native Land Court was to accord legal titles in accordance with English law. This meant that absolute ownership rights over previously communal lands were granted to individuals.[55] This went against *tikanga*[56], according to which *hapu*[57] jointly held the rights of custodianship.[58] Legally, the officially recognised owners were not allowed to form collectivities to reinstall community governance. However, they were free to dispose of their land. This process of individualisation enabled *Pākehā* to buy piece after piece of the Indigenous lands. The Crown would acquire many parcels of land on the outskirts of the Te Urewera region from, amongst others, neighbouring *iwi* or distraught individuals who were in

[53] More information on the term can be found via https://www.maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=runanga.

[54] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 2, 763-771; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 582; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 2.

[55] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 218.

[56] *Tikanga* refers to the Māori system of values, customs, rules, practices and conventions that have developed over time and which are tightly connected to their social context. Tikanga administered Māori lives before Pākehā arrived and still plays an important role for Māori. This is explained in N. COATES, "The Recognition of Tikanga in the Common Law of New Zealand" in *New Zealand Law Review* 2015, Vol. 1, (1) 2 and 4. More information on the term can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=tikanga.

[57] *Hapū* are the most significant, basic political units in pre-European Māori society. Related hapū form *iwi*, the largest social and political units in Māori society. More on tribal organisation can be found in R. TAONUI, "Tribal organisation - The significance of iwi and hapū", *Te Ara - the Encyclopedia of New Zealand* 2005, 1.

[58] Section 9 (15) Tūhoe Claims Settlement Act, 27 July 2014; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 75; B. WOOLFORD ROA, "The long dark cloud of racial inequality and historiographical omissions: the New Zealand Native Land Court", *MAI Journal: A New Zealand Journal of Indigenous Scholarship* 2012, Vol. 1, (3) 3-4.

debt since the times of war.[59] The Māori population in Te Urewera was in the grip of severe poverty at the time.[60] By the 1930s, Tūhoe had lost around 82 percent of their historic lands. As the remaining land was largely unfit for farming, many Tūhoe were forced to move away.[61]

29. All of these developments happened despite the Urewera District Native Reserve Act that had been adopted in 1896. This Act addressed questions of ownership, but also established self-governance for Tūhoe through a General Committee.[62] It is said to have been a means of the government to end defiance.[63] It would prevent the Crown from buying land from individuals, which, according to the discourse at the time, was rugged and barren land anyway.[64] The Crown first failed to set up the Committee, after which it went on to nevertheless acquire land for settlement.[65] In the beginning of the 20th century, the government's view on the land changed, making the Te Urewera region attractive once again. And so, despite prior legal commitments, the land that was legislatively protected as a self-governing reserve in 1896, was eventually largely bought by the Crown.[66] In 1954, it was transformed into a government-owned natural reserve, the 'Urewera National Park'.[67]

[59] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 3, 1005 and 1127; R. P. BOAST, "The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891-1912", *New Zealand journal of public and international law* 2014, Vol. 12, (81) 97-98; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 2.
[60] R. P. BOAST, "Re-Thinking Individualism: Māori Land Development Policy and the Law in the Age of Ngata (1920-1940) ", *Canterbury Law Review* 2019, Vol. 25, (1) 3-4.
[61] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 3, 1003; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 144; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 77.
[62] Section 18 Urewera District Native Reserve Act, 12 October 1896.
[63] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 2, 882-885; R. P. BOAST, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", *Victoria University of Wellington Law Review* 2006, Vol. 37, (547) 569.
[64] R. P. BOAST, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", *Victoria University of Wellington Law Review* 2006, Vol. 37, (547) 568.
[65] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 2, 877-878; Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 5, 2032; B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 5; V. O'MALLEY, "Tūhoe-Crown Settlement – historical background", *Māori Law Review* 2014, 4.
[66] R. P. BOAST, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", *Victoria University of Wellington Law Review* 2006, Vol. 37, (547) 569-570.
[67] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 5, 2026

30. This account of enormous losses of land,[68] while not always at the centre of history writing, was of great grievance to Tūhoe.[69] Tūhoe suffered multiple betrayals of their 1896 Treaty relationship with the Crown.[70] The Native Land Court meant that Tūhoe never received a fair chance to manage their homeland in a legally recognised, communal manner.[71] Moreover, contact with the *Pākehā*, and especially hearings of the Native Land Court, posed a health risk to Tūhoe as it brought them into contact with unknown illnesses.[72] Tūhoe would remember these developments as *Te Mowai*, which can be translated as *"cutting the land adrift"*.[73]

2.2 The Wilderness myth

31. The establishment of Urewera National Park deserves some more contextualisation, as Tūhoe have stated that it imposed values that were foreign to them. Rather than recognising the interests of Tūhoe in Te Urewera, the Crown decided upon nature conservation as a priority for the region.[74] Te Urewera's current management plan states that the establishment of the national park disrupted the interconnectedness of the land, its people and their identity.[75]

32. Such an imposed artificial separation between nature and humans has been labelled as 'green colonialism' by historian Guillaume BLANC, who condemns continued land expropriation in the name of nature conservation, especially on the African continent.[76] Such operations are linked to the idea of a mythical past of pristine Wilderness.[77] Research has shown that it is indeed a mythical past, as 12,000 years ago a large majority of the Earth's surface underwent changes due to human activities.[78] This was also the case for the landscapes in New Zealand

[68] Aside from literal losses of land through official titles, *Pākehā* also limited Māori land use in other manners. The Native Plants Protection Act, 23 October 1934 for example, outlawed the use and collection of native plants. This is set out in J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49 (211) 221. In general, land ownership and traditional practices related to the gathering of food were heavily regulated in New Zealand, as set out in N. COATES, "The Recognition of Tikanga in the Common Law of New Zealand" *New Zealand Law Review* 2015, Vol. 1, (1) 6-7.
[69] B. WOOLFORD ROA, "The long dark cloud of racial inequality and historiographical omissions: the New Zealand Native Land Court", *MAI Journal: A New Zealand Journal of Indigenous Scholarship* 2012, Vol. 1, (3) 12-13.
[70] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 1, xliv.
[71] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 3, 1005.
[72] R. P. BOAST, "The native land court at Cambridge, Māori land alienation and the private sector", *Waikato law review* 2017, Vol. 25., (26) 26.
[73] Te Kawa o Te Urewera, 2017, 44.
[74] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 5, 2032; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 77.
[75] Te Kawa o Te Urewera, 2017, 24.
[76] G. BLANC, *L'invention du colonialisme vert. Pour en finir avec le mythe de l'Éden africain,* Paris: Flammarion, 2020, 346 p.
[77] M. PETEL, "The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature", *Transnational Environmental Law* 2024, (1) 5-6.
[78] A. MCKAY, "The Wilderness Myth", *Nature Ecology & Evolution* 2022, Vol. 6, (21) 21.

under the influence of Māori.[79] Nevertheless, the 1964 US Wilderness Act defines 'wilderness' as *"an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain"*.[80] The development of national parks and wilderness areas in New Zealand was strongly influenced by American practices, building on the same logic.[81] It was only in 1992 that two important articles exposed this idea as a myth. Geographer William DENEVAN labelled it the 'Pristine myth',[82] while biologist Arturo GÓMEZ-POMPA and philosopher Andrea KAUS made a call 'to tame the Wilderness myth'.[83]

33. According to DENEVAN, this myth was most likely not intentionally created. He asserts that, at the time of colonisation, observers were not capable of detecting subtle human interventions in the natural world. Moreover, due to a decline in Indigenous population numbers, areas would have become more 'wild' over time than they had been before settlers arrived.[84] In reality, regions that showed no, or barely any signs of land use, had simply been used in a low-intensity manner, as a result of which they could sustain biodiversity.[85] Environmental historian William CRONON also finds a cultural explanation for the fascination with Wilderness, namely in the Western estrangement from nature.[86] Although it is possible that the myth originated accidentally, it is important to note that the notion of 'Wilderness' goes very well with the legal theory around '*terra nullius*' (*infra*, 138). This suggests that, at least, the theory was convenient for settlers.

34. In any case, this Western concept of Wilderness underlies traditional approaches of land conservation.[87] At the same time, and similar to extractive approaches to nature (*infra*, 140), conservationism implies human mastery over nature.[88] These ideas go against the Tūhoe culture which favours interaction with nature through reciprocal relationships that entail

[79] J. SHULTIS, "Social and ecological manifestations in the development of the Wilderness Area concept in New Zealand", *The International Journal of Wilderness* 1997, Vol. 3, No.. 3, (12) 12.
[80] Section 2(c) Wilderness Act (US Wilderness Act), No. 1131-1136, 3 September 1964.
[81] J. SHULTIS, "Social and ecological manifestations in the development of the Wilderness Area concept in New Zealand", *The International Journal of Wilderness* 1997, Vol. 3, No. 3, (12) 13-14.
[82] W. M. DENEVAN, "The Pristine Myth: The Landscape of the Americas in 1492" in *Annals of the Association of American Geographers* 1992, Vol. 82, No. 3, 369-385.
[83] A. GÓMEZ-POMPA and A. KAUS, "Taming the Wilderness Myth" in *BioScience* 1992, 271-279.
[84] W. M. DENEVAN, "The Pristine Myth: The Landscape of the Americas in 1492" in *Annals of the Association of American Geographers* 1992, Vol. 82, No. 3, (369) 379-381. His article focused on the American continents, but he argues that his theory is more broadly applicable to the rest of *"the New World"*.
[85] A. MCKAY, "The Wilderness Myth" in *Nature Ecology & Evolution* 2022, Vol. 6, (21) 21.
[86] W. CRONON, "The Trouble with Wilderness: Or, Getting Back to the Wrong Nature", *Environmental History* 1996, Vol 1., No. 1, (7) 7-10 and 18.
[87] A. GOMEZ-POMPA and A. KAUS, "Taming the Wilderness Myth" in *Bioscience* 1992, (271) 271-272.
[88] J. DEHM "Reconfiguring Environmental Governance in the Green Economy Extraction, Stewardship and Natural Capital" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (70) 77.

responsibilities not to overwhelm the ecosystem.[89] Unsurprisingly, the creation of the national park restricted Tūhoe's access to the land and made many of them lose connection with it.[90] Environmental researcher Brad COOMBES described the national park as *"culturally insensitive"* and gives the example of the criminalisation of bird hunts upon which a people had relied.[91] In conservationist ideas of Wilderness, the place of Indigenous peoples is unclear.[92]

2.3 Negotiations

35. The relation of New Zealand's legal system with *tikanga* proved to be difficult for over 150 years,[93] but around the 1970s, a political and legal shift took place. In 1975, the Waitangi Tribunal was set up as a permanent commission of inquiry.[94] This Tribunal receives Māori claims on breaches of the Treaty of Waitangi and makes recommendations for remedies.[95] In the 1980s, Māori became more represented in the legal profession and, around this time, the Treaty of Waitangi was looked at differently.[96] A decade later, around the time that DENEVAN, GÓMEZ-POMPA and KAUS published their articles on the Wilderness myth (*supra*, 32), the New Zealand government started negotiating with individual *iwi* to settle historical claims of

[89] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 152; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 77.

[90] Te Kawa o Te Urewera, 2017, 24; J. DEHM "Reconfiguring Environmental Governance in the Green Economy Extraction, Stewardship and Natural Capital" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (70) 82; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 144. In CARR, E. M., "The Rainforest That's a Legal Person", *Ma Earth* 2023, 7 min 11 sec, via https://www.youtube.com/watch?v=NOglQcqoNX8 (consulted for the last time on May 24th 2024) Erin Matariki CARR states at 4 min 28 sec that *"despite all of the violence that Tūhoe went through, the national park is probably one of the worst things that could have happened, because over the generations we were disconnected and we forgot about how to exercise authority and how to be in tune with Te Urewera"*.

[91] B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 6. This point is also made in Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 5, 2032.

[92] Waitangi Tribunal, *Te Urewera Reports*, 894, 2017, Vol. 5, 2063.

[93] N. COATES, "The Recognition of Tikanga in the Common Law of New Zealand" in *New Zealand Law Review* 2015, (1) 2.

[94] Section 4 Treaty of Waitangi Act, 10 October 1975. The official website of the Waitangi Tribunal can be accessed via: https://www.waitangitribunal.govt.nz/ (consulted for the last time on May 24th 2024).

[95] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 227; J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 222; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 77-78.

[96] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 209; J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 218.

breaches of the Treaty of Waitangi.[97] These would result in place-based arrangements.[98] Even though Tūhoe had never signed the Treaty of Waitangi, they partook to search for redress and strive for self-determination.[99] In 2007, the roughly thirty Tūhoe *hapū* put together a negotiation team to represent the *iwi* in its entirety. Through interviewing the lead Tūhoe negotiator Tamati KRUGER, professor of political science Craig KAUFFMAN learned that this team agreed on three fundamental objectives for the negotiations: "*(1) the return of Te Urewera; (2) autonomy for Tūhoe management of Te Urewera; and (3) the maximum amount of redress allowed by the Crown.*"[100]

36. The negotiations started in 2008 and, unsurprisingly, the matter of ownership quickly proved to be an important point of contention. The Crown had an explicit policy not to return conservation lands to Māori,[101] and rather suggested a 'gift-back' scheme which would mean a temporary transfer of ownership of the forest to Tūhoe, after which Te Urewera would automatically be gifted back to the Crown. Although this approach had worked during negotiations with other *iwi*, Tūhoe rejected this proposal. Another track that was explored was vesting the ownership title in a Tūhoe ancestor. This time, it was public backlash that stopped the government from going ahead.[102]

37. TĂNĂSESCU writes that Tūhoe insisted on common values as the foundation of the new arrangement.[103] According to KAUFFMAN, the breakthrough happened in 2011 when Crown negotiators realised that Tūhoe were not looking for ownership in its traditional legal sense. In line of Tūhoe thinking, according to which one cannot ever truly own nature, they would have

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[97] C. JONES, *NEW TREATY, NEW TRADITION: reconciling New Zealand and Māori Law*, Toronto, UBCPress, 2016, 21; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 582; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 74.

[98] D. J. JEFFERSON, E. MACPHERSON and M. STEVEN, "Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law", *Transnational Environmental Law* 2023, (343) 353.

[99] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 144-145.

[100] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 582.

[101] R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 236.

[102] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 582-583. More information on ancestral personhood can be found in R. MACFARLANE, "Journey to the Cedar Wood" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (127) 138-142.

[103] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 81.

simply asked for 'the return' of their lands.[104] COOMBES, however, tells a grimmer story, stating that Tūhoe members rather gave up their attempts to gain full ownership over the lands because they considered it to be unobtainable.[105] Either way, it was John WOOD, the Chief Crown Negotiator, who decided that a feasible political compromise had to refrain from giving ownership to either the Crown or Tūhoe. He was inspired by writings on legal fictions, so that, eventually, the Crown negotiators proposed a form of legal personhood. It is important to note that this proposal came from the governmental side, while Tūhoe negotiators had expressed concern about the Western emphasis on rights.[106] Interestingly, the element which made the Te Urewera Act part of the RoN tradition was proposed by the governmental side. KAUFFMAN summarised it as *"a technical way to sidestep the issue of ownership"*,[107] TĂNĂSESCU as "*a pragmatic way of solving a dispute*".[108]

38. According to Crown negotiator WOOD, the idea of a self-owning entity opened up the negotiations on matters of governance and responsibility. Eventually, in 2012, a treaty settlement was reached. In 2014, as part of the Deed of Settlement[109] between the Crown and Tūhoe, the Te Urewera Act was adopted by the Parliament of New Zealand.[110] The Urewera National Park was disestablished sixty years after its foundation. This marked the first time a New Zealand National Park ceased to exist.[111] Alongside the Te Urewera Act, the Tūhoe Claims Settlement Act was adopted. This Act included an account of Te Urewera's history, financial compensation and a formal apology on behalf of the Crown.[112] As for the Te Urewera Act, negotiators from both sides have acknowledged that the most important aspect is the

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[104] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 578-579 and 583-584.
[105] B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 7-8 and 10. In voicing Tūhoe opinions, COOMBES points towards the double standards surrounding ownership, as if Māori are not allowed to want to own the lands on which their ancestors lived.
[106] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 578-579 and 583-584.
[107] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 584.
[108] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85.
[109] This Deed of Settlement between the Crown and Tūhoe dates back to the 4th of June 2013. An overview of the settlement can be accessed via https://www.tearawhiti.govt.nz/te-kahui-whakatau-treaty-settlements/find-a-treaty-settlement/ngai-tuhoe/#Ngai_Tūhoe_Doc_supp (consulted for the last time on May 24th 2024) .
[110] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 14.
[111] J. RURU, "Tūhoe-Crown settlement – Te Urewera Act 2014", *Māori Law Review* 2014, 4.
[112] Sections 8-10, Tūhoe Claims Settlement Act, 27 July 2014; B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 7; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 148.

arrangement of guardianship, rather than the legal personality itself.[113] Before starting the analysis of this governance aspect, the next section gives a brief account of RoN developments to situate the Te Urewera Act within the RoN landscape.

3. The diversity of the RoN movement

39. In a time in which environmental concerns rise high, and during which emancipation is increasingly linked to rights,[114] it is not surprising that RoN are on the rise.[115] It is argued that RoN are embedded in a wider societal tendency to reconsider humanity's relationship with nature.[116] The movement advocating for RoN has roots in both Western and non-Western thinking and is very diverse.[117] Initiatives have seen the light of day on six continents, of which most are found in the Western Hemisphere.[118] In 2019, the Secretary-General of the UN described Earth Jurisprudence (*infra*, 41) as *"the fastest growing legal movement of the twenty-first century"*.[119] The three following subsections offer an insight into possible ways to categorise all these RoN initiatives.

3.1 Philosophical foundation

40. In the Western world, the roots of RoN go back to the twentieth century, and, most iconically, to 1972, when law professor Christopher STONE published his article *"Should trees*

[113] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 584.
[114] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 9-11.
[115] C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 187.
[116] C. RODRÍGUEZ-GARAVITO, "More-Than-Human Rights: Law, Science, and Storytelling Beyond Anthropocentrism" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (21) 31-33.
[117] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 62-63; C. M. KAUFFMAN and P. MARTIN, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail", *World Development* 2017, Vol. 92, (130) 131; M. PETEL, "The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature", *Transnational Environmental Law* 2024, (1) 1.
[118] C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 188; A. PUTZER, T. LAMBOOY, R. JEURISSEN, and E. KIM, "Putting the rights of nature on the map. A quantitative analysis of rights of nature initiatives across the world", *Journal of maps* 2022, (1) 2-5; An overview of RoN initiatives can be found on the website of the Global Alliance for the Rights of Nature via https://www.garn.org/rights-of-nature-map/ (consulted for the last time on May 23rd 2024) .
[119] A/74/236: Report of the Secretary-General on Harmony with Nature, 26 July 2019, paragraph 129.

have standing?". He states that the granting of RoN would help provoke a change in human consciousness, which would serve the greater purpose of protecting the future of the Earth.[120] The article starts with the historical, continued extension of rights and the way in which every extension seemed, at first, unthinkable. From there, STONE proposes the inclusion of the natural environment in the circle of rights bearers.[121] He immediately reassures the reader that these rights would not go too far,[122] after which he dissects what it means to hold legal rights and why nature could hold such rights. Towards the end of his article, STONE expresses his belief that a reimagination of the relationship between humanity and the rest of the natural world would *"make us better humans"*.[123] Because of this focus on the outcome, STONE's RoN approach has been described as pragmatic or instrumentalist.[124]

41. A different approach founds RoN not on their possible positive effects, but on the inherent value of nature. This position considers that inherent RoN should be *recognised* rather than granted, and was largely developed by priest and scholar Thomas BERRY. He considered that rights arise as soon as something comes into existence, and therefore that the natural world derives its rights from the same source as humans, namely the universe in which humans and the natural world participate.[125] In "*The Great Work, Our Way Into the Future"* BERRY calls for a new form of legal philosophy, 'Earth jurisprudence', which focuses on a harmonious relationship between humanity and nature.[126] Earth Jurisprudence asks for legal systems to

[120] C. STONE, "Should trees have standing? - Towards Legal Rights for Natural Objects", *Southern California Law Review* 1972, Vol. 45 (450) 499-501; B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 65-66.
[121] C. STONE, "Should trees have standing? - Towards Legal Rights for Natural Objects", *Southern California Law Review* 1972, Vol. 45 (450) 450 - 456.
[122] He writes *"Now, to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree"* in C. STONE, "Should trees have standing? - Towards Legal Rights for Natural Objects", *Southern California Law Review* 1972, Vol. 45 (450) 457.
[123] C. STONE, "Should trees have standing? - Towards Legal Rights for Natural Objects", *Southern California Law Review* 1972, Vol. 45 (450) 495.
[124] E. ALBERS, "Rechten voor de natuur?", *De grondwet voor iedereen* 2023, 3-4; ALBERS, E., and WILS, J., "Rights of Nature in the constitution: for the sake of nature, the people, or the state?", *Annales de droit de Louvain* 2023, Vol. 85, No. 1, (77) 78-79; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 24. In D. W. JAMIESON, "The Rights of Nature: Philosophical Challenges and Pragmatic Opportunities" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (95) 101-102, the approach of STONE is categorised under a separate category of 'extensionism' rather than 'pragmatism'. While it is true that STONE refers to the historical extension of rights bearers, his reasoning shows clear characteristics of pragmatism, which is why it is classified as such in this paper.
[125] T. BERRY, *The Great Work, Our Way Into the Future*, New York, Bell Tower, 1999, 5 and 49; P. BURDON, "The Jurisprudence of Thomas Berry", *Worldviews: Global Religions, Culture, and Ecology* 2011, Vol. 15, (151) 162.
[126] T. BERRY, *The Great Work, Our Way Into the Future*, New York, Bell Tower, 1999, 61.

adapt to the way the natural world works, rather than imposing a human structure.[127] In this way, Earth Jurisprudence pleads for ecocentrism rather than anthropocentrism, and introduces an external standard by which to judge positive law.[128] Even though this philosophy can be expressed in multiple ways, in Western legal systems, it is increasingly translated through RoN.[129] The approach which bases RoN on Earth Jurisprudence has been described as spiritual or ecotheological.[130]

42. These two theories legitimise RoN in different ways: for instrumentalists RoN are a means towards and end, whereas, for ecotheologists, RoN are inherently present on planet Earth and should therefore be recognised. Nevertheless, both theories share the conclusion that anthropocentric legal systems need to be rethought. The idea is that sustainability cannot be built on an anthropocentric foundation, which perpetuates the vision that nature is human property rather than a living entity.[131] Both theories intend to rethink the relationship between humanity and nature.[132]

43. The management plan that complements the Te Urewera Act, Te Kawa, invokes the *"living personality"* of Te Urewera,[133] which may suggest a categorisation of the Act within the ecotheological strand of RoN.[134] Section 3 of the Te Urewera Act reinforces this idea by invoking the spiritual importance and identity of Te Urewera.[135] This viewpoint has also been

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[127] C. CULLINAN, "Earth Jurisprudence" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (233) 234; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 580; R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 313.

[128] P. BURDON, "The Jurisprudence of Thomas Berry", *Worldviews: Global Religions, Culture, and Ecology* 2011, Vol. 15, (151) 159.

[129] C. CULLINAN, "Earth Jurisprudence" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (233) 237; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 580-581.

[130] E. ALBERS, "Rechten voor de natuur?", *De grondwet voor iedereen* 2023, 4-5; ALBERS, E., and WILS, J., "Rights of Nature in the constitution: for the sake of nature, the people, or the state?", *Annales de droit de Louvain* 2023, Vol. 85, No. 1, (77) 79-80; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 26.

[131] M. PETEL, "The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature", *Transnational Environmental Law* 2024, (1) 2.

[132] D. R., BOYD, "Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution", *Natural Resources & Environment* 2018, Vol. 32, No. 4, (13) 15; C. M. KAUFFMAN and P. MARTIN, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail", *World Development* 2017, Vol. 92, (130) 131; C. STONE, "Should trees have standing? - Towards Legal Rights for Natural Objects", *Southern California Law Review* 1972, Vol. 45 (450) 495.

[133] Te Kawa o Te Urewera, 2017, 9.

[134] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 150.

[135] Section 3(2)(3) Te Urewera Act, 26 July 2014.

confirmed by the lectures given by Tūhoe.[136] The negotiation history, however, suggests that there were important instrumental considerations — at least initially, and on the part of the Crown negotiators (*supra*, 37).

3.2 Practical implementation

44. When researching and evaluating these RoN implementations, it is important to remember that diversity exists not only within the philosophical foundations of RoN, but also amongst the implementations.[137] Together with researcher Pamela MARTIN, KAUFFMAN has categorised the implementations of RoN in two broad categories. The first model is the 'Nature's Rights Model'. Examples within this category recognise that nature as a whole possesses rights. In terms of content, these rights have been adapted to their natural subject: they typically include a right to maintain the functioning of ecosystem cycles and a right to be restored. The Nature's Rights Model grants rights to nature in its entirety, and allows all people to voluntarily speak up for nature in case of an alleged violation. The Nature's Rights Model takes an all-encompassing and reactive approach, which mirrors traditional human rights legislation and treaties.[138]

45. On the other hand, there are implementations which can be categorised under the 'Legal Personhood Model'. These implementations focus on granting legal personhood, rather than rights, to specific natural entities. As a consequence, a specific mountain or river can exercise the rights flowing from this personhood. These rights are similar to rights of natural and legal persons, such as the right to own property. As this model grants personhood to specific entities, it also grants the ability to represent nature to a specific group of people. These people then have the responsibility to represent the legal entity that is the natural ecosystem.[139] As a pioneer

[136] In CARR, E. M., "The Rainforest That's a Legal Person", *Ma Earth* 2023, 7 min 11 sec, via https://www.youtube.com/watch?v=NOglQcqoNX8 (consulted for the last time on May 23rd 2024) Erin Matariki CARR emphasised at 4 min 55 sec that humans cannot grant rights to nature, which is consistent with the ecotheological strand of RoN.
[137] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 64.
[138] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 14-17.
[139] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 14-17.

in this model,[140] the Te Urewera Act grants a specific legal status to a specific natural region and vests the representation and standing in a Board of selected people to represent it.[141]

46. As this second category of the Legal Personhood Model often relies upon a connection between a specific natural entity and a specific group of people,[142] it is closely tied with political matters of governance. In contrast to the philosophy behind RoN, this political side is still under-researched.[143] Yet, for the Te Urewera Act, the governance aspect is the most important one: the negotiations were mainly concerned with the matter of guardianship over the region (*supra*, 38), and the literature also confirms the political importance of the Act.[144]

3.3 Historical realisation

47. Lastly, it is worth mentioning that RoN are implemented in various ways. A broad distinction can be made between RoN stemming from legislation and RoN flowing from court rulings. Amongst the RoN created through legislation, there are implementations at all levels, ranging from the constitution over parliamentary legislation to local law.[145] The institutional embedding is important to consider as it affects the strength of RoN.[146] It may also affect the democratic legitimacy of the initiatives. In the case of Te Urewera, the legal personhood of the ecosystem is established by a legislative act that was adopted by the Parliament of New Zealand.

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[140] C. M. KAUFFMAN and P. MARTIN, The Politics of Rights of Nature, Strategies for building a more sustainable future, Cambridge, MIT Press, 2021, 141.
[141] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 80.
[142] C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 2001. This interconnection with a specific group of stakeholders is not always central to the Legal Personhood Model. The largest saltwater lagoon of Europe, Mar Menor, for example, received legal personhood without having a special connection to a particular community within Spain. Nevertheless, the law has created several bodies who share the responsibility of serving as guardians. This can be found in article 3 Ley para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca (Spanish law for the recognition of legal personality to the Mar Menor lagoon and its basin), No. 19/2022, 30 September 2022.
[143] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 3.
[144] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 79-82.
[145] C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 189-195.
[146] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 16.

48. While the Te Urewera Act has been discussed in the RoN literature, the next section gives an introduction to the concept of 'commons'. This is the lens through which this paper approaches the Te Urewera Act.

4. Commons and their tragedy

49. The term 'commons' is nowadays used to cover a wide variety of resources and different types of arrangements.[147] In bold terms, it has been described as the *"the opposite of property"*.[148] In general, it promises an alternative to the power of the market and the state. This appeals to communities that try to defend, reclaim or reinvent communal governance systems.[149] Commons are associated with shared guardianship over nature, collaborative relationships and the idea that not everything is for sale.[150] In addition to the renewed political and public interest, Elinor OSTROM's research on commons has led to renewed academic consideration. OSTROM received the Nobel Prize of economics in 2009 for her extensive research, inspiring a *"comeback of the commons"*.[151]

50. This comeback was necessary, as the notion of commons had been discredited by ecologist and microbiologist Garrett HARDIN in his article "*The Tragedy of the Commons"*.[152] He published it in 1968 and described in it the fate of 'the commons' as a tragedy. While concern about the depletion of open access goods goes far back in time, it is this article that has stood

[147] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 33; T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011,* Vol. 19, (422) 423 and 427; G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, 29.

[148] U. MATTEI and A. QUARTA "Principles of Legal Commoning", *Revue juridique de l'environnement* 2017, Vol. 49, No. 1, (67) 69. MARELLA talks about a clash between private property and commons in M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 73.

[149] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 75-76.

[150] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 78-79.

[151] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 74; T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 423; D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 275; B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 155.

[152] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 425; G. HARDIN, "The tragedy of the Commons", *Science* 1968, (1243) 1244-1245.

the test of time.[153] In HARDIN's article, commons are presented as goods that are freely accessible to people who all act as 'rational beings' in trying to maximise their personal gain. HARDIN predicts disastrous results: *"Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."*[154] Privatisation or collectivisation then appear to be the only two options for the successful management of resources.[155] Although HARDIN admits that this solution is not perfect, he states that *"injustice is preferable to total ruin"*.[156]

51. Historically, the European notion of commons referred to common land that multiple people or households could use during certain periods of the year. In the words of historian Susan COX: *"The common [...] never was free"*.[157] Instead, in premodern European commons systems, usage was restricted.[158] These commons were not open to all, were clearly circumscribed and were regulated by their own rules and sanctions. This presumed a certain degree of institutionalism.[159] Aside from that, DE MOOR has stressed the factor of self-governance for these traditional commons.[160] Those are elements that were not taken into account in HARDIN's reasoning. The same goes for communication and the possibility that individuals might gain benefits from working together.[161] Therefore, HARDIN's theory was not consistent with the historical realities.[162] It rather relied on an *"eclectic combination"* of facts and theory from different disciplines.[163] Nevertheless, many scholars that came after him,

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[153] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 55-57; E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 2.
[154] G. HARDIN, "The tragedy of the Commons", *Science* 1968, (1243) 1244.
[155] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 9; V. SHIVA, 'Foreword. The Commons: The Ground of Democracy and Sustenance*'* in G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, (vii) vii.
[156] G. HARDIN, "The tragedy of the Commons", *Science* 1968, (1243) 12447.
[157] S. COX, "No tragedy of the commons", *Environmental Ethics* 1985, Vol. 7, (49) 61.
[158] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Surrey, Ashgate, 2011, 102.
[159] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011*, Vol. 19, (422) 423-425; G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, 50.
[160] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011*, Vol. 19, (422) 430.
[161] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 58.
[162] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 55-57; T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011*, Vol. 19, (422) 425; E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 57; S. RANGANATHAN, "Global commons", *The European Journal of International Law* 2016, Vol. 27, No. 3, (693) 701.
[163] S. RANGANATHAN, "Global commons", *The European Journal of International Law* 2016, Vol. 27, No. 3, (693) 695-696.

accepted his tragedy as given.[164] OSTROM, however, discredited his tragic theory by conducting empirical research on commons all over the world.[165] In her own words, she wanted *"to learn more from the experience of individuals in field settings"*.[166] Through the analysis of several governance systems of common-pool resources (CPRs) (*infra*, 73), OSTROM established that there is no need for privatisation nor collectivisation to sustainably avoid the depletion of CPRs.[167] Instead, she concluded, resources can be governed in a polycentric way.[168]

52. OSTROM pleads for tailored governance solutions beyond the private or the public.[169] This normative stance corresponds to factual findings of institutionalisation and self-governance in different types of commons.[170] DE MOOR asks for more attention for these arrangements, stating that we have forgotten about *"an abundance of potentially useful institutional arrangements for forming self-governing (neither private, nor public) institutions that are formed by the stakeholders themselves"*.[171] According to her, these alternatives are often more cost-effective and efficient than private or public institutions. COGOLATI writes that commons *"are building political momentum towards a more resilient, cooperative and ecological system of governance"*.[172]

53. And yet: if commons can be self-governed, why did so many disappear in Europe? According to DE MOOR, it is the external pressure rather than the internal functioning that is to blame.[173] This pressure relates to the industrial revolution and agricultural developments in the eighteenth century.[174] As local institutions, the commons were not able to cope with the

[164] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 7-8.
[165] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 221.
[166] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 14.
[167] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 56-88.
[168] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 68.
[169] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 14; D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 275.
[170] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés 2011,* Vol. 19, (422) 430; E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 14.
[171] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 431.
[172] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 79.
[173] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 425.
[174] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Surrey, Ashgate, 2011, 102.

waves of enclosures.[175] In the case of Te Urewera, it is directly linked to colonisation (*supra*, 28). States and powerful landowners started enclosing land, which proved to be fatal for the commons. As COGOLATI put it, *"the real tragedy of the commons was not about the system of governance itself, but rather the external process of enclosure"*.[176] Contrary to HARDIN's imagined commons, the historical systems existed as part of wider surroundings with human rules and interactions.[177] As this process of enclosure is still ongoing,[178] one of the strongest critiques on OSTROM is the fact that she does not pay attention to the external factors which put pressure on commons.[179]

54. This external threat of enclosure is very relevant in Te Urewera's history, as the Tūhoe never received a reasonable opportunity under New Zealand's legal system to manage their lands in a recognised communal manner (*supra*, 28). Enclosure happened both in terms of privatisation of parcels and, eventually, in terms of collectivisation as a national park owned by the government. As the Te Urewera Act winds back this acquisition by the government, this paper interprets the Act as an effort to undo the enclosure of Tūhoe's communal lands.

55. As the rules governing commons differ greatly according to the systems and relationships to which they apply, DE MOOR advocates for more research on different institutional arrangements for different resources and circumstances. Together, they can form an 'institutional toolbox' for stakeholders' self-governance.[180] This research contributes to this figurative toolbox through thoroughly analysing the governance system that has been put in place by the Te Urewera Act. Before doing so in the third chapter, this paper has a closer look at the legal text of the Te Urewera Act in the following section.

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[175] T. DE MOOR, *The dilemma of the commoners: understanding the use of common-pool resources in long-term perspective*, Cambridge, Cambridge University Press, 2015, 46.
[176] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 63. The same statement is made by Vandana SHIVA in V. SHIVA, 'Foreword. The Commons: The Ground of Democracy and Sustenance*'* in G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, (vii) vii.
[177] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Surrey, Ashgate, 2011, 102.
[178] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 47.
[179] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 27 and 70.
[180] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 431.

5. The Te Urewera Act analysed

56. The complete Te Urewera Act comprises 118 pages. Even though this is evident from the name, it is important to emphasise that the Te Urewera Act is an *act*, and not a treaty. Although a long process of negotiations preceded it, the Act is not drafted as an agreement between two parties with international legal personality. It is, legally speaking, merely an internal legislative act. This is in line with the international status of Indigenous peoples, whose right to self-determination has been recognised by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), but only within the structures of existing states.[181] Contrary to the United States, New Zealand has no internal principles that confer a sort of sovereign status[182] to Indigenous groups that would allow them to enter into binding treaties with the state. This historical refusal to attribute sovereignty to Indigenous peoples is in contradiction with the practice of the state of New Zealand to try to conclude agreements with them.[183]

57. The Act itself is composed of three parts. The first part 'Te Urewera' introduces the area and its history, offers rules of interpretation and declares Te Urewera to be a legal entity. This declaration constitutes the heart of the Act, which continues to regulate practical matters in its second part, 'Governance and management of Te Urewera'. The Act is concluded by a third part, 'Te Urewera and related matters'. The following paragraphs highlight the elements that are important for a commons analysis.

58. In part 1, the Act clearly sets the tone. Section 3 starts with the background: Te Urewera is introduced as *"ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty"*.[184] Section 3(2) explicitly recognises the spiritual value of the area, and its *"mana"* and *"mauri"*, which can be translated as 'spiritual power' and 'life force'.[185] The more imaginative management plan of Te Urewera speaks of

[181] Article 46 of A/RES/61/295: General Assembly resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007; A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 69-71; R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, (71) 77.

[182] More information on what 'Indigenous sovereignty' means and could mean can be found in R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, 71-82.

[183] R. P. BOAST, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", *Victoria University of Wellington Law Review* 2006, Vol. 37, (547) 550-551.

[184] Section 3(1) Te Urewera Act, 26 July 2014.

[185] Section 3(2) Te Urewera Act, 26 July 2014. More information on the terms can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=mana

"the living personality of Te Urewera".[186] Further on in section 3, the bond between Te Urewera and Tūhoe is set out. Te Urewera is described as the *"ewe whenua"* of Tūhoe, which is translated as *"their place of origin and return, their homeland*".[187] Only after an elaboration on the cultural significance of Te Urewera for Tūhoe, the bond between Te Urewera and other New Zealanders is addressed.[188] This order foreshadows the importance attached to the bond between Te Urewera and its people. This is typical for RoN initiatives which fall into the Legal Personhood category (*supra,* 46). The last paragraph of section 3 adds a specific commitment towards Tūhoe: it says that the Act is intended to *"contribute to resolving the grief of Tūhoe and to strengthening and maintaining the connection between Tūhoe and Te Urewera".*[189] According to Māori law professor Jacinta RURU, it is precisely this consideration that makes the Act so remarkable.[190]

59. The purpose of the Te Urewera Act is laid down in the fourth section, a provision densely filled with meaning:

"4. Purpose of this Act

The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all."[191]

60. These purposes of the Act can be interpreted as the institutionalised interests of Te Urewera.[192] A glance suffices to know that they are very encompassing. The fifth section lays

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and https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=mauri .

[186] Te Kawa o Te Urewera, 2017, 9.

[187] Section 3(5) Te Urewera Act, 26 July 2014.

[188] Section 3(6)(7)(8) Te Urewera Act, 26 July 2014.

[189] Section 3 Te Urewera Act, 26 July 2014.

[190] J. RURU, "Tūhoe-Crown settlement – Te Urewera Act 2014", *Māori Law Review* 2014, 4.

[191] Section 4 Te Urewera Act, 26 July 2014.

[192] D. J. JEFFERSON, E. MACPHERSON and M. STEVEN, "Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law", *transnational environmental law* 2023, 353.

down principles that need to be followed, albeit as far as possible.[193] Section 11, then, declares Te Urewera to be a legal entity, with *"all the rights, powers, duties, and liabilities of a legal person"*.[194] TĂNĂSESCU explains that the decision to call Te Urewera a legal entity, rather than a legal person, avoids confusion between moral and legal matters and creates space for innovative possibilities. This would correspond to the intentions of negotiator WOOD (*supra*, 37). However, there is a clear reference made to legal persons which is reminiscent of corporate personhood.[195] Still, a lack of further elaboration keeps the concept rather undetermined, and thus flexible. As the entity status did not correspond to an existing, traditional concept when it was coined, the Te Urewera Act avoided a situation in which traditional ideas about rights are attached to its specific situation. Rather, it puts ideals of reciprocity and responsibility at the centre *(infra, 87)*.[196]

61. Section 12 logically follows from section 11, stating that the Te Urewera will no longer belong to the Crown. As was the intention of the Crown negotiators, this does not mean that ownership will be transferred to Tūhoe. The transformation of Te Urewera into a legal entity solves, at least provisionally, the question of ownership and authority (*supra*, 37).[197] Neither the Crown, nor Tūhoe receive legal ownership over Te Urewera: it will henceforth own itself, while a governing Board takes on the practical governance. The Board, in TĂNĂSESCU's words, can be viewed as *"a way of being transparent about the artificiality of the construction."*[198]

62. The secondary literature confirms that this legal personality provision was crucial to Tūhoe not because it granted rights to the forest, but because it created a new legal framework which offered space for innovation in the field of governance.[199] It has been described as a tool to

[193] Section 5(1) Te Urewera Act, 26 July 2014.
[194] Section 11(1) Te Urewera Act, 26 July 2014.
[195] D. J. JEFFERSON, E. MACPHERSON and M. STEVEN, "Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law", *transnational environmental law* 2023, 349.
[196] Te Kawa o Te Urewera, 2017, 12, 18, 32, 35 and 37; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 142.; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 80, 84, 85.
[197] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 584.
[198] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 78, 80.
[199] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 585; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 80-81.

install a non-Western framework and allow for reconnection between the land and Tūhoe.[200] Pita SHARPLES, minister of Māori affairs in 2014, has addressed the significance of legal personhood as "*a profound alternative to the human presumption of sovereignty over the natural world"*. He continued that the Act restores the role of Tūhoe as *kaitiaki*[201], guardians and caregivers, and that it aligns with their desire for self-determination.[202] An important nuance here, is the fact that New Zealand has lost ownership, but that it has not lost sovereignty over Te Urewera. While ownership is a matter of national law, sovereignty over a territory is a concept of international law.[203] Thanks to its sovereignty, New Zealand has the authority to legislate on ownership over Te Urewera.

63. Part 2 of the Te Urewera Act continues to concretely organise the governance and management of Te Urewera. Section 16 establishes the Te Urewera Board, after which section 17 specifies that the Board will act on behalf of Te Urewera, act in the name of Te Urewera and provide governance for Te Urewera.[204] The management plan rephrases this function as *"the voice and servant of Te Urewera"*.[205] This rewording emphasises that the Board cannot be identified with Te Urewera, but that both are distinct legal entities. For this reason, TĂNĂSESCU finds it important to stress that the Board functions as a representative, rather than a guardian.[206] According to Western law, guardianship would imply that the decision-making power is taken away from someone. KAUFFMAN and MARTIN, however, stress that guardianship means something else to Tūhoe. Their traditional role of *kaitiaki* focusses on the deciphering of what nature 'communicates' to regulate human behaviour.[207] This position explains why the Te Urewera Act asks the Board to act *"on behalf of, and in the name of Te Urewera"*.[208]

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[200] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 579.
[201] More information on the term can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=kaitiaki+.
[202] J. RURU, "Tūhoe-Crown settlement – Te Urewera Act 2014", *Māori Law Review* 2014, 5-6.
[203] A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 19-20.
[204] Sections 16 and 17 Te Urewera Act, 26 July 2014.
[205] Te Kawa o Te Urewera, 2017, 7.
[206] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 86.
[207] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 153.
[208] Section 17(a) Te Urewera Act, 26 July 2014.

64. Section 18 goes on to list specific functions of the Board, which include the preparation and approval of the Te Urewera management plan.[209] This section designates Tūhoe concepts of management that the Board might take into consideration while performing its functions. While these concepts are introduced in a non-mandatory manner, section 20 clearly states that the Board *"must"* take into account the relationship between Indigenous people and the region of Te Urewera.[210]

65. These substantive guidelines are followed by rules on the composition of the Board. Section 21 determines that, from the third anniversary onwards, six out of the nine Board members will be appointed by the seven trustees of Tūhoe Te Uru Taumatua.[211] Three members are appointed by the Minister of Conservation.[212] To understand what this means concretely, it is necessary to have a closer look at Tūhoe Te Uru Taumatua. This centralised body is the trust of Tūhoe that was established in 2011 and acts as the office, or the 'front door' to the *iwi*.[213] The main concern at its conception was to make the treaty settlement process happen smoothly.[214] The body is composed of Tūhoe representatives which are appointed by the four different Te Urewera 'valleys' or 'Tribals': Waikaremoana, Ruatahuna, Ruatoki and Te Waimana. As the smallest valley, Waikaremoana appoints one representative, while the others all appoint two.[215]

66. According to the Act, these trustees appoint six members for the Te Urewera Board. In practice, however, the trustees appoint only two members, as the four Tribals each directly appoint one.[216] As the Board must strive to make decisions by unanimous agreement or through

[209] Section 18 Te Urewera Act, 26 July 2014.
[210] Section 20 Te Urewera Act, 26 July 2014.
[211] Section 21 Te Urewera Act, 26 July 2014.
[212] Sections 7 and 21(2) Te Urewera Act, 26 July 2014. The list of the nine current Board members can be accessed via https://www.ngaituhoe.iwi.nz/meet-the-te-urewera-board .
[213] Section 12 Tūhoe Claims Settlement Act, 27 July 2014. The metaphor of the front door was suggested by Erin Matariki CARR.
[214] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 150.
[215] Information on Tūhoe Te Uru Taumatua can be found in the Blueprint for The New Generation Tūhoe Authority of 2011, via https://issuu.com/teurutaumatua/docs/the_blue_print_-_new_generation_tuh. On the official website of Tūhoe, the mission of Tūhoe Te Uru Taumatua is described as following: *"Te Uru Taumatua represents the Tūhoe nation and the lands and wealth held in common for Tūhoe. The purpose of the Governing Board of Te Uru Taumatua is to lead and serve the cultural permanency and prosperity of Tūhoetana by unlocking the unity potential of Mana Motuhake. Advancing Tūhoe social and economic development in a way that is distinctively Tūhoe recognises that we will build the Tūhoe nation with our minds, our hearts and our hands."* The website can be accessed through https://www.ngaituhoe.iwi.nz/tut. More information can be accessed via https://www.ngaituhoe.iwi.nz/governance and https://www.ngaituhoe.iwi.nz/2023-appointment-process. My understanding of Tūhoe Te Uru Taumatua also relies on the written explanations by Erin Matariki CARR over mail.
[216] This information was provided by Erin Matariki CARR over mail.

consensus,[217] Tūhoe have important weight. However, the members appointed by the government also have a significant role thanks to section 36(1)(b), which states that, in case of a vote, at least two members appointed by the government need to support a decision in order for it to be adopted.[218]

67. Section 18, then, lists the extensive powers of the Board:

"18 Functions of Board

(1) The functions of the Board are (a) to prepare and approve Te Urewera management plan; and (b) to advise the persons managing Te Urewera on the implementation of the management plan, including by means such as (i) issuing an annual statement of priorities for implementing the management plan: (ii) undertaking any specified functions in relation to the annual operational plan for Te Urewera: (iii) monitoring the implementation of the annual operational plan; and (c) to initiate proposals and make recommendations for(i) adding land to, or removing land from, Te Urewera; and (ii) acquiring interests in land; and (iii) establishing specially protected areas, wilderness areas, and amenity areas within Te Urewera; and (d) to make bylaws for Te Urewera; and (e) to authorise activities that must not otherwise be undertaken in Te Urewera without an authorisation under Part 2; and (f) to prepare or commission reports, advice, or recommendations on matters relevant to the purposes of the Board; and (g) to promote or advocate for the interests of Te Urewera in any statutory process or at any public forum; and (h) to liaise with, advise, or seek advice from any agency, local authority, or other entity on matters relevant to the purposes of the Board; and (i) to perform any other function of the Board specified in this Act or in any other enactment; and (j) to take any other action that the Board considers to be relevant and appropriate in achieving its purposes. [...]"

68. This article refers to *"persons managing Te Urewera"*, signalling that it is not the only body concerned with the management of Te Urewera. The operational management is something that both the Chief Executive of Tūhoe Te Uru Taumatua and the Director-General of Conservation are accountable for. This includes the task of preparing annual operational plans and presenting

[217] Sections 33 and 34 Te Urewera Act, 26 July 2014.
[218] Section 36(1)(b) Te Urewera Act, 26 July 2014.

them to the Board for approval. The Board then assesses whether it is in line with the management plan and its statement of priorities.[219]

69. Taking into consideration these provisions, it is safe to say that the Te Urewera Act is to a great extent concerned with power relations, enabling dialogical governance.[220] As a consequence, the Te Urewera Act is not in the first place concerned with environmental protection. Rather, the Act decides who may take decisions.[221] And as TĂNĂSESCU put it, "*Tūhoe […] relate to the environment through a mode of paying attention to it that is reproduced through use"*.[222] Indigenous people relate to the land through repeated interactions and use of existing resources, rather than by preserving nature in a secluded manner.

70. With this interaction then comes responsibility,[223] which is repeatedly emphasised in the management plan that the Board prepared in 2017. Te Kawa is written poetically, contains black and white pictures of Te Urewera and specifically states that it wishes to disrupt the norm.[224] The document talks about responsibility grounded in principles.[225] It confirms that neither the government nor Tūhoe have ownership or full authority over the territory of Te Urewera: *"Te Urewera may never again be owned by people"*.[226] In its ambition to guide people in their relation to the land (*supra*, 24), Te Kawa provides guiding principles for the Board to follow.[227]

[219] Section 24(1)(2) of schedule 2 of the Te Urewera Act, 26 July 2014; New Zealand High Court Rotorua Registry, *Tuna v. Te Urewera Board*, 3680, 14 December 2023, sections 5 and 27.
[220] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 82.
[221] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 59, 82 and 87.
[222] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 84-85.
[223] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 86.
[224] Te Kawa o Te Urewera, 2017, 7 and 9.
[225] Te Kawa o Te Urewera, 2017, 7.
[226] Te Kawa o Te Urewera, 2017, 24.
[227] Te Kawa o Te Urewera, 2017, 7.

III. Commons characteristics in the Te Urewera Act

71. As mentioned (*supra*, 49), the term 'commons' has no single meaning. Following the example of OSTROM, this research paper uses the contemporary concept of commons as 'institutionalised collective action'.[228] More specifically, it builds on a contemporary understanding of commons, which interprets commons not as mere physical resource areas, but includes the connected participatory mechanisms of governance and decision-making. The notion consists of three cumulative elements: (1) the material resource itself, which will be referred to as the common-pool resource (CPR), (2) a community of people and (3) the practice of commoning.[229] This comprehensive approach stresses the connection between the resources and the community, which is a central concern in the Te Urewera Act (*supra*, 58). It is in line with OSTROM's tendency to focus not merely on the material substance, but on collective self-governance. This approach also remedies an important critique on economic classifications that only focus on the underlying substance (*infra*, 78). As COGOLATI phrases it: *"Without communities, there are no commons."*[230]

72. Before addressing these aspects separately, it is interesting to note that the first chapters of Te Kawa perfectly mirror these elements, albeit in a different order. Chapter one addresses Te Urewera, chapter three addresses Tūhoe and chapter two and four address traditions, governing beliefs and responsibilities.[231] It may also be useful to preface this analysis by stating that commons are not *"inherently good"*.[232] The assessment of these criteria does therefore not imply a value judgement about the Te Urewera Act. There are, however, reasons to pursue the reinstatement and creation of commons. Self-governing, bottom-up institutions are often efficient and robust.[233] Even more, commoning can be a direct form of democracy.[234] Law

[228] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 108.
[229] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 34; M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 66;
[230] S. COGOLATI, International law to save the commons. The international legal protection of the commons in development, dissertation KU Leuven, 2021, 34.
[231] Te Kawa o Te Urewera, 2017, 13, 19, 27 and 33.
[232] S. COGOLATI and J. WOUTERS, "International law to save the commons" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (266) 277.
[233] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 431; B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 112.
[234] S. COGOLATI and J. WOUTERS,"Commons, Global (Economic) Governance, and Democracy: Which Way Forward for International Law?" in M. IOVANE, F. PALOMBINO, D. AMOROSO and G. ZARRA, *The*

professor Ugo MATTEI has pleaded for small-scale institutions which function locally to promote sustainability.[235] In the case of Te Urewera, the Act wishes to undo colonial enclosure (*supra*, 24). Given all these reasons, it is interesting to research the Te Urewera Act through a commons lens. Failure to fulfil criteria does not mean, however, that the governance model is of lesser worth, nor does the fulfilment of the criteria necessarily imply a fair governance model.

1. Te Urewera as a common-pool resource[236]

73. According to a classic economic classification, the level of subtractability and excludability of goods is determining to distinguish between different kinds of goods. According to this matrix, CPRs are goods of which the consumption is rivalrous and of which it is difficult to exclude people. High rivalry implies that consumption of goods entails a lesser availability of these goods for others, while difficult excludability means that it is costly to prevent people from consuming them.[237] The resource can be natural or man-made and can range from cultural knowledge to infrastructure.[238]

		Excludability	
		High	Low
Rivalry/Subtractability	High	**Private goods** (e.g. food, cars)	**Common-pool resources (CPRs)** (e.g. fish stocks, timber)
	Low	**Club/Toll goods** (e.g. satellite television, toll roads)	**Public goods** (e.g. lighthouses, national security)

Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry, Oxford, Oxford University Press, 2021, (68) 82; V. SHIVA, 'Foreword. The Commons: The Ground of Democracy and Sustenance*'* in G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, (vii) vii.

[235] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 229.

[236] The figure represents the classic economic categorisation of different types of goods based on their level of subtractability and excludability. It is taken from S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 53.

[237] A. DECOSTER and E. OOGHE (eds.), *Economie. Een inleiding.*, Leuven, Universitaire pers Leuven, 2017, 371-372; *A contrario*: E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 30-33.

[238] M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 68; E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 30.

74. For these CPRs, a distinction needs to be made between the resource system itself and the resource units that it offers, although they are tightly interconnected.[239] For historical commons, the plots of land constituted the resource system, while the different natural resources that they offered were the resource units. Technically, it was possible to restrict access, but in practice, it proved to be difficult. And as natural resources can be depleted, the use of the resources was rivalrous.[240] Therefore, the lands were situated in the upper row of the economic classification of the image, slightly on the right concerning excludability. This makes them CPRs. The location of CPRs in the matrix makes them susceptible to the free-rider problem, the situation in which users of a resource system do not or insufficiently contribute to its preservation, possibly causing depletion.[241] This was explored in HARDIN's tragedy of the commons (*supra*, 50).

75. For Te Urewera, a conclusion similar to historical commons can be reached. It is costly to restrict access to a region of 2,127 km², which gives it low excludability. Concerning subtractability, both the material, historical and cultural aspects need to be considered, as both tangible, natural resources and intangible resources such as knowledge can be CPRs.[242] Commons institutions are complex and constitute a source not only of tangible goods, but also of culture and spirituality.[243] The object of the Te Urewera Act clearly includes all. On the one hand, the Act concerns the land of Te Urewera with its hills, lakes and trees, but on the other hand, the historical, cultural and spiritual bond between the Tūhoe and the land also has a prominent place. Section 3 of the Act describes Te Urewera not as a source of raw materials, but as *"ancient and enduring, a fortress of nature, alive with history"*.[244] The material object receives a specific legal status by the Te Urewera Act, and can therefore not be reduced to a mere 'object'. The Act goes beyond the visible and tangible landscape: it also includes the immaterial value attached to the area and the cultural traditions of interaction with nature that

[239] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 30.
[240] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 429.
[241] A. DECOSTER and E. OOGHE (eds.), *Economie. Een inleiding.*, Leuven, Universitaire pers Leuven, 2017, 372 and 376-377.
[242] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 34; T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 423.
[243] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 79.
[244] Section 3 Te Urewera Act, 26 July 2014.

have their roots there. This is typical for Indigenous commons, as their lands are not merely perceived as CPRs but rather constitute spaces that are socially constructed by practices.[245]

76. Te Kawa goes more in depth:*"Our disconnection from Te Urewera has changed our humanness. We wish for it to return."*[246] Further in the document, the management plan mentions the strengthening of a desire and need to reconnect with the region as the first, immediate aspiration.[247] This is remarkable: Te Kawa does not simply want to restore a connection between Tūhoe and Te Urewera, but it wants, more fundamentally, to revive the craving for this connection. Building on this connection, then, Te Kawa wants to reinstall an intangible sense of responsibility.[248] It is implied that this responsibility was lost when the lands were enclosed during the nineteenth and twentieth centuries. According to Te Kawa, this responsibility involves a richness to be enjoyed by the persons responsible. It is said to inspire *"leadership, resilience and foresight"*.[249] In an overview of different aspects of Te Urewera and their related responsibilities, the management plan mentions the rebuilding of *"traditional and innovative knowledge"* to restore an *"instinct for responsible living"*.[250] The matter addressed by the Te Urewera Act and its management plan is not only the natural region, but touches upon the collective, cultural and spiritual identity of Tūhoe (*supra*, 59).

77. Not only can the Te Urewera ecosystem be depleted or polluted, the bond between Tūhoe and Te Urewera can also be disrupted. Both the environmental protection and the preservation of cultural and spiritual traditions can be lost in the long term due to (over)participation of third parties.[251] History has proven this (*supra*, 34). As both the criterion of costly excludability and high subtractability are fulfilled, it can be concluded that Te Urewera falls within the classic categorisation of a CPR.

78. This traditional economic categorisation of goods has been criticised on two related points.[252] Firstly, this categorisation directly links a type of goods to a system of appropriation. This suggests that there is only one natural way to govern a certain type of goods, while practice

[245] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 239.
[246] Te Kawa o Te Urewera, 2017, 8.
[247] Te Kawa o Te Urewera, 2017, 32.
[248] Te Kawa o Te Urewera, 2017, 37.
[249] Te Kawa o Te Urewera, 2017, 32 and 46.
[250] Te Kawa o Te Urewera, 2017, 38-39.
[251] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 32.
[252] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 428-429.

shows that these governance systems can vary, even amongst similarly classified goods. Not all CPRs are governed as commons. COGOLATI cites groundwater deposits as an example: even though they constitute CPRs, they are rarely ever governed as commons.[253] Secondly, the classification does not consider the possibility of change in goods and their subtractability or excludability. In a static manner, it considers that all goods belong to one specific category. Possible changes, through technology for example, are hardly considered. DE MOOR adds that it is important to understand such dynamics to fully understand the complexity of everything that the term 'commons' refers to.[254] To remedy these critiques, the categorisation of CPRs has been encapsulated as the first element of a larger definition, namely as the 'object' of commons.

2. Tūhoe as a community

79. The second element addresses the subject of the commons: a community of people that have access to the resources and manage them in common. Even though this criterion might give the impression that all people manage the commons collectively, some form of institutionalisation is not excluded. On the contrary, it was a crucial factor that prevented HARDIN's tragic prediction from occurring in historical commons (*supra*, 51). It happened, for example, that CPRs were managed by local village boards.[255] As DE MOOR explained, commoners were very much aware of the carrying capacity of their commons, and so institutionalised systems were coined to avoid any overexploitation. She writes that historical commons have always had conditions for people to become a member and acquire certain permissions.[256] For Te Urewera, it is the Board which develops the application process for activity permits and also issues them for matters such as the cutting of plants, the killing of animals, farming and recreational hunting (*infra*, 99).[257]

80. As for the community itself, COGOLATI gives a tribe, an extended family, a neighbourhood and a village as typical examples. For the Te Urewera region this role is clearly reserved for Tūhoe. Consisting of different *hapū*, Tūhoe are already a broadly described community. But it would be incorrect to consider Tūhoe as the sole people involved, as there

[253] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 55.
[254] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 428.
[255] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 424.
[256] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 425.
[257] Sections 58 and 59 Te Urewera Act, 26 July 2014.

are government officials represented in the Governance Board. The fact that those persons have seats reserved in the Board is quite atypical. Still, given Te Urewera's history of enclosure, their presence can easily be explained. As TĂNĂSESCU put it, the Act is a means to solve a dispute, a visible compromise *(supra,* 37*)*.[258] Through the Board, the Act created a specific group of responsible persons: six members appointed by Tūhoe and three by the government.[259] One can argue that in this balancing exercise, the Act has brought together both stakeholders — Tūhoe and the state of New Zealand — to form a larger, more artificial community, while simultaneously recognising a difference in dependency or attachment. The Te Urewera Act recognises that the connection between Te Urewera and Tūhoe is stronger than the bond between Te Urewera and the rest of New Zealand (*supra*, 58).[260] A different interpretation can consider the community to solely consist of Tūhoe members and explain the presence of members appointed by the government as a control mechanism which is a byproduct of Te Urewera's history of enclosure. Either way, Te Urewera remains open to all for activities which cause no harm and, in commons jargon, do not extract resource units. The Act phrases this as *"public use and enjoyment"*.[261]

81. Traditionally, the community is considered the subject while the resource is the object. However, in this case, it is explicitly explained that the task of the Board is not the management of land, but the management of people for the benefit of the land (*supra*, 24).[262] This refers back to the RoN aspect of the Te Urewera Act, which raises complications for an analogy with traditional commons. Te Kawa reverses the traditional roles in a commons: it is Te Urewera which, through representatives, manages the people so as to ensure its own flourishing. According to Te Kawa's logic, it would be the community of commoners which is managed by the common resource. The idea is that the functioning of an ecosystem is too complex for people to fully grasp it. Therefore, humans should preserve the balance in this order.[263] For a practical analysis, however, this logical reversal of roles has only limited effects, as there is a group of people to represent Te Urewera, which makes them responsible for the management.

[258] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85.
[259] Section 21 (2) Te Urewera Act, 26 July 2014.
[260] Section 3(7)(8)(9)(10) Te Urewera Act, 26 July 2014.
[261] Section 4(c) Te Urewera Act, 26 July 2014.
[262] Te Kawa o Te Urewera, 2017, 7; C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 588.
[263] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 151.

3. The Act and Te Kawa as commoning

82. Thirdly, the relation between the subject and the object must be characterised by a practice of commoning. COGOLATI specifies that commoning implies an absence of public or private property management, and that, rather, collective action governs the resource through *ad hoc* rules. This means that the governance happens in a horizontal and autonomous manner.[264] As the Te Urewera Act specifies that the land ceases to be vested in the Crown,[265] and Te Kawa states that "*Te Urewera may never again be owned by people"*,[266] it is clear that the management happens beyond any form of human private or private ownership over the region. It is rather Te Urewera which is considered to own itself.

83. The Board members officially represent Te Urewera, but it is up to Tūhoe and the Minister of Conservation to appoint them.[267] Nevertheless, there are more people directly involved. For example, 'bush crews' have been established, consisting of people who live in Te Urewera in a traditional manner to remain in close contact with the ecosystem. According to KAUFFMAN's research, these people are considered to be the real guardians of Te Urewera, even by the Board members. They communicate their findings to Tūhoe Te Uru Taumatua, which takes measures to manage human interference for the benefit of the land.[268] It follows that three actors form the network that governs Te Urewera: the Te Urewera Board represents Te Urewera in a legal and philosophical manner and lays down the management principles, the bush crews speak for Te Urewera through living with it, and Tūhoe Te Uru Taumatua relies on all this information for its operational decisions.[269] Even more, the official website of Tūhoe suggests that visitors contribute to the purpose of the Te Urewera Act by sharing what they have seen in the forest. *"Your eyes and ears are valuable to us, to tell what is good and healthy and what needs attention, care and management."*[270] This illustrates how the practical governance of The Te Urewera Act is the collective work of a network of people and institutional bodies.

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[264] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 34-35.
[265] Section 12(1) Te Urewera Act, 26 July 2014.
[266] Te Kawa o Te Urewera, 2017, 24.
[267] Sections 7 and 21(2) Te Urewera Act, 26 July 2014.
[268] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 589-591.
[269] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 155.
[270] The website can be accessed via https://www.ngaituhoe.iwi.nz/te-urewera (consulted for the last time on May 24th 2024).

84. As for the *ad hoc* rules, the Te Urewera Act and Te Kawa respectively list Tūhoe concepts of management and linked Te Urewera principles which should be respected.[271] In this manner, they construct a governance system specific to the region. The management plan and annual priorities are established by the Board, which also issues activity permits and other authorisations.[272] Section 55 of the Act lists four types of activities that can be conducted in Te Urewera, of which one type is allowed without further authorisation and of which three are subject to specific authorisations and procedures.[273] Considering all this, one can conclude that Te Urewera is managed by *ad hoc* rules inspired by the specific region and situation.

85. Lastly, regardless of the question of who formally manages whom, the ultimate goal of shared, durable enjoyment and protection of a resource remains quite similar to the objective of classic commons. This is illustrated by section 4(c) which speaks of *"a place for public use and enjoyment, for recreation, learning, and spiritual reflection and as an inspiration for all"*.[274] As is usual in commons institutions,[275] no one has the absolute power of alienation.

4. A moderated return to communal governance

86. To conclude this classifying chapter, some important elements are addressed which are either typical for commons or, on the contrary, atypical. These are all relevant considerations before applying OSTROM's eight design principles to the framework.

87. Some characteristics of the arrangement point in the direction of a commons institution. Firstly, the Te Urewera Act emphasises the importance of the connection between Te Urewera and Tūhoe, as *tangata whenua*,[276] Indigenous people, and *kaitiaki*, guardians and caregivers.[277]

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[271] Section 18(2) Te Urewera Act, 26 July 2014; Te Kawa o Te Urewera, 2017, 22-23.
[272] Section 55(1) Te Urewera Act, 26 July 2014; Te Kawa o Te Urewera, 2017, 39.
[273] Section 55(1) Te Urewera Act, 26 July 2014.
[274] Section 4(c) Te Urewera Act, 26 July 2014.
[275] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 112.
[276] *Tangata whenua* refers to local people. Literally, it refers to the people born of *"the placenta and of the land where the people's ancestors have lived and where their placenta are buried"*. More information on this term can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=tangata+whenua
[277] Section 3(6) Te Urewera Act, 26 July 2014; R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 208; More information on the terms can be found via https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=tangata+whenua and https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=kaitiaki+ .

Even more, the Act mentions as one of its first purposes the strengthening of this connection.[278] In retrieving the history of Te Urewera and expressing the intention to resolve grief,[279] the Act suggests an intention to install an arrangement inspired by the past. Te Kawa builds further on this as it is heavy with references to responsibility, respect and reciprocity.[280] More explicitly, Te Kawa talks about *"unlearning"* and *"rediscovery"*.[281] This points in the direction that the governance system laid down in the Te Urewera Act wishes to reconnect, at least to a certain extent, with the original governance of Te Urewera by Tūhoe.

88. Secondly, as briefly mentioned already (*supra*, 5), the Te Urewera Act shares with traditional commons the ambition to move beyond private or public ownership, and yet to also regulate influences on the ecosystem and restore traditions. In doing this, through the establishment of the Board, the Te Urewera Act foresees the two most important organisational characteristics that DE MOOR identified as essential for commons: institutionalisation and self-governance.[282]

89. Thirdly, the Te Urewera Act clearly bears witness to an awareness of the carrying capacity of Te Urewera and the fragility of the bond between Te Urewera and Tūhoe. As the chairman of the Te Urewera Board Tamati KRUGER explains, *"Te Kawa [...] asks us to stop and reflect on Te Urewera and what that means as a living system we depend on for survival, culture, recreation, and inspiration"*.[283] This reasoning asks people to conform their governance system to the natural laws that regulate the functioning of ecosystems. The awareness of the limited carrying capacity of ecosystems is a characteristic that DE MOOR also found in historical commons.[284]

90. On the other hand, the Te Urewera Act appears to possess characteristics that are foreign to traditional commons and therefore entirely its own. Firstly, it is unique that the governance Board is not only a management tool, but that it represents Te Urewera itself.[285] While there surely is an instrumental aspect to the choice for a form of legal personhood, this element also

[278] Sections 3(10) and 4(a) Te Urewera Act, 26 July 2014.
[279] Section 3(10) Te Urewera Act, 26 July 2014.
[280] See, for example, Te Kawa o Te Urewera, 2017, 7, 12, 18, 32 and 37.
[281] Te Kawa o Te Urewera, 2017, 9.
[282] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 430.
[283] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 150.
[284] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 425.
[285] Section 17 Te Urewera Act, 26 July 2014.

brings the Act closer to Tūhoe thinking, as confirmed by Te Kawa.[286] Secondly, there is an atypical variety of objectives.[287] The Act wishes to strengthen the bond between Tūhoe and Te Urewera, preserve ecological, historical and cultural heritage and keep the area open for public enjoyment.[288] This complicates matters for the governance system that is set in place, as the governance practices need to consider many different aspirations which may not always be in harmony (*infra*, 131). A third element that seems to be at odds with traditional commons, is the presence of government appointed members in the Board. This can also put in question the element of self-governance. Lastly, an atypical element is the elaborate legislative anchorage. Commons are considered to be grassroots institutions, which means that they are developed by communities. Although some external recognition is desirable (*infra*, 124), the space for self-government is usually carved out by the communities themselves,[289] rather than by an act of Parliament.

91. The specific history of the enclosure of Te Urewera can explain these 'odd' characteristics for a large part. In 1954, Te Urewera was transformed into a national park, which meant that some legal or institutional action was required to undo this process of enclosure.[290] While it was necessary to legally disestablish the national park, communal governance could theoretically have been reinstalled without representatives of the government in the Board. Nevertheless, the negotiations started in a context in which the Crown owned the area (*supra*, 25). The Te Urewera Act was then considered the golden mean (*supra*, 37). The tone of the Act and of Te Kawa expresses an intention to hand back the governance of Te Urewera to Tūhoe. Still, the government does not lose all control over the region: the Board ensures a weakened, but nevertheless lasting hold. The Board in itself is not peculiar in the tradition of European commons (*supra*, 79). Nevertheless, it is a new institution in Te Urewera, which means that there is no complete return to the Tūhoe governance that existed before Te Urewera was enclosed.

92. The question arises, then, whether one can examine this arrangement through a framework coined for commons, as some elements appear to be alien to it. There are quite some reasons to

[286] See, for example, Te Kawa o Te Urewera, 2017, 9 and 29.
[287] Elinor OSTROM gives examples of CPRs in Switzerland, Japan, Spain and the Philippines which are mainly concerned with agriculture, meadows, timber and irrigation systems, in E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 61-88.
[288] Section 4 Te Urewera Act, 26 July 2014.
[289] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 35.
[290] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 160.

answer this question affirmatively. It is important to remember that commons systems have always been complex and that they have always been diverse.[291] It is not without reason that DE MOOR speaks of an 'institutional toolbox' (*supra*, 55). Still, vigilance is due, as throughout history, different social scientists have used the term 'commons' for phenomena which did not entirely fit within the historical definition, but had important similar characteristics. DE MOOR warns for mindless transfers of research results, and pleads in this way for tailored research approaches.[292] This paper takes on such a cautious research approach. Given the similarities, the intentions behind the Act and the fact that most of the peculiarities can be explained through their historical context, it is valuable to have a look at the Te Urewera Act as a new, possibly inspiring governance system for DE MOOR's toolbox. The distinctive features should not pose too many problems as OSTROM's criteria were specifically coined to apply to a variety of commons.[293] Nevertheless, it remains important to keep the specific history and characteristics in mind.

[291] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 429.
[292] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 425, 427 and 430.
[293] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 88-90.

IV. Ostrom's design principles in Te Urewera

93. Despite the diversity among all kinds of commons arrangements,[294] through inductive practices, OSTROM has distilled eight design principles for institutions which successfully manage CPRs in the long term.[295] These principles are separately explained and applied in the following section. It is important to note that 'successful institutions' should not be understood as institutions of which the operational rules have remained unchanged, but rather as institutions which offered sufficient incentives and means to improve their functioning over time. In other words, these design principles tell something about the robustness and sustainability of the institution.[296] Even though OSTROM tones down her theory by stating that the design principles are not necessarily indispensable,[297] DE MOOR described these principles as *"the 'cooking recipe' for the perfect commons"*. They include all the essential ingredients, while *"local flavour"* differs according to the type of resources and the available institutional tools.[298]

94. Section 4 of the Te Urewera Act mentions in its first sentence that the Act wishes to *"establish and preserve in perpetuity a legal identity and protected status"*.[299] OSTROM's design principles can be used to test this ambition of perpetuity, while taking into consideration the fact that gaps in the commons institution might still be compensated by the elaborated legislative foundation in the Te Urewera Act. The following section moves back and forth between the theoretical framework and the Te Urewera arrangement.[300]

1. The principles applied

95. OSTROM's criteria are the following: (1) clearly defined boundaries, (2) congruence between appropriation and provision rules and local conditions, (3) collective-choice arrangements, (4) monitoring, (5) graduated sanctions, (6) conflict-resolution mechanisms, (7) minimal recognition of rights to organise, and for common-pool resources which are part of

[294] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 34; E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 21-22.
[295] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 88-90.
[296] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 58-60 and 89.
[297] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 90.
[298] T. DE MOOR, "From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons", *Natures sciences sociétés* 2011, Vol. 19, (422) 426.
[299] Section 4 Te Urewera Act, 26 July 2014.
[300] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 45.

larger systems: (8) nested enterprises.[301] If the first, second and third principles are present, and if the cost to adapt the rules is relatively low, a community should be able to develop a performative set of rules. The matter of compliance, then, is covered by the fourth and the fifth principle.[302]

96. Throughout OSTROM's writings, she uses the term 'appropriator' for people who withdraw resource units.[303] This term is linked to traditional commons where the appropriators are, for example, fisher people or farmers. Although this term could be suitable for some people in Te Urewera such as hunters, the term sounds inappropriate in this context, as the idea of appropriation goes against the spirit of the Act. More so, the Act mainly regulates the way in which the area and its heritage will be protected, rather than how elements can be appropriated, although hunting permits are a part of this (*infra*, 99). The Te Urewera Act regulates a wide array of topics, and moves beyond the distinction of appropriators and providers. Therefore, this paper simply refer to 'people' and specify what actions they might take, what services they may provide or which responsibilities they have.

1.1 Clearly defined boundaries

97. The criterion of clearly defined boundaries requires both a clear demarcation of the CPR itself and of the individuals who may use the resource. Without such clear boundaries, there is a risk that benefits created by the efforts of certain people will be reaped by people who did not make a contribution. In the worst case scenario, the resource might be destroyed. Therefore, OSTROM concludes, some people should have the power to refuse access to outsiders.[304]

98. As the Te Urewera Act transforms the previous national park into a new legal entity, this new entity amounts to the same area. Te Kawa also specifies that, formally, it only applies in the region of the previous national park. It stresses that the homeland of Tūhoe encompasses more regions which fall outside of this geographical demarcation, but that the instruments do not apply to private Tūhoe lands.[305] Subpart two of the third part of the Te Urewera Act sets out rules and conditions to add land to Te Urewera. This can only happen if the land meets certain criteria concerning natural features and if the decision is adequately approved.[306]

[301] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 88-90.
[302] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 93-94.
[303] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 30.
[304] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 91.
[305] Te Kawa o Te Urewera, 2017, 16.
[306] Section 101 Te Urewera Act, 26 July 2014.

Section 111 explains in what circumstances land can be removed from it: this requires an act of Parliament.[307]

99. Concerning the circle of people who have access to Te Urewera, a distinction is made between different types of interactions. Section 4 of the Te Urewera Act gives *"public use and enjoyment"* as one of the purposes, more specifically *"recreation, learning, and spiritual reflection"* together with *"inspiration"*.[308] For activities which have a greater impact on Te Urewera's ecosystem, permits are required according to schedule 3 of the Te Urewera Act. This concerns activities which have an impact on the Indigenous plants and animals, the establishment of accommodations, road constructions, farming activities and recreational hunting.[309] The schedule explains under what conditions the Board can distribute these permits. For all of them it is essential that the management plan provided for them, or that the activity would at least be in line with the plan. When the Board decides on activities which affect Indigenous plants or disturb Indigenous animals, the Board must consider different factors, including whether the activity is important for customary practices between Tūhoe and Te Urewera and whether *iwi* and *hapū* support the request.[310] These activities are prohibited for commercial purposes, unless concessions are given.[311] Commercial activities also require the signing of 'Friendship Agreements' with Te Urewera through its Board to commit loyally to Te Urewera values. This is to make sure people do not approach Te Urewera as a stock of extractable resources, but rather as an ecosystem of which people are a part.[312] In sum, through the system of activity permits, the Te Urewera Act provides for a detailed, institutionalised system which restricts the access of people to Te Urewera for activities which risk adversely impacting it.

1.2 Congruence between appropriation and provision rules and local conditions

100. For the second design principle, OSTROM focusses on internal rules. These rules have to regulate the appropriation and provision of the resource, they should be proportionate and they need to be tailored to the local circumstances.[313] Once again, this formulation has traditional

[307] Section 111 Te Urewera Act, 26 July 2014.
[308] Section 4(c) Te Urewera Act, 26 July 2014.
[309] Sections 1-6 of schedule 3 of the Te Urewera Act, 26 July 2014.
[310] Section 1(3)(b)(e) of schedule 3 of the Te Urewera Act, 26 July 2014.
[311] Section 7 of schedule 3 of the Te Urewera Act, 26 July 2014.
[312] Te Kawa o Te Urewera, 2017, 53; C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 158-159.
[313] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 92.

commons in mind. For Te Urewera, this can be translated to rules on interactions, which can either be beneficial or detrimental to Te Urewera and its relation with Tūhoe.

101. When browsing through the regulatory framework of Te Urewera, one rapidly becomes aware of the fact that there is no strict separation between rules to provide resources and rules to consume them. It seems that the Act and Te Kawa rather try to strike a balance through allowing interactions with Te Urewera that never destabilise the ecosystem too much.[314] This is consistent with Indigenous thinking, which rejects secluded conservatism but rather takes on a relational approach of reciprocity. Responsible interactions with the ecosystem, and the use of resources, are crucial for Tūhoe to relate to the land (*supra*, 69).[315] Such a relational approach is considered as a possible way to address the frictions between resource use and environmental protection.[316] Te Kawa expresses this balance through equating the needs of the land with the limits of humans.[317]

102. This approach is illustrated by the trails that go through Te Urewera: while they used to follow the shortest routes, trails are now constructed in ways to minimise environmental impact. Similarly, some existing structures are no longer maintained or simply removed because of their detrimental impact on the forest.[318] This logic is also reflected in the recent change in the approach to possums. Whereas the Department of Conservation (DOC) considered possums to be a pest in Te Urewera and used aerial spraying of 1080 poison, Tūhoe Te Uru Taumatua takes a different approach. Nowadays, Tūhoe hunt the animals to consume the meat and sell the fur. KAUFFMAN spoke with Tūhoe hunters who felt the duty to keep the possum population under control, while minimising their own ecological impact.[319] In this manner, the hunters provide for Te Urewera while simultaneously 'appropriating resources', as the commons jargon would refer to it.

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[314] Te Kawa o Te Urewera, 2017, 46.
[315] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 84-85.
[316] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 61 and 65.
[317] Te Kawa o Te Urewera, 2017, 32.
[318] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 155-156.
[319] C. M. KAUFFMAN, "Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand", *ISLE* 2020, Vol. 27, (578) 591-592.

103. As for the activity permits: they need to be in line with the management plan (*supra*, 99), which means that the impact on Te Urewera's long term prosperity can be taken into account. This ensures a link between activities which 'give' and activities that 'take'. At first sight, permits that allow hunting or picking plants are reminiscent of traditional rules on the appropriation of resource units. Nevertheless, the possum hunting illustrates that hunting cannot simply be categorised as an action which is either 'appropriating' or 'providing'. Ideally, the activity offers a benefit both for Te Urewera and the people involved. In this case, there would automatically be some linkage between people who provide for Te Urewera and people who consume resources. For other activities, this is not necessarily the case. It is up to the Board to maintain a balance through the activities that it permits: actions that benefit Te Urewera will normally be permitted, while other actions are only permitted if the negative impact is limited.[320] This means that the use of certain boats has been prohibited and that new regulations have been put in place on where people can camp and light fires.[321]

104. As for the financing of the Board's functioning, section 38 of the Te Urewera Act determines that the Board, the Director-General of Conservation and the chief executive of Tūhoe Te Uru Taumatua need to agree on an annual budget to which the Director-General and the executive contribute equally, unless they agree otherwise.[322] This funding model mirrors two objectives of the Te Urewera Act: to reconnect Tūhoe with Te Urewera while keeping access open to the wider public. The funding arrangement can be interpreted as the corresponding provision rule which seeks to strike a balance between Tūhoe and the state of New Zealand.

105. Lastly, the question arises whether these rules have been tailored to the specific conditions of Te Urewera. Although one can argue whether all choices made are the best ones, it is clear that the regulatory framework has been put together specifically for Te Urewera, and that the spiritual value of the region, its history of colonisation and its environmental value have been taken into account.

[320] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 155.
[321] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 158.
[322] Section 38 Te Urewera Act, 26 July 2014.

1.3 Collective-choice arrangements

106. The third design principle for long-enduring CPRs concerns collective participation. OSTROM has concluded that institutions in which affected individuals participate in the modification of the rules, can more easily adapt their rules to the local conditions.[323] As the Te Urewera Act creates a layered legal order, different levels of rules need to be addressed.

107. Firstly, there is the Te Urewera Act itself which provides for a broad but rigid framework, as it aims to regulate Te Urewera's status *"in perpetuity"*.[324] It demarcates Te Urewera from the outside world, but also contains a large array of rules. Several of these rules lay down competences and procedure, but others offer substantive guidance for the appointed decision-making bodies. The rules on permits, for example, set clear boundaries to the Board's freedom to decide (*supra*, 99). The Act is the result of intense negotiations, which implies involvement of Tūhoe, but leaves not much room for future adjustments to their demand. It is reminiscent of legal orders with a constitutional framework to work within.

108. Te Kawa, the management plan, occupies second place in the legal order. According to the Te Urewera Act, it is prepared and approved by the Board.[325] Section 45 stipulates the purpose of the plan and section 46 lists what content it should contain.[326] It requires the plan to contain not only central values, but also planned outcomes, expected adverse effects and the way in which these will be remedied. While this list may give the impression that Te Kawa is a technical document, this is not the case. Te Kawa is full of the spiritual Māori language, which is scarce in the more technical Te Urewera Act, with the exception of the introductory chapters of the Act. Te Kawa asserts that it is Te Urewera who manages the people (*supra*, 24), something that is not written in the Act. On the one hand, TĂNĂSESCU interprets this difference in style and content as an indication that the Act itself is not sufficiently aligned with Indigenous worldviews.[327] On the other hand, the fact that Te Kawa charts its own course is seen as a subversion of state power, which was made possible by the distribution of power in

[323] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 93.
[324] Section 4 Te Urewera Act, 26 July 2014.
[325] Sections 18(1)(a) and 44 Te Urewera Act, 26 July 2014.
[326] Sections 45 and 46 Te Urewera Act, 26 July 2014.
[327] Mihnea TĂNĂSESCU relies on an analysis of Carwyn JONES, who determines that the Māori language is abundantly used in symbolic parts, but only sparsely in the operational and more technical sections of the Act. This is part of a wider claim made by JONES that the treaty settlement process is not only an opportunity for Tikanga but that it also poses a risk (*infra*, 133).

the Te Urewera Act.[328] Even though this does not fully amount to collective-choice decision-making, Te Kawa does bring the regulatory framework closer to Tūhoe communities.

109. These management plans are less rigid than the Act itself, but remain quite inflexible. Section 48 of the Act sets out the rules to review the plan, which needs to happen at least 10 years after the approval of the previous plan.[329] The management plan drafted in 2017 is still applicable today. The second paragraph of section 48 specifies that the Board may at any time review and amend the plan to adapt it to advancing knowledge and new circumstances. The third paragraph makes the second schedule of the Act applicable, which provides the rules on the adoption of the plan. These require that the Board consults with the chief executive of Tūhoe Te Uru Taumatua (the Chief executive) and the Director-General of Conservation (the Director-General).[330] The Board must also publicly call for written comments, which it then should consider.[331] As soon as the Board has a draft, it should inform both the public as well as the Chief executive, the Director-General, the Minister of Conservation, the New Zealand Conservation Authority, relevant conservation boards and local authorities, and all persons and organisations which provided their comments at the start.[332] The Board must then consider all written and oral submissions and may amend the draft management plan based on this.[333] After this, the draft must be sent to the New Zealand Conservation Authority, as well as to the Chair of the trustees of Tūhoe Te Uru Taumatua and the Minister of Conservation. For the last two, the plan must be accompanied by a summary of the submissions that have been sent, the comments of the Conservation Authority and an explanation on what has happened with these comments.[334] The Chair of trustees and the Minister may then jointly recommend approval, after which the Board may approve the plan, accompanied by a report on how it has dealt with the submissions and comments on the draft.[335]

110. Some important conclusions can be drawn based on this information. Firstly, there is no legal recognition of decision-making based on direct collective choices: it is the Board that decides, after consulting the general public and specific entities. Secondly, the Board is not obliged to implement comments or suggestions. It is merely obliged to consider them and

[328] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 82-84 and 87.
[329] Section 48 Te Urewera Act, 26 July 2014.
[330] Art 19(1)(a) of schedule 2 of the Te Urewera Act, 26 July 2014.
[331] Art 19(1)(d) and art 19(2) of schedule 2 of the Te Urewera Act, 26 July 2014.
[332] Art 20(1)(a) and art 20(1)(b) of schedule 2 of the Te Urewera Act, 26 July 2014.
[333] Art 21(1)(b) and art 21(2) of schedule 2 of the Te Urewera Act, 26 July 2014.
[334] Art 22(1) and art 22(3) of schedule 2 of the Te Urewera Act, 26 July 2014.
[335] Art 22(4)(5) and art 23(1) of schedule 2 of the Te Urewera Act, 26 July 2014.

explain how it deals with them. However, the Board is dependent on a recommendation by the Chair of trustees and the Minister of Conservation to approve the management plan. This implies that the approval of those two is crucial, while that is not necessarily the case for other people involved, as the contributions of Tūhoe, for example, need to be considered, but do not need to be implemented.

111. Then there are the annual operational plans. These plans are prepared by the Chief Executive and the Director-General, and need to be approved by the Board.[336] These plans guide the daily operational management. As for individual permits, the Board is responsible (*supra*, 99). Schedule 3 provides for clear rules, obliging the Board to respect the management plan.[337] The remaining discretionary powers relate to considerations such as the preservation of nature, customary practices of Tūhoe and, in the case of Indigenous plants and animals, possible support of Tūhoe.[338] Section 1(3)(e) of schedule 3 is a rare direct reference to *iwi* and *hapū* without placing an institutional organ in between as a filter. However, the support of the Tūhoe is only one of the many criteria that need to be considered by the Board. That weakens the position of these communities.

112. A body with a crucial role in these processes of decision-making, is Tūhoe Te Uru Taumatua. It does not only approve the management plan, but also appoints Board members (*supra*, 65). In addition, it takes operational decisions, possibly based on information of the bush crews (*supra*, 83). However, little can be found on the decision-making process of Tūhoe Te Uru Taumatua. Erin Matariki CARR explains that *"leadership has chosen to keep our developments largely in house, while we regain our sense of belief in ourselves. All of this work must be understood in the context of a colonised people reclaiming liberation and self-interdependence, what we call* 'mana motuhake'".[339] In this regard, it is important to remember that there are internal politics within the large Tūhoe population, even if this is not addressed by the Te Urewera Act.[340] That this body is still developing its methods to represent *"the Tūhoe*

[336] Section 24(1)(2) of schedule 2 of the Te Urewera Act, 26 July 2014; New Zealand High Court Rotorua Registry, *Tuna v. Te Urewera Board*, 3680, 14 December 2023, sections 5 and 27.
[337] Sections 1(2)(c), 2(2),3(1), 4(2) and 5(a)(i) of schedule 3 of the Te Urewera Act, 26 July 2014.
[338] Section 1(3)(e) of schedule 3 of the Te Urewera Act, 26 July 2014.
[339] Erin Matariki CARR gave this explanation over email and agreed to be cited in this paper.
[340] B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 12; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85.

nation and its land and wealth",[341] is evident from some Tūhoe protests that have taken place.[342] This must not be reason for alarm, however, as OSTROM has stressed that *"getting the institutions right"* takes time.[343]

113. In 2023, the High Court in Rotorua had to deliver a judgement on huts that had been burnt down after a Tūhoe resident initiated proceedings against Tūhoe Te Uru Taumatua, the Board and the Director-General of Conservation (*infra*, 125).[344] This suggests that not all Tūhoe feel like their voices are heard. So, even though the Te Urewera Act and Te Kawa make a lot of references to Tūhoe and their way of life, it seems that the governance system does not rely on a comprehensive collective-choice arrangement that allows the majority of partaking people to come to decisions together. The fact that Tūhoe political authority is traditionally decentralised with important powers at the level of *hapū*,[345] may complicate the functioning of these institutions.

1.4 Monitoring

114. As concerns about one's reputation and shared norms still turn out to be insufficient to prevent free-riding in the long run, monitoring mechanisms are necessary. This is reflected in OSTROM's fourth design principle, which requires monitors who are either part of the community or accountable to it.[346]

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[341] These words are used on the official website of Tūhoe to describe the function of Te Uru Taumatua. It can be accessed via https://www.ngaituhoe.iwi.nz/tut .

[342] In 2021, a protest flared up against the institution. Tūhoe protested that the trustees could make decisions on their behalf and claimed that they did not receive response to their mails and calls. These protests have been covered in C. JONES, "Tūhoe hapū continue to ask for tribal leadership resignation", *Stuff* 2021, via https://www.stuff.co.nz/national/politics/local-democracy-reporting/300305806/thoe-hap-continue-to-ask-for-tribal-leadership-resignation (consulted for the last time on May 24th 2024); D. WHAITIRI, "Local Focus: More kaumātua protests against Te Uru Taumatua", *The New Zealand Herald* 2021, via https://www.nzherald.co.nz/kahu/local-focus-more-kaumatua-protests-against-te-uru-taumatua/FCIUKQ7SRX7P33WUYTTFHXP6ME/ (consulted for the last time on May 24th 2024); X., ""Whānako whakapapa!" – Protests continue against Te Uru Taumatua", *Te Karere TVNZ* 2021, 2 min 40 sec, via https://www.youtube.com/watch?v=pqTA8u5x4Uk (consulted for the last time on May 23rd 2024). Later, there were new protests directly linked to Te Urewera. Amongst the protest slogans *"TUT* (the abbreviation of Te Uru Taumatua) *is not Tūhoe"* appeared. A picture of the protest is included in X., "Unlawful: High Court condemns destruction of Te Urewera huts", *The New Zealand Herald* 2023, via https://www.nzherald.co.nz/kahu/unlawful-high-court-condemns-destruction-of-te-urewera-huts/TMNJ3TYQQBE5FO4DIUXIJQXYTM/ (consulted for the last time on May 24th 2024).

[343] E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2009, 14.

[344] New Zealand High Court Rotorua Registry, *Tuna v. Te Urewera Board*, 3680, 14 December 2023.

[345] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 149.

[346] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 93-94.

115. The negotiators of the Te Urewera Act have considered this and included a small chapter on 'Compliance and enforcement'. Section 76 gives a long list of offences that can be committed in Te Urewera, ranging from taking animals into the region, removing or planting plants, using land for cultivation or damaging infrastructure.[347] An offence with a wide scope of application consists in doing anything that requires authority without such authority or in breach of it.[348] If warranted officers believe that they can interrupt such an offence or prevent it from happening, they may do so.[349] Furthermore, schedule 4 details that they can require information from alleged offenders, ask persons to stop, search vehicles and seize property.[350]

116. Those warranted officers are trained through a program that the Chief executive and the Director-General agree upon.[351] Together, these two also issue warrants to persons if they agree that the person may exercise warrant powers and duties.[352] However, the wider policy on compliance and enforcement is developed by the Board.[353] Interestingly, section 74 states that *"every constable has the powers of a warranted officer for the purposes of compliance and enforcement under this Act."*[354] Similarly, section 75 affirms that different types of rangers and fishery officers can exercise the powers and duties that were conferred to them by other acts within Te Urewera.[355] As a result, the warranted officers can monitor compliance with the rules, but they are not the only ones exercising authority. Decision-making bodies, in turn, can be scrutinised by courts, as is explored below (*infra*, 125).

117. Aside from the monitoring of people's behaviour, Te Kawa provides for the direct monitoring of Te Urewera itself. It is the Board's task to monitor the ecosystem, to register the impact of certain activities and decide on priorities for the future.[356] More generally, Te Kawa mentions as a priority the establishment of *"increased protection and responsibility through Tribal authorities"*.[357] Although this is not a clear provision on monitoring, it refers to a strong sense of responsibility and sense of duty which may undergird the monitoring system.

[347] Section 76 Te Urewera Act, 26 July 2014.
[348] Section 76(1)(j) Te Urewera Act, 26 July 2014.
[349] Section 6(1) of schedule 3 of the Te Urewera Act, 26 July 2014.
[350] Art 8, art 9, art 10 and art 11 of schedule 3 of the Te Urewera Act, 26 July 2014.
[351] Section 71(2) Te Urewera Act, 26 July 2014.
[352] Section 72(1)(a) Te Urewera Act, 26 July 2014.
[353] Section 71(1) Te Urewera Act, 26 July 2014.
[354] Section 74 Te Urewera Act, 26 July 2014.
[355] Section 75(1) Te Urewera Act, 26 July 2014.
[356] Te Kawa o Te Urewera, 2017, 54.
[357] Te Kawa o Te Urewera, 2017, 39.

1.5 Graduated sanctions

118. Along with this monitoring goes sanctioning by the community. For this, OSTROM refers to *"quasi-voluntary compliance"* as interpreted by political scientist Margaret LEVI. This means that people are at risk of being exposed to coercion, namely if their non-compliance is noticed. For LEVI, this coercion is essential to achieving compliance, as it strengthens the sentiment that *everyone* complies. Internal enforcement needs to deter people from violating the rules through ensuring and giving the impression that everybody complies with them.[358]

119. The Te Urewera Act dedicates a small chapter to the sanctioning of offences. It divides the offences in three categories with different penalties. Section 78 lists specific offences which carry, in the case of an individual infringement, imprisonment for a term not exceeding two years, or a fine below $100,000, or a combination. For companies, a fine can be imposed, and if the offence is continuing, an additional fine can be added for every day the offence continues.[359] Section 79, then, provides the penalties for offences which are not included in section 78. These penalties are the same as the ones provided for in section 78, with the exception of imprisonment, which cannot exceed one year in the case of section 79.[360] Offences included in section 78 are thus considered more serious, which is interesting as it contains for example the offence of scattering seeds of plants injurious to plant or animal life.[361] This gradation shows the level of environmental protection the Te Urewera Act wishes to provide. Whether an offence falls within the third category depends on the intention of the offender: section 80 provides higher penalties if it is proven beyond reasonable doubt that the breach was carried out for the purpose of commercial gain. This aggravating factor raises the maximum length of imprisonment to five years, and also significantly influences the maximum fines.[362] Lastly, a specific provision provides a penalty for offences related to dogs.[363] It is remarkable that all of these sanctions are very traditional and rely on the governmental criminal system. The Board does not have the policy space to establish its own sanctions system.

120. Interestingly, Te Kawa is based on a completely different logic: one of intrinsically motivated responsibility (*supra*, 87). Moreover, it states that in the natural world, there are

[358] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 94-95.
[359] Section 78(3) Te Urewera Act, 26 July 2014.
[360] Section 79 Te Urewera Act, 26 July 2014.
[361] Section 76(1)(c) *cum* section 78(2)(a) Te Urewera Act, 26 July 2014.
[362] Section 80 Te Urewera Act, 26 July 2014.
[363] Section 86 Te Urewera Act, 26 July 2014.

"consequences" rather than rewards or punishments.[364] Through emphasising the implications of human behaviour, Te Kawa brings respect for Te Urewera back to a moral obligation, rather than a set of rules the violation of which implies a specific punishment. So, even though the Te Urewera framework does not have its own traditional sanctioning system, Te Kawa nevertheless lays down its own moral framework focused on responsibility.

1.6 Conflict-resolution mechanisms

121. According to the sixth design principle, members of the community need to have easy access to local arenas to solve disputes and conflicts. OSTROM stresses the importance of this forum in CPRs, as there is no external all-knowing power which decides upon the content of rules. It is up to the people, then, to reach agreement on the exact meaning of rules among themselves. The mechanisms can range from very informal to very elaborate.[365]

122. Such an open platform to discuss disputes is not found in the Te Urewera Act, but neither is there a lack of an external power. Due to the high level of institutionalisation, there are documents which explain rules and organs competent to decide on their exact meaning. For example, Te Kawa defines the central Te Urewera principles to abide by.[366] And as mentioned (*supra*, 99), it is the Board that decides whether activities are in line with Te Kawa.

123. Nevertheless, it is important to keep in mind that the Te Urewera Act is, as a whole, a means to solve a long-running dispute (*supra*, 37). More specifically, the dispute between the Indigenous Tūhoe and the state of New Zealand. The Board is part of an institutionalised framework that ensures a continuous dialogue and ever-ongoing negotiations.[367] This arrangement, however, does not ensure conflict resolution between members of Tūhoe. And even though six Board members are appointed by Tūhoe, this is of course no guarantee that all Tūhoe feel represented. This in itself is not a violation of the Act, as it stipulates that the Board must represent Te Urewera rather than Indigenous people. *"Nature speaks all the time"*, is written in Te Kawa,[368] situating the dialogue between the Board and Te Urewera, rather than between people. From a commons perspective, however, it might be problematic if members

[364] Te Kawa o Te Urewera, 2017, 11.
[365] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 100.
[366] Te Kawa o Te Urewera, 2017, 22-23.
[367] R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 324-325; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 82.
[368] Te Kawa o Te Urewera, 2017, 11.

of the Tūhoe community do not feel seen and yet have no arena to resolve conflicts. Symptoms can include protests (*supra*, 112) and even the filing of a court case (*infra*, 125).

1.7 Minimal recognition of rights to organise

124. As the seventh principle, OSTROM considers external recognition of the CPR, and more specifically its operational rules. This is important, since a lack of such recognition may result in a person resorting to an external authority to avoid being subject to a rule.[369] In COGOLATI's words, *"commons cannot survive in a legal vacuum"*.[370] This design principle might be the strongest point of the Te Urewera Act. The legislative Act does not only confer a specific legal status to Te Urewera that allows it to go to court,[371] but also establishes the authority of different organs such as the Board. In doing so, it offers strong legitimacy to the governance system.

125. This recognition goes thus far that the Board may be the object of judicial review. Recently, the Rotorua High Court has rendered a judgement in which it decided that the Board, Tūhoe Te Uru Taumatua and the Crown had acted unlawfully.[372] The case concerned the lawfulness of the decision to burn down huts in Te Urewera, and the High Court established different irregularities, including the Board's failure to respect certain principles contained in section 5 of the Te Urewera Act. These demand that all persons exercising powers preserve to the extent possible the ecological systems, respect *Tūhoetanga*[373] and keep Te Urewera accessible. Another sore point was the fact that there had been no agreement on the annual operational plans for two consecutive years. The High Court found that several provisions had been violated, and used the content of the Te Urewera Act to hold institutions accountable. The least one can say then, is that the Te Urewera framework is recognised in the New Zealand legal system. OSTROM feared that people might resort to external authorities to be exempted from an internal rule, but in Te Urewera, people can resort to external authorities to have internal rules respected.

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[369] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 101.
[370] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 196.
[371] Section 11(1) Te Urewera Act, 26 July 2014.
[372] New Zealand High Court Rotorua Registry, *Tuna v. Te Urewera Board*, 3680, 14 December 2023, sections 106-108.
[373] "*Tūhoetanga is not defined in the Act, presumably because the concept defies precise definition. The concept acknowledges the deep-seated connection between Tūhoe and Te Urewera, a connection supported by, but transcending, the physical realm.*" This is written in New Zealand High Court Rotorua Registry, *Tuna v. Te Urewera Board*, 3680, 14 December 2023, section 63.

1.8 Nested enterprises

126. Lastly, complex and enduring CPRs are structured in multiple layers of nested enterprises to work on different levels to meet different needs.[374] At first sight, the Te Urewera Act does not foresee a layered structure: the Board is the one and only organ to represent the whole of Te Urewera, the central pivot around which the Act is built. However, the Board is 'only' the representative of Te Urewera, surrounded by several other Tūhoe institutions. As mentioned (*supra*, 65), its members are appointed by other bodies which are located both within and outside Te Urewera. Funding also comes from two established entities (*supra*, 104).

127. The Board relies on Tūhoe Te Uru Taumatua for operational management, which, in turn, is in close contact with bush crews (*supra*, 83). The Act also makes references to the ancient structures of *iwi* and *hapū*. Section 5 recognises their relationship with Te Urewera, while section 20 obliges the Board to take these bonds into account when making decisions.[375] If the Board wishes to add public conservation land to the legal entity or grant an activity permit related to Indigenous plants and animals, it must consider the views of *iwi* and *hapū*.[376] All of this illustrates that there is interlinkage between the Te Urewera governance system and existing structures, but that it does not move far beyond a consultative logic. Through rules on members' appointments and funding matters, the governance system is quite institutionalised.

2. State involvement as the distinctive feature

128. In sum, one can conclude that there are clear boundaries (1) and that there is congruence between appropriation rules and provision rules, albeit in a special, holistic manner, and that these are adapted to Te Urewera's context (2). The criterion of collective-choice arrangements (3), however, does not appear to be met. Even though initiatives such as bush crews ensure involvement of different Tūhoe members, the Te Urewera governance framework heavily relies on institutions which do not allow for comprehensive collective decision-making. The monitoring (4) and sanctioning (5) frameworks appear to be effective in enforcing governance rules, but both of them, and especially the sanctions, remain intertwined with the state apparatus. There is no clear conflict-resolution mechanism (6), but this is largely, although not completely, remedied by the legal framework. This connects with the design principle of

[374] E. OSTROM, *Governing the commons*, Cambridge, Cambridge University Press, 2015, 101-102.
[375] Section 5(d) and 20(1) Te Urewera Act, 26 July 2014.
[376] Section 106 and art 1(3)(d) of schedule 3 of the Te Urewera Act, 26 July 2014.

external recognition, which is an exceptionally strong point of the Te Urewera Act thanks to its legal status (7). Lastly, the Te Urewera governance system is nested between existing bodies, albeit in rather institutionalised and technical ways (8).

129. This research paper contends that all the elements which appear peculiar from a commons perspective can be traced back to the strong position of the state of New Zealand. Not only was Te Urewera in state ownership before the negotiations started, the state of New Zealand also has a strong position in the international legal order. This explains the relatively strong position that the state of New Zealand has managed to retain with regards to Te Urewera. From a commons perspective, the biggest disruptive element is related to the tendency towards enclosure, which is OSTROM's blind spot (*supra*, 53).

130. The weak assessment that the model receives in terms of collective-choice agreements, can be traced back to the high level of institutionalisation.[377] Like a constitutional framework, the Te Urewera Act distributes powers and lays down several specific procedures. These powers are most often not attributed directly to Tūhoe, but rather to the Board, which indirectly involves the state. The Minister of Conservation has also kept some direct powers. This reduces the flexibility and ability to develop different decision-making procedures, but is necessary if the state wants to maintain a legal basis to exercise its powers. There remains, however, an environment of shared authority between the Board, the Minister of Conservation and the executive of Tūhoe Te Uru Taumatua which is reminiscent of polycentric decision-making. The training of warranted officers, for example, but also the adoption of the management plans, involve both the State and authorities within Te Urewera. This high level of institutionalisation, at the expense of collective-choice arrangements, makes conflict-resolution mechanisms on the content of rules superfluous, as there are bodies with the competence to make final decisions. However, this remains rather theoretical, as the protests show that institutions themselves can of course be the point of contestation.

131. The state's effort to remain involved is also reflected in the objectives that the Act tries to reconcile: it seeks to reconnect to an Indigenous worldview and hand back governance, while preserving the region at the same time and guaranteeing public access.[378] The Act consistently puts Indigenous interests first, but also stresses the importance of the region for the rest of New Zealand. The negotiation history of the Act has shown that his openness towards the whole of

[377] This institutionalisation is linked to the protests that have taken place (*supra*, 112).
[378] Section 4 Te Urewera Act, 26 July 2014.

New Zealand was a concern from the side of the government (*supra*, 36), but Te Kawa suggests that Tūhoe have embraced this inspiring role of the region.[379] Still, the combination of objectives complicates the governance framework. The dissatisfaction of the DOC with the handling of possums shows that objectives may clash sometimes.[380] The interest in biodiversity and cultural integrity may also enter into conflict with the interest to keep the lands accessible for visitors.[381]

132. The strong state involvement also has a positive impact on a design principle: the seventh principle of external recognition. Although this external recognition also benefits the state as a part of the governance structure, one cannot forget that it also greatly benefits the system itself. The integration of sanctions in the national justice system, for example, gives teeth to the rules that are laid down in the Te Urewera Act. The judicial proceedings illustrate that external recognition can help to keep the state accountable as a player in the governance system.

133. These findings confirm Carwyn JONES' assertion that New Zealand's settlement process is both an opportunity to reinforce *tikanga* and Māori governance and a possible threat to it. JONES acknowledges that settlement processes can strengthen a sense of community, but warns that they also unsettle existing relationships within *iwi*, between *iwi* and between *iwi* and the state. The Treaty of Waitangi negotiation process was accompanied by specific (Western) rules on representation of Tūhoe and implied close interaction with state institutions. The appointment of negotiators (*supra*, 35) and the establishment of the contested Tūhoe Te Uru Taumatua (*supra*, 65) took place in this context. Although it is difficult to determine which evolutions in Māori legal tradition are the result of self-determination, and which changes respond to external pressure, JONES concludes that the settlement process does in a way undermine Māori self-determination, at least with regard to their legal tradition.[382] Not only the

[379] Te Kawa o Te Urewera, 2017, 10 mentions that "*if Te Kawa has a true purpose it is one that hopes to draw people closer to Te Urewera"*.

[380] The new approach towards possums led to grievances on the side of the DOC, as it claimed that the approach was inadequate. This is documented in T. WALL, "Pest control efforts in Te Urewera have changed - some conservationists worry about the fate of native species", *stuff* 2022, via https://www.stuff.co.nz/environment/300535889/pest-control-efforts-in-te-urewera-have-changed--some-conservationists-worry-about-the-fate-of-native-species (consulted for the last time on May 23rd 2024).

[381] D. J. JEFFERSON, E. MACPHERSON and M. STEVEN, "Experiments with the Extension of Legal Personality to Ecosystems and Beyond-Human Organisms: Challenges and Opportunities for Company Law" *Transnational Environmental Law* 2023, 354.

[382] C. JONES, *NEW TREATY, NEW TRADITION: reconciling New Zealand and Māori Law*, Toronto, UBCPress, 2016, 22-26, and 30; T. ROWSE, "Book review of New treaty, new tradition: reconciling New Zealand and Māori Law", *Journal of New Zealand Studies* 2017, No. 25, 115-116. The argument of JONES was summarised through partly relying on a book review as access to the full original work was not obtained.

anchored presence of the state in Te Urewera governance, but also the level of centralisation and the degree of bureaucratisation can be linked to the powerful position of the state.

134. As this central position of the state cannot be explained through an internal analysis alone, this research paper moves beyond the legal context of New Zealand to the international legal framework in which the state of New Zealand exists. This wider perspective contextualises the Te Urewera Act under the system of international law to explain state influence. The following explanatory chapter does not only help explain the concrete shape of the Te Urewera Act, but also sheds light on the ways in which international law has impacted Te Urewera for the last centuries.

V. The influence of international law

135. The apparent reason to turn to international law in this case of strong state involvement, is its central tenet of state sovereignty.[383] State sovereignty is a layered notion which implies a certain monopoly of control over territories and citizens, which traditionally is indivisible.[384] As expressed in an influential UN General Assembly (UNGA) resolution, it implies permanent sovereignty over natural resources,[385] although this is tempered in transboundary cases.[386] The principle has been iterated in the resolutions that followed,[387] and the International Court of Justice (ICJ) has confirmed its status of customary international law.[388] It implies the right to exercise control over the natural resources that states find within their territory,[389] and stems from the struggles of former colonies for independence.[390] The following section addresses

[383] Art. 2(1) Charter of the United Nations, 24 October 1945; P. HILPOLD, *European International Law Traditions*, Cham, Springer, 2021, 151; J. H. JACKSON, "Sovereignty: Outdated Concept or New Approaches" in W. SHAN, P. SIMONS, and D. SINGH, *Redefining Sovereignty in International Economic Law*, London, Bloomsbury publishing, 2008, (3) 4-5; R. Y. JENNINGS, *The Acquisition of Territory in International Law*, Manchester, Manchester University Press, 1963, 1; U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 37.

[384] J. W. FOSTER, "The evolution of international law", *The Yale law journal* 1909, Vol. 18, No. 3, (149) 153; J. H. JACKSON, "Sovereignty: Outdated Concept or New Approaches" in W. SHAN, P. SIMONS, and D. SINGH, *Redefining Sovereignty in International Economic Law*, London, Bloomsbury publishing, 2008, (3) 5; R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, (71) 72.

[385] A/RES/1803 (XVII): General Assembly resolution on Permanent sovereignty over natural resources, 14 December 1962; C. CULLINAN, "Earth Jurisprudence" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (233) 246-247.

[386] S. HOBE, "Evolution of the Principle on Permanent Sovereignty Over Natural Resources. From Soft Law to a Customary Law Principle?" in M. BUNGENBERG and S. HOBE (eds.), *Permanent Sovereignty over Natural Resources*, Cham, Springer International Publishing, 2015, (1) 8; T. MARAUHN, "The state" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (613) 615-616.

[387] A/RES/3201 (S-VI): General Assembly resolution on the Declaration on the Establishment of a New International Economic Order, 1 May 1974; A/RES/3281 (XXIX): General Assembly resolution on the Charter of Economic Rights and Duties of States, 12 December 1974.

[388] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment, 19 December 2005; J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 51-52; S. HOBE, "Evolution of the Principle on Permanent Sovereignty Over Natural Resources. From Soft Law to a Customary Law Principle?" in M. BUNGENBERG and S. HOBE (eds.), *Permanent Sovereignty over Natural Resources*, Cham, Springer International Publishing, 2015, (1) 11; A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 30 and 32.

[389] A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 33.

[390] A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 21; N. J. SCHRIJVER, "Fifty Years Permanent Sovereignty over Natural Resources. The 1962 UN Declaration as the Opinio Iuris Communis" in M. BUNGENBERG and S. HOBE, (eds.), *Permanent Sovereignty over Natural Resources*, Cham, Springer International Publishing, 2015, (15) 16-17.

some underlying structures of international law that are connected to its central concept of state sovereignty.

1. How international law enabled Te Urewera's enclosure

136. COGOLATI has revealed some inherent properties of international law to be irreconcilable with characteristics of commons. More specifically, it concerns an assumption of inexhaustibility (1), top-down state governance (2) and an underlying logic of extraction (3). In brief, the international legal framework is founded in a completely different logic than commons institutions.[391] These three aspects are briefly explained in their historical context, after which the universalising tendency of international law is added as an overarching characteristic. The principles of 'territorial integrity' and '*uti possidetis'* are also addressed, as they play a large role in the continuity of the international legal framework.

137. Firstly, it is interesting to note that the early days of international law were characterised by a sense of abundance of natural resources, rather than scarcity.[392] When Europeans left their home states on long-distance voyages, they were seduced by a promise of abundance that awaited them.[393] Hugo GROTIUS and Francisco DE VITORIA, widely considered to be founding fathers of international law,[394] built their theory of private and public property on imaginary commons from a mythical past. These commons were portrayed as boundless and disappeared when states emerged which divided resources in private and public property. The sea was considered to be an ancient remnant of the pre-state period and was labelled a *res communis* which implied, as captured in the word, that it was common to all.[395]

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[391] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 128-129. The incompatibility between commoning practices and international law has also been expressed by Darina PETROVA and Tomaso FERRANDO in D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 258.
[392] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 141.
[393] I. PORRAS "Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (111) 118.
[394] C. F. AMERASINGHE, "The Historical Development of International Law - Universal Aspects", *Archiv des Völkerrechts* 2001, Vol. 39, No. 4, (367) 378.
[395] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Surrey, Ashgate, 2011, 78-84; I. PORRAS "Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (111) 119.

138. Secondly, international law was built around top-down governance with states as central players, without much room for self-organised communities.[396] Historically, this was illustrated through the concept of *terra nullius* (belonging to none). The doctrine around it was developed during the 1885 Conference of Berlin and was to be used by Western countries in Africa.[397] More precisely, this term referred to territories which had not yet been claimed by states, although they might have been inhabited by Indigenous peoples. Existing governance structures which managed resources as commons, were invalidated: the land was simply considered not to belong to anyone.[398] Social scientist Kathryn MILUN writes that *terra nullius* was linked to an image of empty space,[399] as if the land was patiently waiting for some kind of appropriation.[400] This supported the Doctrine of Discovery, which justified the instatement of state sovereignty.[401]

139. In this way, non-European societies were banished from the international legal community.[402] And so ownership and sovereignty, both on the level of private corporations and the state, became the basic elements of the legal order.[403] The state swallowed up communal

[396] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 167.
[397] A. T. ANGHIE, "The Evolution of International Law: colonial and postcolonial realities", *Third World Quarterly* 2006, Vol. 27, No. 5, (739) 746; K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 59.
[398] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 144; A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 41; K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 160; K MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 62-32 and 191.
[399] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 61. Moreover, in her book, Kathryn MILUN makes the argument that the image of empty space has an important rhetorical function which has made the oscillation between *res communis* and *res nullius* possible. The idea that something can belong both to everybody and to nobody is, according to MILUN, only possible if one thinks in terms of emptiness. K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 69 and 199.
[400] This idea is connected to the Wilderness Myth (*supra*, 32).
[401] K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 162; R. J. MILLER, J. RURU, L. BEHRENDT and T. LINDBERG, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Oxford, Oxford University Press, 2010, 2 and 8.
[402] A. T. ANGHIE, "The Evolution of International Law: colonial and postcolonial realities", *Third World Quarterly* 2006, Vol. 27, No. 5, (739) 745-746; M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 745.
[403] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 225-226.

organisations, whose political power was lost.[404] As MATTEI put it: *"The legal constructions of modernity were [...] carried out by denying legal dignity to previous (commons-based) legal institutions."*[405] Indeed, a lack of state sovereignty and private ownership over lands was seen as a sufficient reason to bring 'civilisation' to the example of European states. Colonisation was justified, then, as the state would fill in the emptiness and take on the role of protector of the relationships of rights and duties, including trade relations and property rights.[406] The concept of 'civilisation'[407] determined which societies received recognition in the international legal order, and carried the exportation of Western legal and political institutions.[408] Law professor Karin MICKELSON draws a parallel between international recognition of a governance system and the extent to which it subjugated nature: *"the lighter the ecological footprint of the Indigenous peoples in question, the less likely the colonisers were to see the land as 'inhabited' or 'owned'"*.[409]

[404] A. T. ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press, 2005, 104; M. R. MARELLA, "'The Commons as a Legal Concept", *Law and Critique* 2017, (61) 76; A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 41.

[405] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 225.

[406] O. DE SCHUTTER, 'From Eroding to Enabling the Commons: The Dual Movement in International Law', in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (231) 231-232; K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 61-62; N. TZOUVALA, *Capitalism as civilisation: a history of international law*, Cambridge, Cambridge University Press, 2020, 44 and 57.

[407] James LORIMER coined conceptual 'degrees of civilisation'. He distinguished civilised societies, barbarian societies and savage societies. Only the civilised societies received full international legal recognition. This was developed in J. LORIMER, 'La Doctrine de la Reconnaissance, Fondement du Droit International' *Revue de Droit International et de Législation Comparée* 1884, (333) 335. In N. TZOUVALA, *Capitalism as civilisation: a history of international law*, Cambridge, Cambridge University Press, 2020, 51-52, Ntina TZOUVALA explains how this classification was mobilised for colonisation by jurists such as Pasquale FIORE and Carlos CALVO. Article 38 of the Statute of the International Court of Justice, 18 April 1946 still carries the traces of this distinction, mentioning as a source of law the *"the general principles of law recognized by civilised nations"*.

[408] K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 162; U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 37; E. NYS, "L'Etat et la Notion de L'Etat - Apercu Historique.", *Revue de Droit International et de Legislation Comparée* 1901, Vol. 3, No. 2, (418) 429.

[409] K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 165. A similar point is made in U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, 37.

140. Thirdly, international law is built on a logic of extraction of natural resources.[410] The imagery of empty space has not only helped to nullify pre-existing Indigenous organisational structures but also denied legal recognition of the generative capacities of land.[411] Law professor Ileana PORRAS points out that DE VITORIA presented nature as a mere object of exploitation.[412] Law professor Dayna Nadine SCOTT writes that extractivism goes beyond the simple extraction of certain resources, and really refers to a structural economic relationship between humans and nature that is non-reciprocal and oriented to short-term accumulation of benefits.[413] This can be traced back to the first characteristic of presumed abundance and inexhaustibility, as these concepts do not consider processes required to sustain resources. In such a context of inexhaustibility, there is not much reason to consider the responsibilities or limitations of states.[414] International law was not designed to sustain environmental living conditions.[415]

141. Therefore, it is not necessarily the case that international law failed to protect commons, but rather that it enabled enclosure and colonial practices.[416] International law had to erase Indigenous legal concepts and governance if it were to spread the extractive practices that were

[410] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 183.
[411] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 229; K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 164-165; K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Farnham: Ashgate, 2011, 68-69; V. SHIVA, 'Foreword. The Commons: The Ground of Democracy and Sustenance ' in G. RICOVERI, *Nature for Sale: The Commons versus Commodities*, London, Pluto Press, 2013, (vii) viii; N. TZOUVALA, *Capitalism as civilisation: a history of international law*, Cambridge, Cambridge University Press, 2020, 59.
[412] I. PORRAS "Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (111) 116-117.
[413] D. N. SCOTT, "EXTRACTIVISM: Socio-legal Approaches to Relations with Lands and Resources", *Articles & Book Chapter*s 2020, No. 2811, (1) 1. This is also discussed in J. DEHM "Reconfiguring Environmental Governance in the Green Economy Extraction, Stewardship and Natural Capital" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (70) 75.
[414] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 52.
[415] Marjorie KELLY writes that *"regenerative ownership designs are about generating and preserving real wealth, living wealth"* in her book M. KELLY, *Owning Our Future. The Emerging Ownership Revolution*, Oakland, Berrett-Koehler, 2012, 11.
[416] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 148; S. COGOLATI and J. WOUTERS, "International law to save the commons", in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (266) 275.

at the core of colonial pursuits.[417] In DE SCHUTTER's words, *"[t]he disruption of communal social relationships and the shift to an exploitative relationship to nature, in that view, was not the price to pay for economic development to proceed: they were the definition of progress itself".*[418]

142. These principles exert their effect thanks to the universalising ambition of international law. The international legal framework relies on a supposed likeness between all states that has been achieved through the spread of supposedly atemporal and universal values.[419] In doing so, through assimilation efforts, international law has enabled the enclosure of different legal philosophies and different understandings of the relation between communities, authority and place.[420] One of the consequences has been the normalisation of a capitalist understanding of nature as a mere natural resource over which humans exercise supremacy.[421] Because of this, the attempt of international law to be universal and its claim of inclusive neutrality has been

[417] A/HRC/41/54: Global extractivism and racial equality: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 14 May 2019, 6-7; J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 54; N. TZOUVALA, *Capitalism as civilisation: a history of international law*, Cambridge, Cambridge University Press, 2020, 59.

[418] O. DE SCHUTTER, 'From Eroding to Enabling the Commons: The Dual Movement in International Law', in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (231) 235.

[419] U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 34-35; D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 261 and 270-271.

[420] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 67-68; U. NATARAJAN and J. DEHM, "Introduction: Where Is the Environment? Locating Nature in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (1) 10; D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 264 and 279; C. STORR, "Denaturalising the Concept of Territory in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (179) 180-181; N. TZOUVALA, *Capitalism as civilisation: a history of international law*, Cambridge, Cambridge University Press, 2020, 44.

[421] U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 36; D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 264-265.

problematised by feminist and postcolonial theory.[422] The universalising ambition and the concept of nature that are contained in international law go against the diversity amongst commons and their connection to a particular place and community.

143. These elements show how international law has been shaped by colonial ideas related to nature and the way people should interact with it.[423] Nature as such, without being reduced to property, had no place in the framework.[424] The four characteristics are opposed to the logic of commons, which is well aware of the exhaustibility of CPRs and, through bottom-up, communal governance, tries to honour generative processes in a specific context. Due to these oppositions, COGOLATI argues that international law has helped legitimise the enclosure of existing commons. He writes that international law as such is *"part of the phenomenon of enclosure"*.[425] The history of Te Urewera is in line with this theory, as the Crown assumed sovereignty over territories where Tūhoe lived and installed individual, absolute ownership rights (*supra*, 28).

144. The importance of these historical roots is reinforced by the principles of 'territorial integrity' and '*uti possidetis*', two concepts that have ensured stability in the international legal order. Territorial integrity protects states against interference from other states and restricts the right to self-determination of peoples that live within the state borders. *Uti possidetis* ensured that colonial borderlines were preserved as international state boundaries.[426] In doing so, these principles have extended the legacy of early international developments and their fundamental

[422]A. T. ANGHIE, "The Evolution of International Law: colonial and postcolonial realities", *Third World Quarterly 2006*, Vol. 27, No. 5, (739) 741-742; K. BIRRELL: "Narrating Nature Climate Imaginaries in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (332) 344; J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 57.

[423] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 54; U. NATARAJAN and J. DEHM, "Conclusion: remaking International law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (375) 375.

[424] I. PORRAS "Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (111) 117.

[425] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 194-195.

[426] R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, (71) 77-78.

principles. The next section addresses the adoption of the Te Urewera Act in the context of modern international law.

2. How the Te Urewera Act arose despite international law

145. In the 1990s negotiations started between the Crown and Tūhoe. As mentioned earlier (*supra*, 35), these negotiations coincided with a growing awareness of the Wilderness myth. However, there had been no structural rethinking of international law and its legal order.[427] International law is still considered to contribute to an unsustainable relation with the natural environment.[428] To demonstrate this stability in international law, the following paragraphs respectively address the elements of top-down governance, exhaustibility, extraction and universality, while paying attention to the development of international environmental law (IEL) as a new discipline.

146. Concerning the logic of top-down governance, it is telling to note that even during the decolonisation process of the twentieth century, states were widely considered the only way towards independence.[429] Law professor Frédéric MÉGRET has written about the 'specific statism of international law' to refer to the effort of international law to perpetuate the centrality of state sovereignty. In doing so, the discipline makes it hard to imagine legal authorities which do not stem from a state.[430] However, there has been some involvement of actors beyond states. The 1992 UN Rio Conference on Environment and Development, for example, was an important moment for the involvement of non-state actors such as non-governmental organisations (NGOs) and transnational corporations.[431] The commons, however, have not received a meaningful place in the international framework.[432] And so, until today, international

[427] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 226.
[428] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 50.
[429] U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 38-39; C. STORR, "Denaturalising the Concept of Territory in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (179) 199.
[430] F. MÉGRET, "L'étatisme spécifique du droit international", *Revue québécoise de droit international* 2020, Vol. 4, No. 1, (105) 107.
[431] T. MARAUHN, "The state" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, 617 and 627.
[432] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 173.

law does not provide a clear structure to recognise commons as local institutions of self-governance. COGOLATI calls this the 'commons gap'.[433] MILUN has used the metaphor of a radar to describe commons' position in international law. According to her, international law functions like a radar system which does not capture the signals of different non-state entities, such as Indigenous peoples and commons. "*[C]ertain peoples and cultures appear and others disappear"*. [434]

147. The continued strong position of the state[435] is illustrated by the fact that the Te Urewera Act is the result of New Zealand's decision to start settling historical claims of breaches of the Treaty of Waitangi. The state involvement in Te Urewera comes as no surprise if one considers that the Crown and Tūhoe entered into negotiations over land that was owned by the state. In theory, New Zealand could have completely handed over governance matters to Tūhoe. However, communal governance openly puts into question the binary separation between public and private property on which state sovereignty relies.[436]

148. Concerning the assumption of inexhaustibility and the extractive logic within international law, it is important to address the branch of IEL. With the 1972 Stockholm Conference on the Human Conference, concerns about the environment were brought to the level of international law. This summit elicited many other conferences, several treaties and legal principles which would form the foundation of IEL.[437] Its underlying concept of 'the environment' is one that portrays nature as an object of stewardship, as opposed to the concept of nature as a natural resource in other branches of international law. Despite the development of IEL, the foundations of international law and its original conceptualisation of the natural world have not structurally been rethought.[438] It can be argued that this is made possible by the high level of

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[433] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 128.
[434] K. MILUN, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons*, Surrey, Ashgate, 2011, 49.
[435] B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 227-228.
[436] S. COGOLATI and J. WOUTERS, "International law to save the commons" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (266) 273.
[437] V. DE LUCIA, "Beyond anthropocentrism and ecocentrism: a biopolitical reading of environmental law", *Journal of Human Rights and the Environment* 2017, Vol. 8, No. 2, (181) 181; H. MAYRAND, "From Classical Liberalism to Neoliberalism Explaining the Contradictions in the International Environmental Law Project" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (45) 54; U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 26-32.
[438] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International*

fragmentation of international law.[439] This does not only enable international law to protect the natural environment while enabling exploitation of natural resources, but also allows for different concepts of nature to co-exist.[440]

149. There has, however, not been an adoption of a more complex understanding of nature across the whole discipline of international law.[441] This means that the assumption of inexhaustibility and the logic of extraction are still very present. This is visible in the doctrine of permanent sovereignty over natural resources (*supra*, 135), which was reiterated by the Stockholm Declaration and Rio Declaration,[442] as it confirms extraction as the default way of interacting with the natural environment.[443] In general, fundamental international law principles struggle to incorporate or protect the limited carrying capacities of environments.[444]

150. Concerning the universalist tendency of international law, it is important to highlight that the development of IEL has not fully departed from Western thinking. In the 1970s, environmentalism developed in the aftermath of industrialisation in the West, amidst growing scientific understanding of the complexity of ecosystems.[445] In that context, IEL conceptualised nature as the object of stewardship (*supra*, 148). Although this approach differs from the concept of natural resources, it still assumes a division between humanity and the natural world

Law—International Legal Responses to the Global Environmental Crisis, Den Haag, Springer, 2023, (47) 49-54; H. MAYRAND, "From Classical Liberalism to Neoliberalism Explaining the Contradictions in the International Environmental Law Project" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, (45) 54 and 67-68.

[439] A/CN.4/L.702: Report of the Study Group of the International Law Commission on the Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, 18 July 2006.

[440] U. NATARAJAN and J. DEHM, "Introduction: Where Is the Environment? Locating Nature in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (1) 3-9; U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 43.

[441] K. BIRRELL: "Narrating Nature Climate Imaginaries in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (332) 336.

[442] Stockholm Declaration on the Human Environment in A/CONF.48/14/Rev.1: Report of the United Nations Conference on the Human Environment, 16 June 1972, principle 21; Rio Declaration on Environment and Development in A/CONF.151/26 (Vol. 1): Report of the United Nations Conference on Environment and Development, 12 August 1992, principle 2.

[443] C. CULLINAN, "Earth Jurisprudence" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (233) 246-247.

[444] U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (21) 23.

[445] U. NATARAJAN and J. DEHM, "Introduction: Where Is the Environment? Locating Nature in International Law" in U. NATARAJAN and J. DEHM (eds.), L*ocating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (1) 3.

and humanity's supremacy over the latter.[446] This fundamental separation goes back to early Christianity and has been reinforced by the Enlightenment and industrialisation in Europe.[447] Environmental historian William CRONON phrased this idea as *'the place where we are is the place where nature is not'*.[448] Therefore, the dominant European narrative on the natural world still underlies international law, putting the Western understanding in the position of a supposedly universal vision.[449]

151. Lastly, unrelated to these basic characteristics of international law, there is a supplementary reason why international law is inhospitable to commons institutions: the fact that commons discourse at the international level is often associated with vast areas such as the sea and the atmosphere, rather than small-scale institutions.[450] As international law still has difficulties in preventing overexploitation of the 'global commons',[451] these difficulties may be projected onto non-global commons and contribute to enclosure efforts. Conclusions on the merit of global commons that are transferred to small-scale commons are reminiscent of HARDIN's tragedy of the commons (*supra*, 50), and do not help the cause of commons that function as institutions of collective action within national jurisdictions.[452] The bad name of the

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[446] V. DE LUCIA, "Beyond anthropocentrism and ecocentrism: a biopolitical reading of environmental law", *Journal of Human Rights and the Environment* 2017, Vol. 8, No. 2, (181) 183; J. DEHM "Reconfiguring Environmental Governance in the Green Economy Extraction, Stewardship and Natural Capital" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (70) 77.

[447] U. NATARAJAN "Who Do We Think We Are? Human Rights in a Time of Ecological Change" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, 200 (221); D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 260 and 262.

[448] W. CRONON, "The Trouble with Wilderness: Or, Getting Back to the Wrong Nature", *Environmental History* 1996, Vol 1., No. 1, (7) 17. This idea is intrinsically linked to the Wilderness myth (*supra*, 32).

[449] K. BIRRELL: "Narrating Nature Climate Imaginaries in International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (332) 335-336; K. KHODAY, "The Mythic Environment Ecocosmology and Narrative Remakings of Environmental Consciousness" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (284) 285; U. NATARAJAN and J. DEHM, "Introduction: Where Is the Environment? Locating Nature in International Law" in U. NATARAJAN and J. DEHM (eds.), L*ocating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (1) 10.

[450] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 107; S. RANGANATHAN, "Global commons", *The European Journal of International Law* 2016, Vol. 27, No. 3, (693) 693.

[451] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 142-143; K. MICKELSON, "The Maps of International Law: Perceptions of Nature in the Classification of Territory beyond the State" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (159) 170.

[452] S. COGOLATI and J. WOUTERS, "International law to save the commons" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (266) 274.

global commons might have played a role in the entrenchment of state power in the Te Urewera Act.

VI. The potential for international legal change

152. So, governance institutions that do not rely on state sovereignty have never really been recognised by international law.[453] Similarly, the paradigm of state sovereignty did not reserve a place for legal responsibilities towards nature, let alone for RoN.[454] The question remains, then, whether international law could nevertheless play a supporting role in the reinstatement of commons, possibly on the basis of RoN. While some authors conclude international law to be *"beyond repair"* when it comes to the accommodation of commons,[455] other authors advocate not to give up on the discipline.[456] There is, however, some shared sentiment that international law will not reinvent itself as it entrenches the interests of powerful institutions.[457] Without determining whether there is indeed no top-down breakthrough to be expected, this paper examines the existing initiatives that try to make international law more accommodating for commons and RoN.

1. An international right to commons?

153. COGOLATI believes that international law needs to be fundamentally reconstructed to offer protection to commons, but also recognises the evolution that international law has already displayed since the Second World War. He mainly sees potential in international human rights

[453] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 167. Even more so, according to COGLATI, scholarly discussion on commons as institutions for self-governance remain rare in international law, as he writes in S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 108.

[454] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 52.

[455] Ugo MATTEI states that international law operates on a scale that is too large and too distant from the political commons institutions in U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 229.

[456] Samuel COGOLATI expresses the hope that the discipline of international law will not be abandoned in S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 198. He refers to the impact that human rights have had on international law as a reason to believe in the power of movements to rethink international law, and to guide it towards a more ecological structure. Usha NATARJAN and Kishan KHODAY share a similar hope for international law, focussing on the conceptualisation of nature. In U. NATARAJAN and K. KHODAY, "Locating Nature: Making and Unmaking International Law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, 23-24 they argue that international law can become a part of the solution if it adopts a new understanding of the natural world.

[457] U. NATARAJAN and J. DEHM, "Conclusion: remaking International law" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (375) 376.

law.[458] After highlighting the intertwined history of commons and human rights,[459] COGOLATI explains that human rights have already been used to defend the institutionalisation of commons both in academic writing and in practice.[460] He admits, however, that the scope of the right remains unclear. That is why he goes on to research to what extent legally recognised rights can be invoked to protect commons as social institutions, touching, amongst others, on the right to communal property and Indigenous rights.[461]

154. In this respect, it is important to mention the Indigenous and Tribal Peoples Convention, the first international treaty focusing on Indigenous peoples.[462] Article 8 of this ILO Convention specifies that due regard must be paid to Indigenous customs when applying national legislation to Indigenous groups. Article 14 states that *"the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised"*. The right to *"participate in the use, management and conservation of [natural] resources"* is protected by article 15.[463] While this sounds promising for Indigenous community governance, it is important to know that the state of New Zealand did not ratify this Convention, and neither did the United States of America, Canada or Australia.[464] Moreover, these provisions aim to create rights for Indigenous peoples without questioning the larger system in which they are built. The provision on ownership rights, for example, does not consider Indigenous thinking that rejects the Western notion of ownership.

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[458] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 21 and 197. Burns WESTON and David BOLLIER share his trust in human rights for the protection of commons in B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 87.

[459] Samuel COGOLATI draws the attention to the Charter of the Forest which accompanied the Magna Carta, and which protected commoners from privatisation in S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 203. COGOLATI stresses that these two charters were considered two sides of the same coin.

[460] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 204-206.

[461] Samuel COGOLATI also examines the right to freely dispose of natural wealth and resources, the right to a clean and healthy environment, the right to food, peasants' rights and women's rights, as listed in S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 217-218.

[462] Indigenous and Tribal Peoples Convention, ILO C169, 27 June 1989; A. MENSI, *Indigenous Peoples, Natural Resources and Permanent Sovereignty*, Boston, BRILL, 2023, 69; J. RURU, "Indigenous peoples" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (733) 739.

[463] Art 8, 14 and 15 of the Indigenous and Tribal Peoples Convention, ILO C169, 27 June 1989.

[464] The list of countries that ratified the convention can be consulted on https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314.

155. In 2007, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted.[465]At its conception, the state of New Zealand expressed doubts about the declaration, but the country decided to endorse it a couple of years after its adoption, albeit with reservations.[466] The declaration was the result of bottom-up advocacy efforts, but remains non-binding.[467] As mentioned earlier (*supra*, 56), this declaration protects the rights to self-determination and self-governance as long as they are exercised within the legal structures of existing states.[468]

156. Lastly, as COGOLATI points out, it is worth mentioning that human rights do not fundamentally challenge the top-down and extractive logic of international law, let alone the anthropocentric starting point.[469] Even though COGOLATI examines the scope and strengths of many different recognised human rights, he concludes that the existing instruments are insufficient to fully protect commons.[470]

2. International recognition of RoN?

157. For RoN, international non-binding initiatives have gained momentum around 2010. In 2009, the General Assembly of the UN designated an official International Mother Earth Day.[471] During the 2010 World People's Conference on Climate Change and the Rights of Mother Earth in Bolivia, a Universal Declaration on the Rights of Mother Earth (UDRME) was adopted.[472] This document has no binding status in international law, but proclaims that all

[465] A/RES/61/295: General Assembly resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007.
[466] J. RURU, "Indigenous peoples" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (733) 740-741.
[467] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 239.
[468] Art 3, 4 and 46 of A/RES/61/295: General Assembly resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007.
[469] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 202.
[470] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 258.
[471] A/RES/63/278: General Assembly resolution on International Mother Earth Day, 1 May 2009; B. WESTON and D. BOLLIER, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 61.
[472] The Universal Declaration of Rights of Mother Earth, 22 April 2010 was not adopted by the UNGA, but can be read on the website of the International Rights of Nature Tribunal via https://www.rightsofnaturetribunal.org/wp-content/uploads/2018/04/ENG-Universal-Declaration-of-the-Rights-of-Mother-Earth.pdf; J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 55-56; C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal

living beings have rights and stresses the obligations of humans towards other beings.[473] In 2012, the UNGA adopted as a resolution the outcome document of the UN Conference on Sustainable development. This document is entitled 'The future we want' and recognises existing RoN initiatives at the national level while encouraging, more generally, 'harmony with nature'.[474] Three years later, the UNGA adopted a resolution under this title, initiating a virtual dialogue among experts on Earth Jurisprudence.[475] More than 120 international experts took part, which resulted in a summary report to the UNGA entirely devoted to Earth jurisprudence. In the report, the experts ask for a resolution that affirms the importance of exploring Earth jurisprudence.[476] In 2019, for the tenth anniversary of International Mother Earth Day, the Secretary-General wrote an extensive report on the matter. The report offers an overview of recent developments and highlights the important role of civil society and NGOs. It concludes with a recommendation for states to consider a 'universal declaration on the rights of Mother Earth'.[477] Nevertheless, this attention for RoN has not yet materialised in an international binding framework that strengthens the position of national RoN or creates RoN at the international level.[478] This means that, for now, even in countries with recognised RoN, it is not possible to invoke strong international norms.[479]

158. There have, however, been further developments on the level of NGOs and non-governmental networks.[480] In 2010, committed NGOs joined forces to set up the Global

Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 200.

[473] C. CULLINAN, "Earth Jurisprudence" in L. RAJAMANAI and J. PEEL (eds.), *The Oxford Handbook of International Environmental law (2nd ed.)*, Oxford, Oxford University Press, 2021, (233) 240-241; R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 325.

[474] A/RES/66/288: General Assembly resolution on The future we want, 27 July 2012, paragraphs 39 and 40.

[475] A/RES/70/208, General Assembly resolution on Harmony with Nature, 22 December 2015, 3.

[476] A/71/266: Note by the Secretary-General on Harmony with Nature, 1 August 2016, 19. Since then, more reports and resolutions have been adopted. A complete overview of reports and resolutions can be found on the UN Harmony with Nature website which can be accessed via http://www.harmonywithnatureun.org/unDocs

[477] A/74/236: Report of the Secretary-General on Harmony with Nature, 26 July 2019, paragraphs 20, 21 and 134.

[478] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 50.

[479] C. M. KAUFFMAN and P. MARTIN, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail", *World Development* 2017, Vol. 92, (130) 138.

[480] This development of international structures for RoN from the bottom-up has been called the fourth wave of RoN by Roger MERINO in R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 325. In brief, MERINO considers the appearance of RoN in the courts to be the first wave, the adoption of RoN in legislation the second and the involvement of Indigenous peoples the third.

Alliance for the Rights of Nature.[481] In 2015, the alliance created the nomadic International Rights of Nature Tribunal, a tribunal of environmental advocates that offers 'alternative' judgments in environmental cases. The tribunal has no binding powers or coercive mechanisms, but rather tries to influence legal thinking on environmental matters.[482] Some authors see great potential in the tribunal's ability to build an alternative paradigm,[483] while others question its practical impact.[484] According to Samantha FRANKS, lawyer in international law, the tribunal has paved the way for the ruling of the Inter-American Court of Human Rights (IACtHR) on an autonomous right to a healthy environment.[485]

159. The IACtHR had long recognised the link between human rights and environmental degradation,[486] and issued an Advisory opinion in 2017 that declared the right to a healthy environment to be an autonomous right.[487] In 2020, in a landmark ruling concerning Lhaka Honhat Indigenous groups in Argentina, the IACtHR applied it for the first time.[488] The argumentation of the court is of significant importance for RoN, as the court writes that the right to a healthy environment implies the protection of components such as forests and rivers, even if there is no clear evidence as to how these environments relate to humans. The Court considers the protection of the natural environment to be an interest in itself, and recognises the

[481] S. FRANKS, "The Trees Speak for Themselves: Nature's Rights under International Law", *Michigan Journal of International Law* 2021, (633) 650. More information can be found on the website of Global Alliance for the Rights of Nature, via https://www.garn.org/.
[482] H. FUKURAI and R. KROOTH, *Original Nation Approaches to Inter-National Law: The Quest for the Rights of Indigenous Peoples and Nature in the Age of Anthropocene*, London, Palgrave Macmillan, 2021, 234-240; C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 200; R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 326. More information on the Rights of Nature Tribunal can be found on their website, via https://www.rightsofnaturetribunal.org/about-us/.
[483] H. FUKURAI and R. KROOTH, *Original Nation Approaches to Inter-National Law: The Quest for the Rights of Indigenous Peoples and Nature in the Age of Anthropocene*, London, Palgrave Macmillan, 2021, 237; M. MALONEY, "Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal", *Vermont Law Review* 2016, (129) 141-142; R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 308 and 326.
[484] E. FITZ-HENRY, "Conjuring the Past: Slow Violence and the Temporalities of Environmental Rights Tribunals", *Geoforum* 2020, (259) 265.
[485] S. FRANKS, "The Trees Speak for Themselves: Nature's Rights under International Law", *Michigan Journal of International Law* 2021, (633) 650.
[486] R. SENA, "The intersection of human rights and climate change in the inter-american human rights system: what to hope for?", *Wisconsin International Law Journal* 2021, Vol. 38, No. 2, (331) 352.
[487] IACtHR, *Advisory Opinion on the Environment and Human Rights*, OC-23/17, 15 November 2017; L. MARDIKIAN, "The right to a healthy environment before the inter-american court of human rights", *International and Comparative Law Quarterly* 2023, Vol. 72, (945) 946.
[488]IACtHR, *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, 6 February 2020.

importance of nature for other living beings. In doing so, it reconciles the anthropocentric human rights approach with an ecocentric approach, keeping the door open for RoN.[489]

160. Within the following two years, the IACtHR will rule on the obligations of states in the face of climate change, and so will the ICJ.[490] Very recently, the International Tribunal for the Law of the Sea (ITLOS) issued a unanimous advisory opinion that recognises anthropogenic greenhouse gas emissions to be pollution of the marine environment under the United Nations Convention on the Law of the Sea (UNCLOS).[491] This opinion is significant for IEL for many reasons, but two reasons are particularly relevant in the context of this paper. Firstly, the advisory opinion recognises the interconnectivity between the atmosphere and the oceans. Secondly, the tribunal has determined that UNCLOS imposes its own environmental obligations that may go beyond the obligations that states have under the United Nations Framework Convention on Climate Change (UNFCCC). Two professors in international environmental law focus on different elements when discussing this opinion.[492] Jacqueline PEEL interprets the reasoning of the court as a way to use the strict divisions between branches in international law to the advantage of environmental protection. Christina VOIGT makes the analysis that the tribunal does not consider the Paris Agreement in its entirety, and that it therefore loses an opportunity to work towards a coherent and interconnected international legal framework. Either way, the advisory opinion has acknowledged the interconnectedness of global commons, while grappling with the fragmentation of international law.

[489] C. RODRÍGUEZ-GARAVITO, "More-Than-Human Rights: Law, Science, and Storytelling Beyond Anthropocentrism" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (21) 38-39; M. A. TIGRE, "Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment", *American Society of International Law* 2020, Vol. 24, No. 14, (1) 3.

[490] A/RES/77/276: General Assembly resolution of Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023; Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023.

[491] ITLOS, *Advisory opinion on climate change and international law*, No. 31, 21 May 2024.

[492] As this advisory opinion was pronounced close to the submission deadline, it was not possible to rely on articles published in academic journals. Instead, this section relies on the blogs and articles that were published by experts shortly after the opinion was issued. These are J. PEEL, "Unlocking UNCLOS. How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-relevant International Law", *Verfassungsblog* 2024, 1-8; K. SCOTT, "A new ruling says countries – including NZ – must take action on climate change under the law of the sea", *The Conversation* 2024, 1-3; C. VOIGT, "ITLOS and the importance of (getting) external rules (right) in interpreting UNCLOS", *Verfassungsblog* 2024, 1-14.

3. RoN and commons joining forces

161. There are some important conclusions to be drawn from the previous two sections. Firstly, they show that both commons and RoN have not yet achieved meaningful protection under international law. Secondly, they illustrate that international law is engaging with commons and RoN in a rather separate manner. This mirrors the fact that the literature on commons and the literature RoN do not engage much with each other (*supra*, 9). Nevertheless, Te Urewera illustrates how these matters are in fact intertwined. Thirdly, the overview on commons and RoN in international law has also displayed an important similarity: the importance of bottom-up initiatives to influence international law.

162. This paper argues that RoN and commons share a very similar goal: they both challenge the same universalising logic in international law of inexhaustibility, top-down management and extractability. Both of them object to the current conceptualisation of nature in international law. For these reasons, this paper argues for considering both concepts together more often. As bottom-up initiatives appear to be important tools for these movements in the international legal sphere, this paper argues that commons advocacy efforts and RoN advocacy initiatives have much to gain from joining forces. This paper argues that transnational advocacy efforts should consider becoming 'transconceptual' to guide international law in a direction that is more accommodating for bottom-up governance institutions that recognise the generative qualities and the exhaustibility of ecosystems.

163. The movements for commons and RoN do not only share similar goals, they also have different strengths. Advocacy that pools the accomplishments and resources of both movements has the potential to contest the continued strong position of the state in a credible manner from the bottom up. As commons are experiencing a revival in scholarly attention (*supra*, 49), RoN are gaining practical relevance through new initiatives around the world (*supra*, 39). While the economic concept of commons lacks a clear legal translation (*supra*, 6), Earth Jurisprudence has been described as one of the most prominent *legal* movements of our time (*supra*, 39). The RoN movement has developed strategic methods to find entrance points for RoN in legal systems: research has found that a focus on low profile court cases has been successful to create precedent and momentum for RoN to later be adopted in larger cases.[493] Similarly, the adoption

[493] C. M. KAUFFMAN and P. MARTIN, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail", *World Development* 2017, Vol. 92, (130) 136.

of local laws and regulations has also been employed as a strategy to find an entrance for RoN.[494] In brief, RoN could help commons institutions to become visible on the radar of international law. In doing so, they might subtly shift sovereignty from the state to people, and specifically Indigenous peoples.[495] This would both be beneficial to commons institutions and RoN initiatives.

164. Unsurprisingly, the RoN movement has been brought up as a way to fundamentally change the way in which international law considers the relation of humanity with nature. Such a new approach would find inspiration in Indigenous conceptions of nature and consider obligations towards nature.[496] RoN could be deployed to inspire generative rules that *"allow life to reproduce according to its own processes and give subjectivity not just to humans [...], but larger living communities that include humans and non-humans."*[497] Even before changing the foundations of international law, international legal recognition of commons or RoN could radically reinforce their position within national boundaries. The international framework could place governance institutions beyond the reach of routine legislative changes. Lastly, transnational RoN initiatives could also inspire international law to recognise RoN at the international level, beyond national territories, in the image of the global commons. This would, however, raise important new questions of political representation and the distribution of power.[498] The large scale of international law also carries the risk of overlooking existing

[494] C. M. KAUFFMAN, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor" in C. RODRÍGUEZ-GARAVITO (ed.), *MORE THAN HUMAN RIGHTS An Ecology of Law, Thought and Narrative for Earthly Flourishing*, New York City, New York University, 2024, (183) 192.
[495] R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, (71) 72.
[496] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 54-55 and 65-67.
[497] U. MATTEI, "The ecology of international law: towards an international legal system in tune with nature and community?" in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (212) 229.
[498] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 60; R. MERINO, "Law and Politics of the Human/Nature: Exploring the Foundations and Institutions of the 'Rights of Nature'" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (307) 330.

relationships between communities and nature or disregarding local differences,[499] as RoN are not immune to the universalising tendencies of international law (*supra*, 142).

165. While these projections remain hypothetical, it is interesting to note that both the movement for commons and the movement for RoN pursue a change of course in the same direction: a situation in which governance over nature is not organised under private or public ownership. It is important to imagine these shared aspirations, as they demonstrate the similarities that these movements share. The literature then calls upon the creative imagination of jurists to concretely rethink the system of (international) law.[500]

166. Still, precisely under the existing international framework, the Legal Personhood Model may be of value to commons institutions. The next chapter makes theoretical conclusions on this potential of RoN in light of the international legal framework. Although the chapter relies on the case study of Te Urewera, its conclusions cover the general potential of RoN to oppose prevailing principles of international law, and thereby prevent enclosure. To do this, the insights of the previous chapters are brought together. Based on the achievements of the Te Urewera Act, the first section addresses the benefits that a RoN framework may offer. The second section addresses the risks that have been illustrated by the Te Urewera framework.

[499] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 61.

[500] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 206; M. R. MARELLA, "The Commons as a Legal Concept", *Law and Critique* 2017, (61) 62 and 84; U. MATTEI, "First Thoughts for a Phenomenology of the Commons" in D. BOLLIER and S. HELFRICH (eds.), *The Wealth of the Commons: A World Beyond Market & State*, Amherst, Levellers Press, 2012, (37) 43. A suggestion of what a different international legal order could look like is given in D. PETROVA and T. FERRANDO, "Three Enclosures of International Law: Commoning Premises, Processes and Aims" in U. NATARAJAN and J. DEHM (eds.), *Locating Nature: Making and Unmaking International Law*, Cambridge, Cambridge University Press, 2022, (255) 281 and 282.

VII. The commons potential of RoN

167. Despite the fact that the Te Urewera Act bears witness to its history and its emergence under modern international law, the RoN framework manages to defy certain prevailing principles in favour of a logic of CPRs that are communally managed by a community of people.

1. The benefits of legislative RoN for commons

168. Although many of these elements are connected, the commons achievements of the Legal Personhood Model for Te Urewera have been disentangled for analytical purposes. They are (1) a weakening of top-down state control, (2) an acknowledgement of the relationship between a people and their lands, (3) a recognition of Tūhoe relational thinking, (4) a recognition of Te Urewera as a living ecosystem with regenerative processes and a vulnerability to exhaustion, and (5) a defiance of the dualism between private and public property.

169. Firstly, and maybe most importantly, the Te Urewera Act has achieved a weakening of top-down state control over the region, to the benefit of Tūhoe governance. The Act allocates power to several governing bodies in which Tūhoe members are represented. Even though the state has not completely relinquished control, it does hand over policy power to Tūhoe, making the governance system less hierarchical. Although the state has not lost international sovereignty over the region, it has lost ownership over what previously was a national park. The possum debate (*supra*, 131) illustrates that Tūhoe Te Uru Taumatua has the ability to make policy decisions in line with Tūhoe thinking, regardless of the position of certain government officials. Even though there has not been a reinstalment of Tūhoe commons in the way it existed before colonisation, there has been a weakening of top-down state power thanks to the Legal Personhood Model.

170. Secondly, and connected to this handing over of governance powers, the Te Urewera Act recognises the bond between a specific community and their lands (*supra*, 58). The Te Urewera Act states that Te Urewera is Tūhoe's "*ewe whenua, their place of origin and return, their homeland."*[501] This simple recognition of the relationship between the people and the land goes

[501] Section 3(5) Te Urewera Act, 26 July 2014.

against the logic of *terra nullius*. In doing so, it can also be considered to overcome the Wilderness myth. The Legal Personhood Model can take credit for this (*supra*, 46).

171. Thirdly, the use of the Legal Personhood Model allows for local recognition of Indigenous thinking (*supra*, 101). The bare fact that the worldview of Tūhoe was included in the Act challenges a universalist logic, while the content of the recognised worldview goes against a logic of extraction. Even though the Indigenous concepts and principles mainly emerge in the introductory parts of the Act and less in the technical sections (*supra*, 108), their importance should not be underestimated. The judgement of the Rotorua High Court (*supra*, 125), for instance, identified a violation of *Tūhoetanga*, a central principle in Tūhoe thinking that is protected by the Act.[502] Tūhoe thinking promotes a relational logic between people and nature (*supra*, 69). Therefore, its legal recognition brings the governance system of Te Urewera closer to a governance system that cultivates reciprocal relationships between people and nature, bypassing a merely conservationist model.[503]

172. Fourthly, Te Urewera is recognised as a living ecosystem with regenerative processes and resources that are prone to exhaustion. This is related to the Tūhoe worldview and concerns the heart of the RoN initiative. The Legal Personhood Model acknowledges Te Urewera in a distinct manner, drawing upon a separate spiritual identity of the region (*supra*, 58). Once again, this goes against the imagery of empty space and the assumption of inexhaustibility. Te Kawa's ambition to manage people for the benefit of the land (*supra*, 24) bears witness to the awareness that Te Urewera has generative abilities, but also that resources can be exhausted. Te Kawa repeatedly calls for responsibility (*supra*, 87), emphasising the human dependence on nature and the consequences that human interactions may have. In doing so, the governance structure challenges the idea of ownership and control over nature.[504]

173. Fifthly, the Legal Personhood Model challenges the traditional dichotomy between private and public property. With the statement that the region will never again be owned by people (*supra*, 23), the governance structure bypasses dominant property structures. Although this element was considered a premise at the start of this research (*supra*, 5), the analysis of international law affirms its importance for the reinstalment of commons. Not only the dualism

[502] Section 5(1)(c) Te Urewera Act, 26 July 2014.
[503] In this way, the Te Urewera Act can also reassure people who fear that RoN may reinforce the legacy of green colonialism. This concern has been expressed in M. PETEL, "The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature", *Transnational Environmental Law* 2024, (1) 8 and 17.
[504] J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 220.

between the public and the private, but also the dualism between the subject and the object are transcended. The interests of many people are considered, without granting ownership to any of them.

2. The risks of legislative RoN for commons

174. The RoN framework does not only offer opportunities for commons institutions, but can also involve risks. Based on the analysis of Te Urewera, this section highlights how the Legal Personhood Model may exert an influence that is not necessarily beneficial for commons. It concerns issues of (1) political representation, (2) continued state involvement, (3) vulnerability to legislative change, (4) a reaffirmation of state power, and (5) the concept of RoN itself.

175. Firstly, as Te Urewera Board members are expected to represent the interests of Te Urewera, issues of political representation of the Tūhoe population may be raised. The RoN aspect makes the governance system of Te Urewera more vulnerable to political contestation.[505] While the members of Tūhoe Te Uru Taumatua are supposed to represent different valleys (*supra*, 65), according to the Te Urewera Act, the Board members need only act on behalf and in the name of Te Urewera.[506] The idea that a group of people is to represent one specific entity may also enhance centralist tendencies, which comes at the expense of polycentric and collective decision-making. Even though the Act sometimes directly refers to *iwi* and *hapū*, the Board and Tūhoe Te Uru Taumatua hold a lot of power. The protests that have taken place (*supra*, 112) seem to challenge this centralisation, or at least the concrete way in which it was implemented at the time. The Legal Personhood Model may hinder collective-choice arrangements (*supra*, 113).

176. Secondly, if the Legal Personhood Model functions as a legal, constitutional framework for communal governance, it can easily be used to secure state authority or to give power to bodies that do not necessarily involve all interested people in their decision-making. This can also lead to the incorporation of typical state practices, such as activity permits. TĂNĂSESCU has suggested that these bureaucratic elements may lead to frustration among Tūhoe.[507] For the constitutional framework of commons (*supra*, 6), DE SCHUTTER stresses that it should

[505] C. M. KAUFFMAN and P. MARTIN, *The Politics of Rights of Nature, Strategies for building a more sustainable future*, Cambridge, MIT Press, 2021, 147.
[506] Section 17(a) Te Urewera Act, 26 July 2014.
[507] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 86.

"strengthen the ability of these communities to manage resources, in order to ensure that the outcomes are beneficial to societies as a whole."[508] DE SCHUTTER has addressed the careful balance between facilitation by the state and state interference: he emphasises that the state should take on a supportive role to install commons without intentions of exercising control.[509] Needless to say that this equilibrium might be hard to find in practice, especially given the strong starting positions of states in legal orders.

177. Thirdly, and linked to this strong starting position of states, it is important to realise that RoN installed by legislative acts remain vulnerable to legislative change. As a consequence, the Legal Personhood Model will not provide comprehensive protection against enclosure. The Te Urewera Act mentions that it wishes to *"preserve in perpetuity a legal identity and protected status for Te Urewera"*[510], but the purely legal-technical value of the document remains a parliamentary act. This means that the power to amend lies with Parliament, rather than with bodies of Tūhoe authority. Although this would undoubtedly be an extremely sensitive matter, the conditions of governance could be amended. This power imbalance is relevant as some people consider the Act to be a merely pragmatic, temporary phase in the long history of colonial relations, rather than a final arrangement.[511]

178. Fourthly, in a way, the instrument of a legislative act reinforces the powerful position of the state. The Act does not only give the Parliament the practical opportunity to change the law, but also confirms the state as the legitimate authority to regulate the matter. In the words of professor in international studies Christian LUND, *"the state is always in the making"*.[512] As public authority is perpetuated through its use, the appeals for recognition of rights help construct the power of the state. Although this may sound paradoxical, LUND argues that rights

[508] O. DE SCHUTTER, 'From Eroding to Enabling the Commons: The Dual Movement in International Law' in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (231) 254-255.
[509] O. DE SCHUTTER, 'From Eroding to Enabling the Commons: The Dual Movement in International Law' in S. COGOLATI and J. WOUTERS (eds.), *The Commons and a New Global Governance*, Cheltenham, Edward Elgar, 2019, (231) 255-256.
[510] Section 4 Te Urewera Act, 26 July 2014.
[511] B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 8; M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85.
[512] C. LUND, "Rule and Rupture: State Formation through the Production of Property and Citizenship", *Development and Change* 2016, Vol. 47, No. 6, (1199) 1200; S. PAHUJA addresses the ongoing *"actualisation of the state"* in international law in S. PAHUJA, "Laws of encounter: a jurisdictional account of international law", *London Review of International Law* 2013, Vol. 1, No. 1, 63-98.

and authority are constituted simultaneously.[513] The adoption of the Legal Personhood Model by a state therefore confirms its authority over the region.

179. Fifthly, the RoN aspect in itself also sparks debate. TĂNĂSESCU sees potential in the construction, but remains critical, stating that *"settler states would sooner accept self-owning land than Indigenous owned one"*.[514] He contends that land owned by Indigenous peoples would threaten the traditional definition of a state with unwavering power of its territory. Still, one can argue that a self-owning territory also poses a threat to the classic concept of a state. COOMBES criticised the arrangement for not being far-reaching enough. According to him, the Act is a means to silence Tūhoe and preclude future ownership claims to ensure that Te Urewera will not be owned by Indigenous peoples.[515] The Legal Personhood Model carries the risk of being used as a means to deny ownership rights.

3. RoN's potential for negotiated solutions

180. The two previous sections highlighted both the potential benefits and potential risks of employing RoN to accommodate commons institutions. More specifically, they evaluated the Legal Personhood Model as a means to reinstate Indigenous communal governance in previously enclosed regions. They did not intend to make a general value judgement on the Te Urewera Act. As the Te Urewera Act did not manage to reinstate a commons that strictly followed OSTROM's design principles, it is important to remember that this was not its explicit purpose.

181. Therefore, it would be unfair not to draw attention to the potential of RoN that the Te Urewera Act demonstrated very clearly: the potential to create space and provide the framework for shared governance between States and Indigenous peoples in a way that tries to honour local Indigenous thinking while also securing public access. The Te Urewera Act shows that the Legal Personhood Model can create in-between situations that largely hand over governance while letting the state hold on to controlling power. In this way, it contributes to intrastate autonomy for Tūhoe, as protected by UNDRIP (*supra*, 56).[516] The Te Urewera Act brings

[513] C. LUND, "Rule and Rupture: State Formation through the Production of Property and Citizenship", *Development and Change* 2016, Vol. 47, No. 6, (1199) 1200-1201.
[514] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85.
[515] B. COOMBES, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera", *Espace populations sociétés* 2020, Vol. 1-2, (1) 6-10.
[516] R. SHRINKHAL, ""Indigenous sovereignty" and right to self-determination in international law: a critical appraisal", *AlterNative: An International Journal of Indigenous Peoples* 2021, Vol. 17, No. 1, (71) 79.

together the New Zealand common law system and important principles of *tikanga*, creating a small, hybrid legal order.[517] While this might be insufficient for Indigenous rights activists, it can lower the threshold for states to allow various degrees of self-governance.

182. RURU is elated about the revolutionary arrangement. She calls the creation of a separate legal entity a *"win-win solution"* for Māori and the Crown alike, while expressing the hope that the Te Urewera Act would be an international inspiration for other questions on ownership and management.[518] She writes that the arrangement *"pushes the boundaries of [New Zealand's] national imagination"* and concludes that it makes her very proud to be a New Zealander.[519] As mentioned higher (*supra*, 179), TĂNĂSESCU and COOMBES have different opinions in this regard.

183. This paper does not engage with these normative discussions, but wishes to point towards the strengths and the weaknesses of the Legal Personhood Model as an institutional framework for commons, and more specifically Indigenous commons. This framework can take numerous forms which all inevitably require political choices, that are then up for discussion. The frameworks can either extensively elaborate on internal political structures or leave them largely open.[520] Then, once the power structures are known, these will also be open to contestation.[521] In this regard, it is important to stress that the Te Urewera model may function as an inspiration for other governance arrangements, but that it should not thoughtlessly be transplanted to other regions, countries or continents. It is precisely the flexibility of the Legal Personhood Model, and the space that it creates, that make it valuable. It allows for the integration of different philosophies and for connection to specific landscapes.[522] The copying of implementations risks reproducing the universal inclination of international law (*supra*, 142),[523] while the strength of commons institutions lies precisely in their rootedness in a

[517] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 74.
[518] J. RURU, "Tūhoe-Crown settlement – Te Urewera Act 2014", *Māori Law Review* 2014, 4-6.
[519] J. RURU, "First laws: Tikanga Māori in/and the law", *Victoria University of Wellington law review* 2018, Vol. 49, (211) 223 and 225.
[520] As emphasised in M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 85, the Te Urewera Act does not interfere with internal Tūhoe politics.
[521] As highlighted in S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 72, commons do not guarantee fair power structures.
[522] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 67.
[523] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 87.

specific context.[524] The characteristic commons deviations of the Te Urewera Act are therefore not too problematic, either. In TĂNĂSESCU's words: *"Te Urewera shows a way of using legal entity status as a potential tool of empowerment, while acknowledging its limitations".*[525] It serves as one example of what RoN could mean for the commons. As implementations of the Legal Personhood Model can be very diverse, the degree in which they overlap with commons governance can also vary. This means that analyses of other RoN models may offer other interesting insights. As DE MOOR illustrated with her 'institutional toolbox', different institutional arrangements are worth being studied.[526]

[524] S. COGOLATI, *International law to save the commons. The international legal protection of the commons in development*, dissertation KU Leuven, 2021, 79; B. WESTON and D. BOLLIER , *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge: Cambridge University Press, 2013, 126.
[525] M. TĂNĂSESCU, *Understanding the Rights of Nature: A Critical Introduction*, Bielefeld, transcript Verlag, 2022, 87.
[526] J. GILBERT, E. MACPHERSON, E. JONES and J. DEHM, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda" in D. DAM-DE JONG and F. AMTENBRINK (eds.), *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis*, Den Haag, Springer, 2023, (47) 57-58.

Conclusion

184. In studying the Te Urewera Act, this paper addressed the following question: *'What does a commons evaluation of the Te Urewera Act demonstrate about RoN's potential to contribute to the reinstatement of (Indigenous) commons?'* Through analysing the governance structure of Te Urewera according to OSTROM's design principles and explaining deviations within the framework of international law, this research paper highlights the potential benefits and risks of employing RoN, and more specifically the Legal Personhood Model, for the reinstatement of (Indigenous) commons.

185. The analysis demonstrates the potential of RoN to carve out space for a governance system that is tailored to specific circumstances. Thanks to the Legal Personhood Model, the Te Urewera Act manages to weaken top-down state control and move beyond the classic dualism between private and public property. The Act acknowledges the relational thinking of Tūhoe, the regenerative capacities of Te Urewera and the relationship between Tūhoe and their land. The framework manages to resist the principles of top-down state governance, inexhaustibility, extraction and universalism within international law. In doing so, it helps to bring the governance structure closer to a commons logic. Even more so, the framework gives legal visibility to the structure, which strengthens its position.

186. The Legal Personhood Model does not guarantee a 'perfect' commons, however, as the analysis of risks reveals. Some of the 'problematic' aspects of the Te Urewera Act are fully explainable by the RoN framework. This is the case for the question of political representation and the fear that RoN may be used as a means not to grant rights directly to specific groups. Most of the risks, however, also relate to Te Urewera's history of enclosure and the strong position of the state of New Zealand. They include the risk of continued state involvement, a vulnerability to legislative change and a reaffirmation of state power. This central position of the state already surfaced during the first analyses of this research, and did so again in the overview of risks. The Te Urewera Act could not fully liberate itself from the exercise of state power, and this might bring one to the conclusion that RoN initiatives are unable to accommodate commons governance structures.

187. This paper argues that such a conclusion would be premature. By involving the international legal framework, it explains the strong position of states. It shows how basic principles of international law are antithetical to a commons logic, but also reveals the

important role of bottom-up initiatives for change in international law. It is important to realise that the interaction between national legal systems and the international framework goes in two directions. So, even though the continued state presence in the Te Urewera governance system can be considered to be a large deviation from an ideal type of commons, initiatives at the local level are a promising pathway to influence and change the international framework of the future. This means that imperfect RoN initiatives may influence the principles of international law that limit the possibilities of commons. Their existence today may help remedy their most prominent flaw in the future.

188. This ties back to the paradoxical position of the state. Throughout this paper, the state emerges as both the oppressive and enabling force of communal governance. While the interference of the state is considered to be detrimental to communal governance, its willingness to legislate on the matter is of great significance as it offers legal visibility and a certain protection against enclosure. Even though a reliance on state power reaffirms the state's strong position, it also contributes to a trend that might weaken the position of states in the long term.

189. Therefore, based on a commons analysis of the Te Urewera governance system, this paper concludes that a legal RoN framework, and more specifically the Legal Personhood Model, can be of great value in efforts to reinstate (Indigenous) commons. RoN can be employed as a framework that sets clear boundaries and allows for internal communal governance. At the same time, they may also make commons visible on the legal radar and help to break the prevailing principles of the international framework. In doing so, RoN initiatives might incrementally weaken the power of states in subsequent initiatives. This conclusion does not mean that the framework is perfect, or that there are no risks attached to it. Nor does it imply that RoN must be used to install commons instead of shared governance structures. It does, however, mean that the Legal Personhood Model offers interesting opportunities for commons. Therefore, it is worth being studied as a tool in DE MOOR's ‘institutional toolbox’.

190. In this regard, this paper raises a call to consider commons and RoN simultaneously more often. Commons and RoN do not only share similarities that make them allies in the face of international law, but also have differences that allow for cross-pollination. As both concepts increasingly receive political and scholarly attention, there is potential for critical theoretical interaction and ‘transconceptual’ advocacy to bend the course of international law. In tracing back Te Urewera's history, this paper provides insight into a possible shared future for RoN and commons. Nevertheless, as the Māori proverb goes, *kia whakatōmuri te haere whakamua*.

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