IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 107 / 2024

BETWEEN	**DANIEL CLINTON FITZGERALD** Appellant
AND	**ATTORNEY-GENERAL** Respondent

SYNOPSIS OF SUBMISSIONS FOR TE KĀHUI TIKA TANGATA HUMAN RIGHTS COMMISSION AS INTERVENER

Dated: 11 March 2025

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KIA URUHAU TE KŌTI, MAY IT PLEASE THE COURT:

1. Te Kāhui Tika Tangata Human Rights Commission (**Commission**) has been granted leave to intervene to provide the Court with "independent submissions in relation to the human rights implications of the issues arising in this appeal".[1]

2. This appeal (and that in *Putua v Attorney-General*[2]) raise squarely before this Court questions about the nature and scope of the damages remedy developed by the courts in *Baigent's case*.[3] A key issue is whether the Attorney-General (and the majority in *Attorney-General v Chapman*) is correct to say that the "state liability" recognised in *Baigent's case* means merely the "liability of *the Crown*, which denotes *executive government*",[4] and whether Mr Fitzgerald (and the minority in *Chapman*) is correct to say that "state liability" does not allow for "carve-out[s] … depending on the identity of the actor involved".[5]

3. The Commission does not comment on the specific facts of this case, but makes the following submissions regarding the nature and scope of New Zealand Bill of Rights Act 1990 (**NZBORA**) remedies: (i) New Zealand has undertaken to ensure individuals receive an effective remedy for breaches of their rights recognised under the International Covenant on Civil and Political Rights (**ICCPR**); (ii) there is a significant and closely intertwined relationship between the ICCPR and NZBORA; (iii) the New Zealand courts have primary responsibility for developing NZBORA remedies under New Zealand's constitutional arrangements; (iv) the New Zealand courts have relied on the right to an effective remedy in art 2(3) ICCPR to develop NZBORA remedies; and (v) it is important for the Court to bear in mind the nature and scope of the NZBORA damages remedy.

I. New Zealand has undertaken to ensure individuals receive an effective remedy for breaches of their ICCPR rights

4. New Zealand has ratified the ICCPR.[6] New Zealand has also ratified the Optional Protocol to the ICCPR,[7] which "recognizes the competence" of the

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[1] *Fitzgerald v Attorney-General* SC 107/2024, 20 February 2025 (Minute of Glazebrook J) at [2]. The Commission will abide the Court's decision on the parties' dispute on which issues are properly before it.
[2] *Putua v Attorney-General* SC 31/2024.
[3] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [***Baigent's case***].
[4] Resp Subs at [48] (original emphasis); and *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 [***Chapman***] at [204] per McGrath and William Young JJ, and at [214] per Gault J.
[5] App Subs at [28]; and *Chapman* at [92] per Elias CJ, and at [216] per Anderson J.
[6] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [**ICCPR**]. New Zealand ratified the ICCPR on 28 December 1978: UN Treaty Body Database "Ratification Status for New Zealand" <tbinternet.ohchr.org> [**UNTBD**].
[7] Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for

United Nations Human Rights Committee (**Committee**) to receive and consider communications from individuals alleging that New Zealand has violated their ICCPR rights.[8]

5. Article 2(1) provides that "Each State party … undertakes … to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]". Article 2(3) relevantly provides that "Each State Party … undertakes … (a) To ensure that any person whose rights or freedoms herein recognized are violated shall have an effective remedy". New Zealand has accepted the obligation in art 2 ICCPR without reservation.[9]

6. The right to an effective remedy in art 2(3)(a) is recognised as "one of the most fundamental and essential rights for the effective protection of all other human rights".[10] The Committee has described art 2(3) as a "treaty obligation inherent in the [ICCPR] as a whole".[11] The ICCPR also contains specific remedies provisions. These are instantiations in specific contexts of the general obligation in art 2(3). Article 9(5) thus provides that a victim of unlawful arrest or detention "shall have an enforceable right to compensation". Article 14(6) further provides that a person who has been subject to a miscarriage of justice "shall be compensated according to law". New Zealand has accepted the full force of the obligation in art 9(5); it has entered a reservation to art 14(6).[12]

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signature 16 December 1966, entered into force 23 March 1976) [**Optional Protocol**]. New Zealand ratified the Optional Protocol on 26 May 1989: UNTBD. Pursuant to art 2, individuals must exhaust domestic remedies before they can submit an individual communication to the Committee.

[8] The Committee was established by States Parties to the ICCPR to ensure compliance with the ICCPR. The Committee monitors compliance of States Parties to the ICCPR through reports submitted by them to the Committee (via the Secretary-General of the United Nations) on their implementation of the ICCPR and, for States Parties like New Zealand that have ratified the Optional Protocol, the Committee considers communications from individuals alleging breaches of their ICCPR rights.

[9] New Zealand did not seek to enter a reservation to art 2(3), presumably because it understood that a reservation could not have been made compatibly with the objects and purposes of the ICCPR: Ministry of Justice "Constitutional Issues & Human Rights: International Covenant on Civil & Political Rights" <justice.govt.nz>. The Committee has taken the view that "reservations to article 2 would be incompatible with the [ICCPR] when considered in the light of its objects and purposes": *General Comment 31* CCPR/C/21/Rev.1/Add.13 (26 May 2004) [**GC 31**] at [5].

[10] International Commission of Jurists *The Right to a Remedy and Reparation for Gross Human Rights Violations* (revised ed, 2018) at 53. It is notable that this is a right guaranteed by numerous universal and regional international human rights instruments, including the ICCPR: see, e.g., Universal Declaration of Human Rights GA Res 217A (1948), art 8; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 14; International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969), art 6; Charter of Fundamental Rights of the European Union 2000/C 364/01, art 47; and American Convention on Human Rights (1969) 1144 UNTS 123 (signed 2 November 1969, entered into force 18 July 1978), art 25.

[11] *General Comment 29* CCPR/C/21/Rev.1/Add.11 (31 August 2001) at [14].

[12] ICCPR, art 14(6), which provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice,

7. In *General Comment 31*, the Committee stated that the treaty-based obligation in art 2(3) "requires" States to "make reparation to individuals whose [ICCPR] rights have been violated".[13] According to the Committee, "the obligation to provide an effective remedy, which is central to the efficacy of art 2(3), is not discharged" in the absence of reparation.[14] The Committee further clarified that the ICCPR "generally entails appropriate compensation", in addition to the "explicit reparation" [15] required by arts 9(5) and 14(6). The principle of full reparation is recognised as a general principle of law[16] and as a principle of customary international law.[17] Full reparation takes the form of restitution, compensation and satisfaction, either singly or in combination.[18]

8. New Zealand is bound to perform its obligations under the ICCPR in good faith as a matter of international law.[19] New Zealand has not wavered in that

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the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him". New Zealand's reservation states that: "The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for *ex gratia* payments to persons who suffer as a result of a miscarriage of justice.".

[13] GC 31 at [16]. The International Court of Justice [**ICJ**], which decides cases in accordance with international law, has observed that the views of the Committee are to be given "great weight" on matters relating to the interpretation of the ICCPR: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Merits)* [2010] ICJ Rep 639 at [66]. See also *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC) [***Tangiora***] at 21.

[14] GC 31 at [16].

[15] GC 31 at [16]. The Committee noted that, "where appropriate, reparation can also involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations".

[16] Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (CUP, Cambridge, 2006) [**Cheng**] at ch 9.

[17] *Case Concerning the Factory at Chorzów (Merits)* (1928) PCIJ (series A) No 17 [***Chorzów Factory***] at 29. This is "[o]ne of the most oft-quoted passages in international law": Dinah Shelton "Righting Wrongs: Reparations in the Articles on State Responsibility" (2002) 96 Am J Intl Law 833 at 835. Indeed, the right to reparation for internationally wrongful acts is generally considered to be a right recognised by customary international law. See, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2022] ICJ Rep 13 at [70]; and *"Enrica Lexie" Incident (Italy v India) (Award)* PCA, 21 May 2020 at [1082]. Professor Cheng writes that "[a]lthough the [PCIJ in *Chorzów Factory*] was speaking of treaty, or contractual engagements, it cannot be doubted that the principle is applicable equally, if not *a fortiori*, to obligations *ex lege*". He notes further that this interpretation is confirmed by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 184 where "the principle was reiterated and applied to the breach of any engagement capable of giving rise to international responsibility": at 233, n 1.

[18] Article 31(1) of the International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) (annexed to GA Res 56/83 (2002)) [**Articles on State Responsibility**] sets out the obligation of the responsible State "to make full reparation" for internationally wrongful acts. Article 34 defines "full reparation" as taking the form of "restitution, compensation and satisfaction, either singly or in combination". The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147 (2006), Annex at [18] states that: "full and effective reparation … include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition". With reference to these Basic Principles, the Committee has developed the *Guidelines on measures of reparation under the Optional Protocol to the ICCPR* CCPR/C/158 (30 November 2016).

[19] Vienna Convention on the Law of Treaties (1980) 1155 UNTS 31 (opened for signature 23 May 1969, entered into force 27 January 1980) [**Vienna Convention**], art 26, which provides under the heading

commitment: its most recent report to the Committee (2015) stated that "New Zealand is strongly committed to the protection and promotion of international human rights, as embodied in the Universal Declaration of Human Rights, and in other core human rights treaties … such as the Covenant [ICCPR]".[20]

II. There is a significant and closely intertwined relationship between the ICCPR and NZBORA

9. The domestic implementation of New Zealand's international law obligations falls on the State (including the legislature, executive and judiciary). If an ICCPR right is violated in New Zealand and is not remedied in this jurisdiction, then New Zealand will be in breach of international law.

10. There is no rule specifying the precise mode of incorporating treaties into domestic law.[21] Concepts such as "incorporation" and "transformation" are not a substitute for analysis – they require unpacking. In each case, a domestic court must "scrutinise the relationship" between the particular legislation or common law principle and particular international treaty at issue.[22] These considerations will "dictate the … scope and effect of the treaty in domestic law".[23] The Court of Appeal's decision in *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* offers a useful example of the type of analysis that is required.[24]

11. In the present case, New Zealand law applies a strong presumption that NZBORA should be interpreted, applied and developed consistently with New Zealand's commitment to the ICCPR. Parliament enacted NZBORA shortly after New Zealand ratified the Optional Protocol.[25] NZBORA's twin

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"Pacta sunt servanda", that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". See generally Mark E Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden, 2009) at 361–368.

[20] *Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure: Sixth periodic report of States parties due in 2015 – New Zealand* CCPR/C/NZL/6 (24 July 2015) at [7]. See also United Nations Human Rights Council *National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21 – New Zealand* A/HRC/WG.6/46/NZL/1 (18 March 2024) at [1] ("New Zealand is committed to promoting and protecting human rights, domestically and internationally.") and [11] ("The BORA affirms the government's obligations under the International Covenant on Civil and Political Rights."); and Hon Paul Goldsmith, Minister of Justice "Human rights recommendations accepted" (press release, 27 September 2024) ("New Zealand remains committed to human rights and considers the scrutiny of the UPR process [an] important part of the international human rights system.")

[21] *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 WLR 1 at [42].

[22] Shaheed Fatima *Using International Law in Domestic Courts* (Hart Publishing, Portland, 2005) [**Fatima**] at [3.12].

[23] Fatima at [3.12], citing, among others, *R v Secretary of State for Transport, ex parte Pegasus Holdings (London) Ltd* [1988] 1 WLR 990 (QB).

[24] *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280289.

[25] In *Baigent's case*, Casey J considered this timing was significant, observing at 691: "The Act [NZBORA] reflects [ICCPR] rights, and it would be a strange thing if Parliament, which passed it one year later [after New Zealand ratified the Optional Protocol], must be taken as contemplating that

purposes are to: (i) affirm, protect and promote human rights and fundamental freedoms in New Zealand; and (ii) affirm New Zealand's commitment to the ICCPR.[26] Those purposes have remained constant since the enactment of NZBORA. The express acknowledgment of the link between NZBORA and the ICCPR in paragraph (b) of NZBORA's Long Title[27] underscores the strength of the common law presumption that statute and common law should be developed compatibly with international law. As this Court has recognised, the presumption of compatibility with international obligations "is of particular relevance here vis-à-vis the ICCPR because a stated purpose of [NZBORA] is to 'affirm New Zealand's commitment to the [ICCPR]'".[28]

12. Section 3 NZBORA is also relevant to the question of how *responsibility* for affirming New Zealand's commitment to the ICCPR has been allocated under NZBORA.[29] Section 3(a) provides that NZBORA applies to acts done by "the legislative, executive, or judicial branches of the Government of New Zealand".[30] The "Government of New Zealand" thus refers to a broader concept than the "executive". It expressly includes the legislative, executive and judicial "branches of the Government of New Zealand" (i.e., these are "branches" or parts of a greater whole).

13. Parliament has thus ensured that each of these "branches of the Government of New Zealand" are bound to act in a manner that serves NZBORA's purposes.

New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts." The New Zealand experience is in contrast to that in the United Kingdom, which ratified the European Convention on Human Rights [**ECHR**] in 1951 and opted into the right of individual petition and the jurisdiction of the European Court of Human Rights [**ECtHR**] in 1966. For over 30 years since its opt-in, successful petitions were brought against the United Kingdom in the ECtHR—with no prior opportunity for the United Kingdom's domestic courts to consider whether there was an ECHR breach. It was not until the Human Rights Act 1998 (UK) that the ECHR was incorporated into United Kingdom domestic law, thereby 'bringing rights back home': *Rights Brought Home: The Human Rights Bill* (presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty) (October 1997).

[26] New Zealand Bill of Rights Act 1990, Long Title, paras (a) and (b).

[27] Fatima at [3.10] notes that this type of "express reference" to an international treaty in domestic legislation is at "the level closest to that of an incorporated treaty", and as a "matter of practice", it is easier to invoke 'unincorporated' treaties when construing and applying such a statute.

[28] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [***Fitzgerald* (SC)**] at [225], n 325 per O'Regan and Arnold JJ. See also at [42] per Winkelmann CJ ("[NZBORA's] enactment fulfils, in part, New Zealand's obligations under the ICCPR").

[29] The different implications of s 3 NZBORA remain to be worked through on a case-by-case basis, but for present purposes the following points can be drawn from s 3(a) NZBORA.

[30] The commentary to art 2, the predecessor to s 3, in Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* (1985) [**White Paper**] states that NZBORA was intended "to apply generally to public and governmental action" (at [10.19]). In defining "public action", the White Paper gave as examples "the issue by a court of an injunction to enforce a racially restrictive covenant to which only private individuals are parties" and "enforcement by a court of the common law of defamation" (at [10.20(e) and (g)). The White Paper identified several common variables in the examples it cited, including that the action "especially of courts—might be seen as *coercive* and accordingly involving the State in enforcing questionable private actions by contrast with a passive and recognizing judicial role" and "might be directly based on authority from Parliament": (at [10.21(iii) and (iv)) (original emphasis).

It is in this sense that s 3(a) can be said to enlist the legislature, executive and judiciary in the *joint* project of affirming, protecting and promoting human rights in New Zealand, and affirming New Zealand's commitment to the ICCPR. Each of the legislature, executive and judiciary represent a different authority exercised within "the Government of New Zealand". This phrase, as it is used in NZBORA, serves as a synonym for "the state".

14. The scope of s 3(a) mirrors the position on attribution under art 4(1) of the International Law Commission's *Articles on State Responsibility*, which provides that the "conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions".[31] Section 3(a) thus aligns domestic *responsibility* for affirming, protecting and promoting fundamental rights through NZBORA with international *responsibility* for New Zealand's compliance with the obligations it assumed under the ICCPR. This seeks to harmonise the relative authorities comprising (parts of) the state in the service of NZBORA's purposes. The question in respect of NZBORA remedies is how the constitutional division of labour as between those three branches is allocated *as a matter of New Zealand's constitutional arrangements and practice.*

III. The New Zealand courts have primary responsibility for developing NZBORA remedies under New Zealand's constitutional arrangements

15. The domestic responsibility for developing NZBORA remedies lies primarily with the courts. Parliament retains the power to legislate to affirm, supplement or change the law if it wishes to do so. This is the settled constitutional division of labour in respect of NZBORA remedies.[32] NZBORA's purposes guide the courts (and other actors) in their interpretation and application of NZBORA, as well as in their development of NZBORA remedies. New Zealand's obligations under the ICCPR can therefore be expected to inform this development. This is particularly so in circumstances where one of New Zealand's central

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[31] Articles on State Responsibility, art 4. Although set out within a non-binding document, the Articles on State Responsibility are "widely regarded as (mainly) reflecting extant customary international law on the subject": *Laws of New Zealand* International Law (online ed, LexisNexis) at [189], n 2. At international law, a State cannot "invoke the provisions of its internal law as justification for its failure to perform a treaty": Vienna Convention, art 27. Nor can the executive branch (who normally represents the State internationally) argue that the impugned action was carried out by another branch as a means of seeking to relieve the State from responsibility. In relation to the ICCPR, the Committee has re-affirmed that ICCPR obligations bind the State as a *whole*: "all branches of government (executive, legislative and judicial) … are in a position to engage responsibility of the State party": GC 31 at [4]. For a useful discussion, see James Crawford *State Responsibility: The General Part* (CUP, Oxford, 2013).

[32] This is consistent with New Zealand's obligation to develop judicial remedies for breaches of rights under art 2(3)(b) ICCPR. In *Baigent's case* at 691, Casey J placed particular emphasis on New Zealand's commitment to art 2(3)(b). See also William A Schabas *Nowak's CCPR Commentary* (3rd ed, NP Engel, Germany, 2019) at 64: "States parties are required to place priority on judicial remedies".

commitments under the ICCPR is to "ensure" that individuals have access to an "effective remedy" in New Zealand for breach of their rights.

16. In the context of NZBORA remedies, NZBORA's purpose of affirming, protecting and promoting human rights requires the courts to develop remedies that give individuals the "full measure"[33] of their rights so that those rights are "practical and effective".[34] As noted, NZBORA's purpose of affirming New Zealand's commitment to the ICCPR (and the common law presumption of compatibility with international obligations) means the courts should develop NZBORA remedies in a manner that is consistent with it. To do otherwise would be to thwart, not affirm, New Zealand's commitment to the ICCPR.

IV. The New Zealand courts have relied on the right to an effective remedy in art 2(3) ICCPR to develop NZBORA remedies

17. The New Zealand courts have consistently drawn on the obligation under art 2(3) ICCPR to ensure an effective remedy for rights breaches in their development of NZBORA remedies. *Baigent's case* offers an instructive example. Each of the four judges in the Court of Appeal majority expressly invoked the obligation to ensure an effective remedy under art 2(3) to develop the NZBORA damages remedy established in *Baigent's case*.

18. President Cooke reaffirmed, in the context of NZBORA remedies, "the importance of a straightforward and generous approach" to NZBORA rights, and the strength of the words in the Long Title ("protect" and "promote").[35] His Honour also invoked art 2(3) and the right to an effective remedy at international law, noting again the strength of the formulation of that obligation, in finding that compensation was available for a breach of NZBORA.[36] His Honour relied on s 3 NZBORA to characterise it as the courts' "*duty*" to give individuals an effective remedy if they can establish that their constitutionally-protected rights have been infringed.[37] His Honour further warned of the need to be "alert … to the danger that both the Courts and Parliament at times may

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[33] See *Fitzgerald (SC)* at [41] per Winkelmann CJ; and *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 [***Mist***] at [45] per Elias CJ and Keith J. See also *Baigent's case* at 691–692 per Casey J; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 per Cooke P and at 277 per Richardson J; and *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

[34] *Fitzgerald (SC)* at [41] per Winkelmann CJ*; Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] per Elias CJ and at [103] per Tipping J; and *Mist* at [45] per Elias CJ and Keith J.

[35] *Baigent's case* at 676.

[36] *Baigent's case* at 676.

[37] *Baigent's case* at 676 (emphasis added).

give, or at least be asked to give, lip service to human rights in high-sounding language, but little or no real service in terms of actual decisions".[38]

19. Justice Casey stated that NZBORA "is to be given a generous interpretation, giving full measure to the rights and freedoms guaranteed" and recognised that "[w]hile [NZBORA] contains no express enforcement provisions, its underlying premise is that 'the Courts will affirmatively protect those fundamental rights and freedoms by recourse to appropriate remedies within their jurisdiction.'"[39] His Honour similarly considered that art 2(3) was "of particular relevance" in the light of para (b) of the Long Title of NZBORA.[40]

20. Justice Hardie Boys said he would be "most reluctant to conclude that [NZBORA], which purports to affirm this commitment [to art 2(3)], should be construed other than in a manner that gives effect to it".[41] According to Hardie Boys J, unless NZBORA "is to be no more than an empty statement, [it] is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that [it] affirms". His Honour continued by noting that: "It is … implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe [NZBORA] in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed."[42]

21. Justice McKay recognised that the commitment to the ICCPR, and in particular art 2(3), is part of the "declared purpose" of NZBORA, which must be considered in interpreting it.[43] His Honour considered that it was "clear that rights affirmed by [NZBORA] are intended to have substance and to be effective", and that it was "impossible to interpret [NZBORA] as simply making a pious declaration of so called rights which could be infringed with impunity and would confer no remedy for their breach".[44]

22. The courts' primary role (and responsibility) to develop NZBORA remedies is underscored by the position recently taken by New Zealand (acting through the

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[38] *Baigent's case* at 676.
[39] *Baigent's case* at 690–691.
[40] *Baigent's case* at 690–691.
[41] *Baigent's case* at 699–700.
[42] *Baigent's case* at 702.
[43] *Baigent's case* at 718.
[44] *Baigent's case* at 718. More recently, the lead judgment of this Court in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 relied on art 2(3) ICCPR and New Zealand's obligation to ensure an effective remedy in recognising that New Zealand courts have the power to declare legislation inconsistent with NZBORA: at [41]–[42] per Glazebrook and Ellen France JJ (with whom Elias CJ expressed "general agreement": at [74]). See also at [29]–[31] per Glazebrook and Ellen France JJ. See

executive) in respect of its compliance with the Committee's Views in *Thompson v New Zealand*.[45] In that communication, the Committee rejected a series of arguments advanced by New Zealand based on the reasoning of the *Chapman* majority and found a breach of art 9(5) ICCPR in the failure to ensure Ms Thompson an "effective remedy" in the form of reparation (including compensation).[46] New Zealand is obliged to respond by using "whatever means lie within [its] power to give effect to the Views".[47]

23. New Zealand's response to date in respect of the Committee's Views in *Thompson* confirms the constitutional division of labour in respect of NZBORA remedies described above. The formal position adopted by New Zealand is that inconsistency has been created by the courts. The minutes of the Committee's meeting to discuss the *Follow-up to Views under the Optional Protocol to the Covenant* record that the Special Rapporteur, Mr Santos Pais, noted that "judicial precedent was preventing the State party from remedying the violation".[48] Mr Santos Pais thus proposed that New Zealand be allocated "Grade E" (i.e., contrary to or a rejection of the Committee's Views in respect of payment of compensation and non-repetition).[49] The Committee adopted that proposal. Counsel for the Attorney-General acknowledged in the hearing of *Putua* that the pending judgment of this Court in that appeal is one of the reasons for the lack of response to *Thompson v New Zealand* to date.[50] This Court now has the opportunity to address the "judicial precedent" (i.e., *Chapman*) that is said to be preventing New Zealand from complying with its international obligations.[51] If the courts do not do so because they consider that there is no

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further *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6] per Gault P and Blanchard J (in considering whether a domestic remedy should be available for a tortious invasion of privacy, it "cannot be disregarded" that "individuals can seek remedies against the state at international law after exhausting domestic remedies", referring in particular to the ICCPR). There are other examples of judges determining remedies referring to the art 2(3) obligation: see e.g., *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [129]–[131] per McGrath J; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [106] per Elias CJ and at [364]–[365] per McGrath J ("This international obligation to give an effective remedy [in art 2(3)(a) ICCPR] was held to be part of New Zealand's domestic law in the judgment of Cooke P in … *Baigent's case*").

[45] *Thompson v New Zealand* CCPR/C/132/D/3162/2018 (7 June 2022) [***Thompson***] at [1].

[46] *Thompson* at [9].

[47] *General Comment 33* CCPR/C/GC/33 (25 June 2009) at [15].

[48] *Follow-up to Views under the Optional Protocol to the Covenant: Summary record (partial) of the 3950th meeting* CCPR/C/SR.3950 (10 November 2022).

[49] Ibid. Grade E reflects a situation where the "Information or measures taken [by the State party] are contrary to or reflect rejection of the recommendation": *Guidelines on the procedure for follow-up to Views* CCPR/C/162 (13 November 2023) at [25].

[50] SC 31/2024, Transcript at 316, lines 5–16.

[51] It is appropriate for this judge-made disconnect with international law obligations to be corrected by the courts. In *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7, this Court made a similar observation in relation to barristerial immunity, noting that "an anomaly created by the Courts" ought to be remedied by the courts: at [94] per Elias CJ, Gault and Keith JJ.

"jurisdiction" for them to award compensation for breaches of NZBORA by members of the judicial branch, the issue may escalate and require a legislative response to bring New Zealand back in line with its international human rights obligations.

V. It is important to bear in mind the nature and scope of the NZBORA damages remedy

24. The Commission submits that the remedy developed in *Baigent's case* establishes liability for breach of NZBORA by any of the "branches of the Government of New Zealand" bound by s 3(a) NZBORA.[52] The Commission makes the following observations.

25. First, none of the judgments of the Court of Appeal majority in *Baigent's case* states that the public law remedy they were developing is limited to breaches by the executive branch. To the contrary, a fair reading of *Baigent's case* contradicts that claim. The Court of Appeal majority endorsed the judgment of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, which involved judicial breach of fundamental rights.[53] Lord Diplock (for the majority of the Board) explained the nature of the monetary remedy as "a liability in the public law of the State … which has been newly created by sections 6(1) and (2) of the Constitution".[54] President Cooke stated that the *Maharaj* analysis applied in respect of NZBORA because "[r]emedies implicitly authorised by an enacted declaration of rights cannot differ *in nature* from remedies authorised by a generally-worded remedies clause".[55] Justice Casey similarly noted the "focus on public responsibility" in s 3 NZBORA and the fact that "remedies for the breach could also be in the public law sphere", reflecting New Zealand's commitment under art 2(3) ICCPR.[56] His Honour then proceeded to endorse the approach in *Maharaj*, including the passage referenced above.[57] Justice Hardie Boys, after reviewing the relevant authorities, including *Maharaj*, noted that NZBORA requires that "those who in the three branches of government exercise its functions, powers and duties will observe the rights that [NZBORA] affirms".[58] His Honour proceeded to say

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[52] Resp Subs at [48] (original emphasis); and *Chapman* at [204] per McGrath and William Young JJ, and at [214] per Gault J.
[53] *Baigent's case* at 677 per Cooke P, at 692 per Casey J, at 698 and 700 per Hardie Boys J and at 718 per McKay J, citing *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) [***Maharaj***].
[54] *Maharaj* at 399.
[55] *Baigent's case* at 677 (original emphasis).
[56] *Baigent's case at* 691.
[57] *Baigent's case* at 691–692.
[58] *Baigent's case* at 702.

that "implicit in that commitment, indeed essential to its worth, [is] that the Courts … are able to grant appropriate and effective remedies where rights have been infringed".[59] Justice McKay concluded that where an NZBORA right "is infringed by a branch of government or a public functionary, the remedy under [NZBORA] must be against the Crown".[60]

26. In *Baigent's case*, the Court of Appeal majority expressly align the new remedy with s 3(a) NZBORA, which as noted is directed at acts done by the "legislative, executive or judicial branches of the Government of New Zealand". It would be surprising if the courts were to develop a new remedy to respond to breaches of affirmed rights but, without commenting on it, only intend the remedy to be available for breaches of NZBORA by *some* branches of Government but not others. Moreover, as also noted, the majority in *Baigent's case* developed NZBORA remedies expressly by reference to the obligation to ensure an effective remedy in art 2(3) ICCPR.[61] The narrower reading of the remedy in *Baigent's case* jars with that reasoning: it would *not* ensure compliance with art 2(3). The obligation in art 2(3) applies to "the State" or "New Zealand", including the conduct of any State organ.[62]

27. Second, the suggestion that the remedy developed by the courts in *Baigent's case* should be limited only to "executive" acts is inconsistent with the language of *Baigent's case* itself (which, as noted earlier, frequently refers to "branches" (plural) of Government). The Attorney's submission only appears to be sustained by the terminological clutter associated with the different meanings of terms such as "Government of New Zealand", "the Crown" and "the state". Mindful of the inclusive definition of "Government of New Zealand" in s 3(a) NZBORA, the starting point is that the meaning of such terms is contextual.[63] Here, the NZBORA remedies were developed to align with the

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[59] *Baigent's case* at 702.
[60] *Baigent's case* at 718.
[61] *Baigent's case* at 676 per Cooke P, at 690–691 per Casey J, at 699–700 per Hardie Boys J and at 718 per McKay J.
[62] Andrew Butler "State Immunity for Judicial Breach of Rights: The Human Rights Committee Speaks" (2023) 21 NZJPIL 65 at 74–75; GC 31 at [5]; *Thompson* at [1]; and *Barrio v Spain* CCPR/C/136/D/3102/2018 (7 March 2023) at [11].
[63] See *Chapman* at [78] per Elias CJ. Examples from *Baigent's case* are at 697 ("[The NZBORA] affirms rights and freedoms and by limiting its application to the acts of *the three branches of government* and to those performing public functions, powers or duties it commits *the* state to the protection and promotion of those rights and freedoms which the long title declares to be its purpose") and at 702 per Hardie Boys J ("The [NZBORA] … is a commitment by *the Crown* that those who in the *three branches of the government* exercise its functions, powers and duties and will observe the rights that the Bill affirms") and at 718 per McKay J ("It is *the Crown*, as the legal embodiment of *the state*, which is bound by the [ICCPR] to ensure an effective remedy for the violation of fundamental rights"). Cf the *Chapman* majority's reading

scope of NZBORA (and international law). The terminological clutter is best understood as a reflection of the winding historical path through which those concepts have been received in modern times. As Professor Joseph writes (from a historical perspective), "the King was the source of executive, legislative, and judicial power and it is still the case today that these powers are exercised in the name of (or with the concurrence of) the Sovereign. … The greater part of the machinery of central government is regarded as an emanation of the Crown".[64]

28. The absence of a "juridical entity" such as that found in many civilian systems is a distraction given s 3 NZBORA. But the "state", whether by that name or another, can be discerned through the exercise of public power and functions by different bodies in New Zealand.[65] There are different "authorities"[66] of the state; Judges exercise "the judicial power of the state" or adjudicative authority.[67] They are thus brought within the scope of s 3 NZBORA.

29. Third, the Attorney-General is the proper defendant for claims that one or more of the "branches of the Government of New Zealand" committed an NZBORA breach. In doing so, the Attorney-General acts on behalf of the "Crown" or, in NZBORA terms, "the Government of New Zealand" as the "fountain of

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of *Baigent's case* that it is unclear whether *Baigent's case* extended liability out to the State as a whole: *Chapman* at [145] per McGrath and William Young JJ, and at [212] per Gault J.

[64] PA Joseph *Laws of New Zealand* Constitutional Law (online ed, LexisNexis) [**Joseph *Laws of New Zealand***] at [22] (footnotes omitted) and at [97] ("the monarch is the source and fountain of justice and all jurisdiction is exercised in her name"). See also Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [2.2]. However, as Professor Joseph goes on to state, "through gradual constitutional attrition, legislation, and decisions of the Courts, many of the former powers of the monarch have been abolished, restricted or lost, or transferred to the Queen in Parliament, the Courts or minsters of the Crown. Today, the Crown may exercise primary legislative powers only through and with the consent of Parliament … The Crown may not determine cases through the exercise of judicial power, although the Crown may pardon offences and exercise other prerogatives in relation to the administration of justice". See also Patrick F Baud "The Crown's Prerogatives and the Constitution of Canada" (2021) 3 JCL 219 at 226 who notes, in the Canadian context, that: "[t]he lack of personal involvement of the Queen and her representatives in judicial functions and the constitutional protection of judicial independence differentiate the functioning of the judiciary from that of the Crown in its other capacities, but the judges still hold office under the Crown and exercise Crown authority".

[65] The "state" may be dispersed, at least in functional terms, across a range of different bodies or actors, but it is wrong to say that it does not exist even if it may be difficult to locate. A tangible illustration is the Constitution Act 1986, s 2(1) ("The Sovereign in right of New Zealand is the *head of State of New Zealand*"). See also the State-Owned Enterprises Act 1986; and State Sector Act 1988. See generally Janet McLean *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP, Cambridge, 2012) [**McLean**].

[66] Earl Grey referred to "the different authorities of the State": *Parliamentary Government considered with reference to Reform* (2nd ed, John Murray, London, 1864) at 3–4 and 76. See further Mark Hickford "The Historical, Political Constitution—Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L Rev 586 at 606 ("adjudicative dimensions of the Crown").

[67] Joseph *Laws of New Zealand* at [25]. See also McLean at 9 ("Indeed … there is a British state tradition (though with mixed ideological commitments) which treats the common law judges as a representation of the state"). See further *Arbitrators' Institute of New Zealand Inc v Legal Services Board* [1995] 2 NZLR 202 (HC); and *Tangiora* at 20 (the natural and ordinary meaning of "judicial authority" is a person or body "having power to judge a matter before it, which power is derived from the state").

justice", not in the exercise of the Crown's executive functions.[68] This reflects the historical role of the Attorney-General as the King's lawyer dating back to times when "the King was the source of executive, legislative, and judicial power".[69] It also reflects what happens in practice: the Attorney-General acts as the defendant in NZBORA claims against the different "branches of the Government of New Zealand", including breaches implicating the judicial branch[70] and claims that legislation is inconsistent with NZBORA.[71]

30. Fourth, the development of NZBORA remedies, including damages, should reflect the fact that breaches of fundamental rights will often result from multiple contributing actors—for example, a legislative or regulatory framework; executive officials acting within that framework; and judges adjudicating in relation to that framework. As Elias CJ said in *Chapman*:[72]

> In many cases, it will be difficult to separate out judicial breach of rights from breaches by other State actors, leading to arbitrary results and perhaps difficult questions of attribution or materiality. So, for example, delay may be partly the result of judicial conduct and partly the result of executive conduct (whether of police or prosecutors, or in the provision of court facilities); unreasonable search and seizure may result both from the granting of search warrants and their execution. While *Maharaj* is generally viewed as a case concerning judicial breach (in the wrongful committal), it could equally well be seen, as is suggested by Lord Diplock's references to failure of the legal system and as it was subsequently treated by the Privy Council, as a legislative failure in the provision of appeal rights to enable the system to provide its own correction. Indeed, breach of human rights by officials or others properly within the responsibility of the executive, such as the police, may often be material to judicial outcomes. The public law damages remedy acknowledged to be available in respect of such breaches may properly be claimed unless the claim is an abuse of process.

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[68] See e.g., *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL) at 311 where Lord Diplock approved the practice of the Attorney-General prosecuting contempt of court allegations, noting that: "He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, *as do Her Majesty's judges themselves*; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions") (emphasis added); and *Mikisew Cree First Nation v Canada* 2018 SCC 40, [2018] 2 SCR 765 at [128] where Brown J stated that in the particular context before the Court "Crown conduct" triggering the duty to consult "must … be understood as excluding the parliamentary (and, indeed *judicial*) *functions of the Canadian State*" (emphasis added).

[69] See at n 64 above.

[70] See e.g., *Siemer v Attorney-General* [2022] NZHC 2789 (application by the first defendant, the Attorney-General, to strike out Mr Siemer's claims for declarations and compensation for alleged breaches by the Supreme Court of his NZBORA rights; the Supreme Court of New Zealand was named as the second defendant); and *Greer v Attorney-General* [2018] NZHC 1290 (application by the first defendant, the Attorney-General, to strike out Mr Greer's claim for damages for breach of NZBORA by the District Court Judge, High Court Judge and Court of Appeal (the second, third and fourth respondents)). See generally Paul East "Life as the Attorney-General: Being in the Right Place at the Right Time" (2017) 2023 AULR 37 at 37. Historically, judicial power was considered to emanate from the royal prerogative of the King, who "cause[d] law and justice in mercy to be administered in all judgments". Although the parts of state power originally held by the King have fragmented over time, the Attorney-General remains: *Halsbury's Laws of England* (online ed) Constitutional and Admin Law vol 20 (2023) at [132].

[71] See e.g., *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683; and *Attorney-General v Chisnall* [2024] NZSC 178.

[72] *Chapman* at [53] (footnotes omitted).

31. The present appeal offers a useful illustration. Parliament enacted the three-strikes regime; the prosecutor laid a charge aware of the consequences of conviction on a stage-3 offender; and the sentencing Judge imposed (and a Court of Appeal majority upheld) a disproportionately severe sentence. The prosecutor, High Court and Court of Appeal acted on the basis of the "received understanding" of the regime. In this type of case, the focus should be on identifying the breach of the individual's rights and an effective remedy for that breach. It sits awkwardly with that focus to disaggregate the different actors and seek to assign responsibility to one. As Elias CJ warned in *Chapman*, distinctions between judicial and non-judicial state acts "may be elusive in practice and productive of arbitrary outcomes".[73] The risk of distortion arises because: (i) litigants may be incentivised to focus on a particular *executive* actor (e.g., a prosecutor); (ii) the characterisation of an act as *executive*, judicial or legislative may determine the remedy that is (or is not) available; and (iii) excluding judicial liability for damages may place the courts in a difficult position developing principled thresholds for NZBORA breaches because this type of carve-out is arguably inconsistent with promoting and protecting fundamental rights. This type of fragmentation runs counter to s 3 NZBORA and the public law remedy developed in *Baigent's case*.

32. Moreover, in these types of cases, there is also the risk that litigants seek, in effect, to 'blame' one actor or branch of government when several may have contributed to the relevant harm (i.e., the NZBORA rights breach).[74] If multiple actors are involved, a public law remedy against the "state" (i.e., s 3 actors) may require the courts to ask whether "but for" the state conduct (in the aggregate), the harm would have occurred. This avoids some of the complexity associated with fragmentation. Human rights cases frequently involve multiple causes (i.e., two or more causes leading to the harm, neither of which may by itself be sufficient), concurrent causes (i.e., two or more causes leading together to the

[73] *Chapman* at [53], n 125 where Her Honour noted the difficulties with determining "whether a warrant is issued by a judge or registrar, or whether a breach of fair trial rights is attributed to judicial or prosecutorial misconduct".

[74] In some cases, there may be an individual actor who has clearly acted inconsistently with NZBORA on their own accord and in a manner which makes the allocation of responsibility against that actor clear. But in others such as where damage is caused by the combined action of several actors or factors, no one contribution may be indispensable such that the wrong would not have occurred 'but for' it. See also Andrea Gattini "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment" (2007) 18 EJIL 695 at 710 ("To say that the genocide would have been committed anyway is not equivalent to saying that the genocide would have been committed with the same modalities … the fact that Serbia's omission was not the *only* cause does not mean that it was *no* cause at all.").

harm),[75] omissions[76] and failure to comply with positive duties. If the "state" is to be disaggregated, the approach of asking whether "but for" the conduct of a single actor the harm would have occurred may need to be modified in favour of a material contribution standard.[77] NZBORA's twin purposes set the parameters for the courts in developing judicial responses to this type of issue.

33. Fifth, *Chapman* did not purport to change the nature of the *Baigent* remedy (a direct public law remedy against the *state*).[78] Nor is there any suggestion that the *Chapman* majority's approach precludes *findings of breach by a judge*. This appeal is not a case where it is said the prosecutor's conduct alone gave rise to the rights breach.[79] Nor is it one where the judge's conduct is said to be the sole cause such as might raise issues if *Chapman* remains good law. Here, the factual inquiry should look at all relevant conduct by branches of (in NZBORA terms) "the Government of New Zealand". If a breach is found, the presence of an *executive* actor (i.e., the prosecutor)[80] means that this Court is not precluded from awarding compensation as part of an effective remedy. Such an award should be expressly directed at *state liability* arising from the breach established by the relevant factual inquiry, not singling out one state actor.

Dated 11 March 2025

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[75] HLA Hart and Tony Honoré *Causation in the Law* (2nd ed, OUP, Oxford, 1985) at ch 8.
[76] The ECtHR has expressly rejected the "but for" test for omissions leading to rights breaches: *E v United Kingdom* 33218/96, 26 November 2022 at [99]; and *Smiljanić v Croatia* 35983/14, 25 March 2021 at [84], as cited in Vladislava Stoyanova *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP, Oxford, 2023) at 47.
[77] See at nn 73 and 74 above.
[78] *Baigent's case* at 677 per Cooke P, at 692 per Casey J, at 698 and 700 per Hardie Boys J and at 718 per McKay J, citing *Maharaj*.
[79] See e.g., *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).
[80] Prosecutors are bound by s 3 NZBORA and must act in accordance with the substantive constraints imposed by NZBORA notwithstanding the fact the *Solicitor-General's Prosecution Guidelines* (1 July 2013) [**Guidelines**] do not explicitly mention NZBORA as a consideration; NZBORA is a statute establishing minimum standards to which s 3 actors must conform whereas the Guidelines do not have statutory force: *Attorney-General v Fitzgerald* [2024] NZCA 419 at [43]; and Resp Subs at [57]. Those obligations are a critical part of prosecutors meeting the "public interest test" in deciding whether to prosecute, pursuant to the Guidelines, cls 5.1 and 5.5–5.11. This is also what is envisioned by the *United Nations Guidelines of the Role of the Prosecutor* (1990) (at cls 12 and 13(b)); and the *International Association of Prosecutors Standards* (1999), two documents whose aspirations and practices the Guidelines are expressly said to reflect: Guidelines, cl 2.3. See also Council of Ministers of the Council of Europe, *The Role of Public Prosecution in the Criminal Justice System* (Recommendation Rec (2000)19, 6 October 2000), cl 1.