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

SC 31 / 2024

BETWEEN	**KORO PUTUA** Appellant
AND	**ATTORNEY-GENERAL** Respondent

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

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TĒNĀ E TE KŌTI, MAY IT PLEASE THE COURT:

1. Te Kāhui Tika Tangata Human Rights Commission submits that New Zealand law should not maintain an *a priori* carve-out that precludes compensation for judicial breaches of the New Zealand Bill of Rights Act 1990 (**BORA**).

2. The current approach under New Zealand law, following the majority position in *Attorney-General v Chapman*, does not permit judicial inquiry into what is required to ensure an effective remedy for breaches of fundamental rights by the judiciary in the particular circumstances before the court.[1] The *Chapman* majority held that an award of compensation for such breaches is outside the "jurisdiction" of the courts.[2] This approach will necessarily place New Zealand in breach of its international human rights obligations in any case where compensation is an element of an effective remedy for judicial breaches of BORA.[3]

3. It is an "elementary"[4] proposition that courts give effect to a "strong presumption" in favour of interpreting domestic law, "whether common law or statute", so as to not place the State in breach of its international obligations.[5] New Zealand's international obligations are also relied upon by the courts to reappraise an area of the common law, confirm a particular view of the common law, or provide relevant background for consideration of the applicable common law.[6] The need for reappraisal of the common law in this way is

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[1] *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 [***Chapman***].

[2] *Chapman* at [209] per McGrath and William Young JJ. The majority's position was subject to strong dissents by Elias CJ and Anderson J.

[3] It is relevant that acts of the judiciary are attributable to the State as a matter of international law: James Crawford *State Responsibility: The General Part* (Cambridge University Press, Oxford, 2013) [**Crawford**] at [4.2.2.3]. The acts of the New Zealand judiciary, as conduct of the State, may therefore result in a breach of obligations under international law by New Zealand.

[4] *A v Secretary of State for the Home Department (No 2)* [2004] EWCA Civ 1123, [2005] 1 WLR 414 [***A v Secretary of State***] at [266] per Laws LJ.

[5] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 at [27] per Lord Hoffmann. In New Zealand, see: *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [***Fitzgerald***] at [116] per Winkelmann CJ, [225] per O'Regan and Arnold JJ and [250] per Glazebrook J and the cases cited therein (statutory interpretation); and *Hosking v Runting* [2005] 1 NZLR 1 (CA) [***Hosking***] at [6] and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [69] (common law development). For further examples, see chs 9–10 of Shaheed Fatima *Using International Law in Domestic Courts* (Hart Publishing, Portland, 2005) [**Fatima**]. Fatima notes that the broader legal policy—that domestic law should conform with international law where possible—has "been acknowledged even by strict adherents of dualism such as Dicey": at [9.5], citing AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, 1959) at 62–63. This includes unincorporated treaty obligations. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) at 283, Lord Goff said judges have a "duty, when [they are] free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty" (the European Convention on Human Rights, which at that time had not been incorporated into English law).

[6] Fatima at [10.6]. For an illustration of unincorporated treaties prompting a reappraisal of the common law, see *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [53] per Lord Steyn ("[T]he House cannot ignore the norm created by the Convention [on the Rights of the Child]. This factor on its own justified a reappraisal of *R v Caldwell* [an earlier House of Lords decision]"). Cf Resp Subs at [32.2].

particularly acute in human rights cases due to the ambulatory nature of international human rights instruments,[7] including the International Covenant on Civil and Political Rights (**ICCPR**).[8] In the specific context of BORA, such reappraisal may be necessary if the courts are to adhere faithfully to BORA's core purpose of affirming New Zealand's commitment to the ICCPR.[9]

4. Mindful of the need to avoid duplication of the parties' submissions, the Commission's submissions are limited to the following issues:[10] (i) the extent to which the concept of an "effective remedy" is a longstanding principle of the common law and is deeply embedded in the case law developing BORA remedies;[11] (ii) the nature and scope of New Zealand's obligation under international law to ensure an effective remedy for breaches of the rights secured by the ICCPR; (iii) the impact (if any) on judicial independence if compensation from the State for judicial breaches of BORA was available; and (iv) the extent to which a reappraisal of the majority position in *Chapman* is appropriate and consistent with orthodox common law methodology.

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[7] Richard K Gardiner *Treaty Interpretation* (2nd ed, Oxford University Press, Oxford, 2017) at 293–294; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16 at [53]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7 at p 114 (Separate Opinion of Vice-President Weeramantry); and *Tyrer v United Kingdom* ECtHR, Application 5856/72, 25 April 1978 at [31].

[8] International Covenant on Civil & Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [**ICCPR**]. See also Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [**Optional Protocol**]. New Zealand ratified the ICCPR on 28 December 1978 and the Optional Protocol on 26 May 1989.

[9] It should be clear that simply asking whether an obligation under international law has been "incorporated" fails to appreciate the true nature and extent of the interplay between common law and international law. The question of "incorporation" is itself a nuanced one: there is no rule specifying the precise mode of incorporating treaties into domestic law: *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 WLR 1 at [42] per Lord Steyn. As Fatima discusses at [3.5]-[3.6], incorporation via statute can be direct (expressly giving a treaty the force of law) or indirect (a treaty is incorporated without expressly being given the force of law). At [3.10], she identifies two further "hybrid categories": (i) express reference group: "where a statute expressly provides, for example in the long title, that it gives effect to an unincorporated treaty but does not give the treaty force of law"; and (ii) evidential nexus group "where, although a statute contains no express mention of a treaty, there is extrinsic evidence showing it was intended to give effect to the unincorporated treaty". The express reference group 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 these hybrid statutes: at [9.10]. Given para (b) of the Long Title, the New Zealand Bill of Rights Act 1990 [**BORA**] appears to fall within the express reference group. This Court has recognised that the presumption of compatibility with international obligations "is of particular relevance here vis-à-vis the ICCPR because a stated purpose of [BORA] is to 'affirm New Zealand's commitment to the [ICCPR]'": *Fitzgerald* at [225], n 325 per O'Regan and Arnold JJ. At [42], Winkelmann CJ recognised the importance of BORA's "common law, statutory and international antecedents", noting in particular that its "enactment fulfils, in part, New Zealand's obligations under the ICCPR".

[10] *Putua v Attorney-General* SC 31/2024 Minute of the Court, 3 September 2024 at [3].

[11] BORA affirmed pre-existing common law rights: Long Title, para (a); and Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at [3.2].

COMMON LAW REQUIRES REMEDY FOR BREACH OF RIGHT

5. It is a principle of common law that a breach of rights requires a remedy.[12] Blackstone described it as "a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress".[13]

6. In *Ashby v White*, Holt CJ remarked that "it is a vain thing to imagine a right without a remedy",[14] a sentiment adopted by Elias CJ as the starting point for her dissenting reasons in *Chapman*.[15] This reflects the maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy).[16] *Broom's Legal Maxims* describes *ubi jus* as an "elementary" maxim.[17] It has been endorsed by New Zealand courts,[18] including in their development of BORA's remedial jurisdiction. In *Baigent's Case*, McKay J noted the "long history" of the *ubi jus* maxim[19] and said the "common sense" of Holt CJ's dictum "applies equally to [BORA]".[20] Justice Hardie Boys described Holt CJ's statement as "apposite".[21]

7. The principle that a breach of rights requires an effective remedy is consistent with the concern of New Zealand's appellate courts to ensure that individuals are given the "full measure" of their enacted fundamental rights.[22] Providing individuals with the "full measure" of their BORA rights must also apply to the

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[12] This principle is also reflected in the equitable maxim that "equity will not suffer a wrong to be without a remedy": *Halsbury's Laws of England* Equitable Jurisdiction (online ed, 2021) vol 47 at [103].
[13] William Blackstone *Commentaries on the Laws of England* (1723-1780) vol 3 at 23, cited in *Marbury v Madison* 5 US 137 (1803) at 163. In *Marbury*, Marshall CJ said at 163: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. … The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."
[14] *Ashby v White* (1703) 2 Ld Raym 938 at 953, 92 ER 126 at 136 (KB) per Holt CJ (dissenting).
[15] *Chapman* at [1].
[16] Daniel Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Sweet & Maxwell, London, 2010) vol 2 at 2316. See also Abimbola A Olowofoyeku "When Courts Get it Wrong: Judicial Errors and Common Law Underenforcement" (2018) 134 LQR 450 at 450–451 and 476; and *Halsbury's Laws of England* Courts and Tribunals (online ed, 2025) vol 24A at [25], n 1.
[17] J G Pease and Herbert Chitty *A selection of legal maxims by Herbert Broom* (8th ed, Sweet & Maxwell, London, 1911) [***Broom's Legal Maxims***] at 153.
[18] See eg *Earthquake Commission v Insurance Council of New Zealand Inc* [2014] NZHC 3138, [2015] 2 NZLR 381 at [172]; and *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (HC) at 187.
[19] *Simpson v Attorney-General* [***Baigent's Case***] [1994] 3 NZLR 667 (CA) at 717.
[20] *Baigent's Case* at 717.
[21] *Baigent's Case* at 697. See also *Chapman* at [1] per Elias CJ. In a different context, see *Hosking* at [2] per Gault P and Blanchard J: "The emergence internationally of concern for the protection of human rights and of individual consumers provides examples reflecting the shift in emphasis from the traditional approach to tort liability (liability for reprehensible conduct) to the protection of identified rights. But even the great cases of the past, accepted as representing significant developments in the law, can be seen as recognising the need to provide remedies for interference with rights: *Entick v Carrington* (1765) 19 State Tr 1030; 95 ER 807 and *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126 are examples."
[22] See *Fitzgerald* 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 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 per Cooke P and 277 per Richardson J; and *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

remedial response in the event those rights are breached.[23] That ensures BORA rights are "practical and effective".[24]

NEW ZEALAND HAS ASSUMED AN OBLIGATION TO ENSURE AN EFFECTIVE REMEDY FOR BREACHES OF ICCPR RIGHTS

8. *BORA's international law antecedents.* BORA is a domestic statute. It enlists the different branches of the State—the legislature, executive and judiciary—in the project of affirming, protecting and promoting human rights.[25] But the rights protected in BORA did not spring fully formed into existence like Athena from Zeus' forehead. BORA rights have common law and international law antecedents.[26] BORA's Long Title explicitly acknowledges that it was motivated by, and is intended to reflect, New Zealand's *continued* commitment to the rights guaranteed in the ICCPR.[27]

9. *Article 2 is fundamental to the ICCPR.* The ICCPR is an international treaty that currently has 174 States parties, including New Zealand. Pursuant to art 2(3)(a), New Zealand has assumed an obligation "to *ensure*" that "any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity".[28]

10. Article 2 serves "an important function in the systematic interpretation of the [ICCPR]" because it applies to all ICCPR rights.[29] The United Nations Human Rights Committee (the **Committee**) has clarified that art 2 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".[30] This

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[23] See *Canada (Attorney-General) v Power* 2024 SCC 26 [***Power***] at [32] per the majority; and *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62, [2003] 3 SCR 3 at [24]. Note that s 24(1) of the Canadian Charter of Rights and Freedoms contains an express remedies clause.
[24] *Fitzgerald* at [41] per Winkelmann CJ; *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] per Elias CJ and [103] per Tipping J; and *Mist* at [45] per Elias CJ and Keith J.
[25] BORA, Long Title, para (a).
[26] *Fitzgerald* at [42] per Winkelmann CJ (Glazebrook J agreed at [244], n 347]).
[27] BORA, Long Title, para (b).
[28] Emphasis added. Article 2 "creates duties for States parties with respect to the domestic application and guaranteeing of all [ICCPR] rights": William A Schabas *Nowak's CCPR Commentary* (3rd ed, NP Engel, Germany, 2019) [***Nowak***] at 32. States must give effect to their ICCPR obligations in good faith: art 26 of the 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**].
[29] *Nowak* at 33. Article 2 has an "accessory character": an art 2 violation "can occur only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive [ICCPR] rights": at 33.
[30] *General Comment 31* CCPR/C/21/Rev.1/Add.13 (26 May 2004) [**GC 31**] at [4]. A State party cannot "invoke the provisions of its internal law as justification for its failure to perform a treaty", 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: Vienna Convention, art 27; and GC 31 at [4].

reflects the position under international law that any conduct by a "State organ", including the legislature, executive and judiciary, is attributable to the State.[31] It follows that any conduct attributable to the State, including by the judiciary, may place New Zealand in breach of its international obligations.

11. 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".[32] It is in harmony with the common law principle that breaches of rights require remedies.[33] The Committee has described art 2(3) as a "treaty obligation inherent in the [ICCPR] as a whole".[34] The general obligation to ensure an "effective remedy" provides the ICCPR's overarching remedial logic. More specific remedial provisions such as art 9(5), which provides victims of unlawful arrest or detention with "an enforceable right to compensation", are instantiations of the art 2(3) obligation that apply in particular contexts.[35]

12. *Article 2(3) is central to the development of BORA's remedial jurisdiction.* The domestic implementation of these 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.[36] With the exception of the position in respect of some legislative breaches, which Parliament addressed through an amendment to BORA[37] (following this Court's decision in *Attorney-General v*

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[31] Crawford at [4.2.2.3]; International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) (annexed to GA Res 56/83, A/Res/56/83 (28 January 2002) [**Articles on State Responsibility**], art 4; and *Responsibility of States for internationally wrongful acts: Report of the Sixth Committee* GA Res 62/446 (2007). 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.

[32] International Commission of Jurists *The Right to a Remedy and Reparation for Gross Human Rights Violations* (revised ed, 2018) [**Commission of Jurists**] at 53. It is notable that this is a right guaranteed by numerous universal and regional international human rights instruments, including the ICCPR: see eg 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, art 25.

[33] It also reflects the *ubi jus* maxim: see Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 2006) [**Cheng**] at 233, n 1.

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

[35] Aspects of art 9 correspond with the right to be free from arbitrary arrest and detention in s 22 of BORA.

[36] *Fitzgerald* at [42] per Winkelmann CJ and see [242]–[243] and [247] per Glazebrook J. Cf nn 219 and 223 per O'Regan and Arnold JJ.

[37] BORA, ss 7A–7B. There are also legislative acknowledgments of the *Baigent* remedy: s 12(2)(c) of the Limitation Act 2010 includes a claim "for monetary relief for a breach of [BORA]" within its definition of a "money claim". In 2011, the Attorney-General issued a s 7 report recording that the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill "appears to be inconsistent with

Taylor),[38] it has fallen to the courts to develop BORA's remedial jurisdiction.[39] This is consistent with art 2(3)(b) of the ICCPR, which envisages that States parties (including New Zealand) will develop judicial remedies for breaches of rights.[40]

13. It should come as no surprise given the strong presumption referred to above[41] that the concept of an "effective remedy", echoing art 2(3), runs as a consistent thread through the courts' development of BORA's remedial jurisdiction. In *Baigent's Case*, Cooke P said the courts would "fail in [their] duty" to protect and promote human rights[42] if they failed to provide an "effective remedy" for BORA breaches,[43] including compensation where appropriate.[44] Similarly, this Court justified its finding in *Taylor* that the courts have the power to make declarations that legislation is inconsistent with BORA on the basis that "no other effective remedy" would otherwise exist in such cases.[45]

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the provision for effective remedy for breaches of rights contained in [BORA]": at [1]. The Attorney-General said at [15] ("Denying prisoners an effective remedy for breaches of [BORA] rights is inconsistent with [BORA]") and at [18] ("Excluding prisoners from the full protection of [BORA] while under control or supervision appears to breach articles 2 and 3 of the ICCPR. These articles relate to the obligation to respect and ensure the rights in the ICCPR and the obligation to provide an effective remedy for their violation"). The Bill was terminated before first reading.

[38] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 [***Taylor***].

[39] BORA's remedial jurisdiction is an example of the interplay between statute and common law. As Professor Michael Taggart has commented (drawing on Professor Jack Beatson), common law and statute should not be seen as "oil and water": *Private Property and Abuse of Rights in Victorian England* (Oxford University Press, Oxford, 2002) at 197, citing Jack Beatson "Has the Common Law a Future?" [1997] CLJ 291 at 309. See also Jack Beatson "The role of statute in the development of common law doctrine" (2001) 117 LQR 247.

[40] In *Baigent's Case* at 691, Casey J placed particular emphasis on New Zealand's commitment to art 2(3)(b). See also *Nowak* at 64: "States parties are required to place priority on judicial remedies".

[41] See above at [3].

[42] BORA, Long Title, para (a). "Protect" and "promote" are as strong words as "vindicate": at 676 per Cooke P.

[43] See also at 690–691 per Casey J ("[BORA] reflects [ICCPR] rights, and it would be a strange thing if Parliament, which passed it one year later [after acceding to the Optional Protocol], must be taken as contemplating that New Zealand citizens could go to the [Committee] in New York for appropriate redress, but could not obtain [it] from our own courts"), 699 and 701–703 per Hardie Boys J ("I would be most reluctant to conclude that [BORA], which purports to affirm this commitment [to art 2(3)] should be construed other than in a manner that gives effect to it") and 718 per McKay J ("The declared purpose of [BORA] must be considered in interpreting the Act", noting the purpose of affirming New Zealand's commitment to the ICCPR). The "emphasis on interpreting [BORA] consistently with the ICCPR" in *Baigent's Case* was noted by O'Regan and Arnold JJ in *Fitzgerald* at [225], n 325. Andrew Butler and Petra Butler identify *Baigent's Case* as "perhaps the best example" of New Zealand courts making significant use of the ICCPR and the work of the Committee: *The New Zealand Bill of Rights Act 1990: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 104.

[44] In *Baigent's Case*, compensation was the only effective remedy: at 676 per Cooke P.

[45] *Taylor* 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 further *Hosking* 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 *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [129]–[131] per McGrath J; *Taunoa v*

14. <u>*Scope of the obligation to ensure an effective remedy.*</u> Pursuant to the obligation in art 2(3)(a), States parties to the ICCPR must "ensure" individuals have "accessible and effective remedies to vindicate [their ICCPR] rights".[46] Irremediability and/or ineffective remedies undermine the protection of fundamental rights under BORA and are inconsistent with art 2(3)(a).[47]

15. As a matter of international law, the concept of an "effective remedy" encompasses the obligation to make reparation, where appropriate. In *General Comment 31*, the Committee stated that art 2(3) "requires" States to "make reparation to individuals whose [ICCPR] rights have been violated".[48] 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.[49] The Committee further clarified that the ICCPR "generally entails appropriate compensation", in addition to the "explicit reparation" [50] required by arts 9(5) and 14(6).[51]

16. The concept of reparation and what it requires is well-established as a matter of international law. In his seminal text, Professor Bin Cheng identifies the

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Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429 [***Taunoa***] at [106] per Elias CJ and [364]–[365] per McGrath J ("This international obligation to give an effective remedy [in art 2(3)(a) of the ICCPR] was held to be part of New Zealand's domestic law in the judgment of Cooke P in … *Baigent's Case*").

[46] GC 31 at [15]. Notably, during negotiations, there was "broad consensus … in principle in favour of an effective remedy against violations of the [ICCPR]": *Nowak* at 36.

[47] *Nowak* at 63. For example, an unrestricted discretion on the part of a political organ to grant amnesty is not an effective remedy: at 63.

[48] GC 31 at [16]. The International Court of Justice, which must decide 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)* Judgment, ICJ Reports 2010, p 639 at [66]. See also *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC) at 21. This Court has similarly relied on the Committee's views, including as expressed in General Comments, in a number of its decisions: see eg *Attorney-General v Chisnall* [2024] NZSC 178 at [161]–[162] and [206] per Winkelmann CJ, O'Regan, Williams and Kós JJ; *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [72]; and *Taunoa* at [80], [82], [84] and [93] per Elias CJ, [294], n 368 per Tipping J and [360] per McGrath J. In the Court of Appeal, see *Baigent's Case* at 699 per Hardie Boys J; and *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393: "Whether a decision of the [Committee] is absolutely binding in interpreting [BORA] may be debatable, but at least it must be of considerable persuasive authority."

[49] GC 31 at [16].

[50] 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". Article 31(1) of the 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* A/Res/60/147 (21 March 2006), Annex at [18] states: "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).

[51] New Zealand has made a reservation to art 14(6): see below at n 66.

"principle of integral reparation" as a general principle of law.[52] He cites as authority the well-known statement of the Permanent Court of International Justice (**PCIJ**) in *Chorzów Factory* that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[53] The PCIJ went on to explain "[t]he essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed".[54]

17. Payment of compensation, where restitution in kind is not possible, may be necessary to ensure full reparation.[55] As Professor Manfred Nowak explains, "[i]n many cases of human rights violations, only monetary compensation for pecuniary damages (loss of property, earnings, lost opportunities, legal costs, etc) and non-pecuniary damages (physical or mental pain and suffering, harm to reputation or dignity) can bring some relief to the victims and/or their families".[56] This reflects the fact that "money is the common measure of valuable things".[57]

18. The specific obligation in art 9(5) is a legal "guarantee" to a claim for compensation for persons who have been unlawfully deprived of their liberty.[58] It is not "a matter of grace or discretion".[59] As noted above, art 9(5)

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[52] Cheng at ch 9.
[53] *Case Concerning the Factory at Chorzów (Merits)* (1928) PCIJ Rep, 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: Commission of Jurists at 153, citing *Case Concerning the Factory at Chorzów (Jurisdiction)* (1927) PCIJ Rep, Series A No 9 at 21, and in the context of human rights violations: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136 at [152]-[153] and *Aloeboetoe v Suriname (Reparations)* I/ACtHR, 10 September 1993 at [43]. Unlike treaties, customary international law automatically forms part of New Zealand common law: *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [174], n 290 per William Young and Ellen France JJ.
[54] *Chorzów Factory* at 47. Professor Cheng writes that "[a]lthough the [PCIJ] 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 International Court of Justice in *Reparation for Injuries Suffered in the Service of the United* Nations, Advisory Opinion, ICJ Reports 1949, p 174 at p 184 where "the principle was reiterated and applied to the breach of any engagement capable of giving rise to international responsibility": Cheng at 233, n 1.
[55] As noted, the Committee states the ICCPR "generally entails appropriate compensation": GC 31 at [16].
[56] *Nowak* at 73.
[57] Hugo Grotius "The Rights of War and Peace" Book II, ch XVII, section XXII (Whewell translation, 1953) as cited in *Opinion in the Lusitania Cases* German-United States Mixed Claims Commission, 1 November 1923 at 35.
[58] *Nowak* at 264. See *General Comment 35* CCPR/C/GC/35 (16 December 2014) [**GC 35**] at [50].
[59] GC 35 at [50].

"complements but does not displace the more general obligation to provide remedies for unlawful or arbitrary arrest or detention in accordance with art 2(3)".[60] Where the unlawful arrest or detention is associated with other violations of the ICCPR, art 2(3)(a) may require additional reparation (including compensation).[61] This is why in *Thompson v New Zealand*, the author claimed a violation of rights under art 2(3) read in conjunction with art 9(1), in addition to violations under art 9(1) and (5).[62] In the light of its finding of a breach of art 9(1) and (5), the Committee did not deem it necessary to examine the claim under art 2(3),[63] but nonetheless made the following salient observation:[64]

> 9. Pursuant to article 2(3)(a) …, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, **the State party is obligated, inter alia, to provide the author with adequate compensation**. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, including by reviewing its domestic legislation, regulations and/or practices **to ensure that individuals who have been unlawfully arrested or detained as a result of judicial acts or omissions may apply to receive adequate compensation, in accordance with the obligation set forth in the Covenant.**

19. *Articles 2(3)(a) and 9(5) apply to judicial breaches.* There is nothing in the text of arts 2(3)(a) or 9(5), or the scheme of the ICCPR, to exclude compensation for judicial breaches of rights regardless of the circumstances. To the contrary, ICCPR obligations bind the State as a whole and can be breached by judicial acts.[65]

20. In assessing the nature of the international law obligation, it is relevant that New Zealand has not entered a reservation in relation to arts 2 or 9 of the ICCPR, whether in respect of judicial or any other breaches of those articles.[66] As a matter of international law, New Zealand thus accepts the full force of those obligations. But as a matter of domestic law (and contrary to that position), the carve-out adopted by the majority in *Chapman* compels an approach that will in some cases *necessarily* preclude the New Zealand courts

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[60] *Nowak* at 265.
[61] *Nowak* at 265.
[62] *Thompson v New Zealand* CCPR/C/132/D/3162/2018 (7 June 2022) [***Thompson***] at [1].
[63] *Thompson* at [7.7].
[64] Emphasis added. See also *Barrio v Spain* CCPR/C/136/D/3102/2018 (7 March 2023) [***Barrio***] at [11].
[65] See above at [10].
[66] Ministry of Justice "Constitutional Issues & Human Rights: International Covenant on Civil & Political Rights" <www.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": GC 31 at [5]. New Zealand has made a reservation to art 14(6), but for the reasons given by Elias CJ at [69] of *Chapman*, the Commission does not consider the reservation to art 14(6) inhibits the *Baigent* remedy.

from giving an effective remedy (by removing compensation from the remedial options) and thereby place New Zealand in breach of its international obligations. Those obligations include art 2(3)[67] and, if it is engaged on the facts (as it is here), art 9(5) (ie, in every case involving a judicial breach of fundamental rights where compensation is a necessary part of an effective remedy).[68] This is a carve-out developed by judges themselves, not Parliament.

THE RELEVANCE OF JUDICIAL INDEPENDENCE

21. In the context of judicial breaches, the question of whether compensation may be required as part of an effective remedy has raised concerns about the potential impact on another core value of the common law and rule of law—judicial independence.

22. In the 2024 Robin Cooke Lecture, Lord Sales described the different approaches in *Chapman* as reflecting a "conflict between two different principles within the rule of law":[69] (i) remedies for breach of rights (emphasised by the minority);[70] and (ii) judicial independence (emphasised by the majority).[71] Lord Sales characterised the values underlying these two principles of the rule of law as "incommensurable".[72]

23. But perceived problems of incommensurability often recede as competing values become more unbalanced.[73] On a proper analysis, for example, a minor restriction on liberty will not raise an incommensurability problem where it attains a large measure of security (eg pre-flight checks at an airport). In most cases, the correct approach will become clear when the impact on the different

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[67] See *Nowak* at 39.
[68] In *Fitzgerald*, this Court considered it would be "surprising" to attribute to Parliament an intention to require judges to impose sentences that breach New Zealand's international obligations: at [3] (summary), [43] and [123] per Winkelmann CJ, [203] per O'Regan and Arnold JJ and [247] per Glazebrook J. Similar reasoning could be applied in considering whether *Chapman* should stand.
[69] Philip Sales (Justice of the United Kingdom Supreme Court) "What is the rule of law and why does it matter?" (Robin Cooke Lecture, Wellington, 12 December 2024) [**Sales**] at 12. It is axiomatic that the rule of law is central to our legal system: s 3(2) of the Supreme Court Act 2003 and Senior Courts Act 2016.
[70] *Chapman* at [1], [14], [26], [57]–[58], [68] and [77] per Elias CJ and [224] per Anderson J. "That rights are vindicated through remedy for breach is fundamental to the rule of law": at [1] per Elias CJ. See also *Power* at [41] in the context of Charter remedies ("An award of damages against the state for exceeding its legal powers has long been recognised as an important requirement of the rule of law.")
[71] *Chapman* at [97] and [182] per McGrath and William Young JJ (Gault J agreed at [213]–[214]). Justices McGrath and William Young said that maintaining "the effective functioning of the rule of law in our society", by protecting judicial independence, "is perhaps the strongest reason for the law to provide personal immunity for judges and … an institutional immunity …, protecting the government or anyone else from bringing collateral action for breach of rights in the course of the judicial process involved".
[72] Sales at 12.
[73] Competing options, where it appears that neither is better than the other, are only incommensurate if it is possible for one to be improved without becoming better than the other: Joseph Raz "Incommensurability" in *The Morality of Freedom* (Oxford University Press, Oxford, 1988) at 326. Professor Raz argues further at 329: "Saying two options are incommensurate does not preclude choice".

values is viewed in the light of concrete facts. Indeed, in the present case, there is no true conflict or incommensurability problem at all.

24. To be clear, the Commission does not reject, or seek to dilute, the fundamental importance to the rule of law of an independent judiciary. To quote Anderson J in *Chapman*: "If there was any such risk [of derogating from judicial independence], I would not countenance Crown liability".[74] Nor does the Commission challenge the common law personal immunity of judges,[75] "one of the most important ways in which judicial independence is protected".[76]

25. However, the issue on the present appeal concerns specifically the availability of compensation against the *State* for judicial breaches of rights, not the individual member of the judicial branch responsible for the breach. This is a very limited and indirect incursion (if any) on judicial independence.[77] This is because judges would not be personally liable for any such breach.[78] Nor is it likely that judges will be indirectly influenced into making decisions in a manner that does not upset the Government's wishes;[79] as Elias CJ and Anderson J aptly observed, New Zealand judges "are made of sterner stuff".[80]

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[74] *Chapman* at [223] per Anderson J.
[75] The Commission reserves its position in respect of any reconsideration of the scope of this immunity for conformity with BORA: see *Chapman* at [13], [56], n 131 and [60] per Elias CJ.
[76] *Chapman* at [223] per Anderson J. See also *Broom's Legal Maxims* at 71.
[77] The minority in *Chapman* considered the potential incursion on judicial independence was too tenuous to engage concerns of undermining judicial independence. Professor Philip Joseph has criticised the majority's reasons for extending the immunity as "wholly speculative" and lacking "empirical support": "Constitutional Law" [2012] NZ L Rev 515 at 524–526. Stephanie Woods similarly argued that the majority used "somewhat speculative policy concerns … to justify an extremely wide reaching finding": "Judicial immunity: State immunity?" [2012] NZLJ 6 at 8.
[78] The important distinction between (personal) judicial liability and State liability can explain the various common law cases where judicial (ie personal) immunity has been recognised as an exception to the *ubi jus* principle. See eg *Broom's Legal Maxims* at 170: "There are some cases in which, although a wrongful act has been done, yet on grounds of public policy, an action will not lie. … The immunities from action which are enjoyed by … judges of Courts of record … have been mentioned elsewhere". The discussion in *Broom's Legal Maxims* about judicial immunity relates to the "general rule of great antiquity, that no action will lie against a judge of record for any act done by him in the exercise of his judicial functions, provided such act, though done mistakenly, were within the scope of his jurisdiction": at 70. Geoff McLay "Damages under the New Zealand Bill of Rights Act 1990" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 203 at 215 states that *Chapman* "is consistent with the traditional common-law position that there is no liability for judges in relation to conduct carried out within their jurisdiction, which protects High Court judges in New Zealand, and now District Court judges". However, the "traditional common law position" is simply that judges are immune from personal liability for errors; not that there can be no direct State liability in respect of judicial errors. See similarly Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1097 stating that "in conferring this judicial immunity, the Supreme Court [in *Chapman*] has aligned the action with the position at common law". However, the latter discussion of judicial immunity at common law is again restricted to the immunity of judges from "any personal civil liability": at 1271–1272.
[79] See *Chapman* at [64] per Elias CJ and [224] per Anderson J.
[80] *Chapman* at [64] per Elias CJ. See also at [224] per Anderson J. The Commission endorses Elias CJ's reasoning as to why the various policy reasons identified by the majority (judicial independence, finality of litigation and the existence of other remedies) do not justify the carve-out precluding compensation claims for judicial breaches of BORA: see *Chapman* at [61]–[68] and [70]–[71].

On the other hand, for reasons discussed, the *a priori* rejection of compensation for judicial breaches constitutes a very substantial incursion into the fundamental common law value and obligation assumed by New Zealand as a matter of international law to provide an effective remedy for rights breaches.[81]

26. Given the terms of the leave judgment and the focus of the parties' submissions, the Commission has focused on the central issue in *Chapman*: the availability of compensation for State liability arising out of *judicial* breaches of BORA.[82] Much of the same reasoning applies, however, to the precise issue in this appeal: the availability of compensation from the State for breaches of BORA by registrars.[83] A carve-out that precludes assessing whether compensation may be required as part of an effective remedy for breaches of BORA by registrars is equally inconsistent with common law principle and New Zealand's international obligations under art 2(3)(a) and, where applicable, art 9(5). If the impugned conduct is conduct for which a registrar could be personally liable, there appear to be no cogent public policy reasons precluding a claim against the State for compensation. If the impugned conduct was essentially a "judicial function" so as to attract judicial immunity, that immunity is limited to the registrar's *personal* liability. State liability for compensation in such circumstances will have very limited and indirect (if any) negative impact on judicial independence and public perceptions of that independence.

27. It is unsurprising that international standards on judicial independence, such as the *Basic Principles* and *Beijing Statement*, tend to demarcate the immunity of judges as being a "*personal* immunity from civil suits for monetary damages for improper acts or omissions in the exercise of … judicial functions".[84]

28. The relationship between the principles of providing effective remedies for

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[81] *Chapman* at [8] per Elias CJ: "[It] would leave a large remedial hole". As Her Honour noted, the remedial hole is exacerbated by the fact that many of the rights affirmed in BORA "are afforded principally within judicial process through discharge of judicial function".
[82] *Putua v Attorney-General* [2024] NZSC 92 at [1].
[83] *Attorney-General v Putua* [2024] NZCA 67, [2024] 2 NZLR 420 at [1]. The concept of judicial immunity was at "the centre of the appeal" before the Court of Appeal, just as it was in *Chapman*: at [9].
[84] United Nations *Basic Principles on the Independence of the Judiciary* endorsed in GA Res 40/32 (1985) and GA Res 40/146 (1985), Principle 16 (emphasis added); and *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (as amended at Manila, 28 August 1997), Principle 32 (emphasis added). The International Association of Judges *Universal Charter of the Judge* (updated in Santiago, 14 November 2017), art 7-2 provides that in respect of the purported exercise of judicial functions, it is "not appropriate for a judge to be exposed … to any *personal liability*, even by way of reimbursement of the state, except in cases of wilful default" (emphasis added). Article 7-2 states further that: "The remedy for judicial errors should lie in an appropriate system of appeals. Any remedy for other failings in the administration of justice lies only against the state."

breach and judicial independence has been considered by decision-makers in influential adjudicative bodies, including the Committee, the Court of Justice of the European Union (**CJEU**) and the European Court of Human Rights (**ECtHR**).

29. In *Thompson v New Zealand*, the Committee disagreed with policy arguments—as advanced by New Zealand (and reflecting the reasoning of the *Chapman* majority)—that the availability of compensation for judicial breaches would undermine judicial independence.[85] Rather, the Committee observed that the obligation under art 9(5) "does not require the establishment of individual liability of judges *or other government agents*".[86] Accordingly, the Committee considered that in cases of judicial error resulting in arbitrary arrest or detention, "compensation to the victim should not undermine judicial independence but rather should strengthen accountability and trust in the judiciary by providing a remedy for a wrong".[87] This reasoning is equally applicable to art 2(3)(a):[88] providing compensation (where appropriate) to victims of judicial violations of rights should strengthen trust in the judiciary by providing an effective remedy for a wrong and promoting the rule of law.[89]

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[85] Justices McGrath and William Young suggested the availability of compensation for judicial breach "turns on a policy judgment": *Chapman* at [97]. To that extent, it is relevant that courts can take account of unincorporated treaties as a source of public policy standards: Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) vol 1 at [2.22].

[86] *Thompson* at [7.6] (emphasis added). The ICCPR is "concerned with providing redress for harm suffered, *rather than with ascribing culpability to government actors* for having caused that harm": at [7.6] (emphasis added).

[87] *Thompson* at [7.6]. See also *Barrio* at [9], where the Committee made the same observation, save that it used the terminology of providing a "reparation" for a wrong.

[88] Andrew Butler "State Immunity for Judicial Breach of Rights: The Human Rights Committee Speaks" (2023) 21 NZJPIL 65 at 74–75. For other illustrations of the Committee recognising the State's obligation to provide an effective remedy (including adequate compensation) under art 2(3)(a), notwithstanding the breach of rights was attributable (at least in part) to judicial error, see *LMR v Argentina* CCPR/C/101/D/1608/2007 (28 April 1011); and *Gunaratne v Sri Lanka* CCPR/C/95/D/1432/2005 (23 April 2009). In *LMR*, there was unlawful judicial interference in an issue (access to abortion) that should have been resolved between the patient and her physician: at [9.3]. The Committee found this was a violation of art 17(1) (prohibition of unlawful or arbitrary interference with privacy): at [9.3]. The erroneous lower Court decisions were eventually overturned by the Supreme Court of Justice. However, following the Supreme Court ruling, the hospital refused to perform the abortion on the grounds that the pregnancy was by then too advanced. Consequently, the Committee considered the author also did not have access to an effective remedy in violation of art 2(3) in relation to arts 3, 7 and 17: at [9.4]. In *Gunaratne*, the Supreme Court of Sri Lanka had found that the author's arrest and treatment by police had breached the national Constitution, but the Court did not render its judgment until some six years after the complaint was lodged: at [3.2], [4.5] and [7.5]. The author claimed, amongst other things, that the Supreme Court did not deliver an appropriate remedy due to delay: at [4.8]. The Committee agreed, noting the art 2(3) obligation for Sri Lanka to ensure that remedies are effective and that "[e]xpedition and effectiveness are particularly important in the adjudication of cases involving torture": at [8.3]. The remedies provided by Sri Lanka had "been unduly prolonged without any valid reason or justification": at [8.3]. See also Sarah Joseph and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, Oxford, 2013) at 875–877.

[89] *Chapman* at [224] per Anderson J ("The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by [BORA]").

30. In *Köbler v Republik Österreich*, the CJEU recognised the State could be liable, including for compensation, in respect of judicial error by a court adjudicating at final instance.[90] The CJEU rejected contrary arguments based on judicial independence, stating that "the principle of liability in question concerns not the personal liability of the judge but that of the State".[91] The possibility of State liability for judicial errors therefore "[did] not appear to entail any particular risk" that judicial independence would be called into question.[92] According to the CJEU, if reparation was precluded when the rights infringement was attributable to a court adjudicating at last instance, "protection of those rights would be weakened".[93] Moreover, in *McFarlane v Ireland*, the ECtHR also distinguished "between the personal immunity from suit of judges … and the liability of the State to compensate an individual for blameworthy delay in criminal proceedings attributable in whole or in part to judges".[94]

REAPPRAISING *CHAPMAN*

31. The parties have provided thorough submissions on when it may be appropriate for this Court to revisit one of its past judgments. It appears to be common ground that there are a number of factors that may be relevant, but that they cannot be exhaustively defined.[95] The Commission agrees that the proper approach of this Court to its own prior decisions does not necessarily lend itself to a prescriptive "test". The task of this Court in *Putua v Attorney-General*, as in every other case, is to determine the correct legal position on the appeal

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[90] *Köbler v Republik Österreich* CJEU Case C-224/01, 30 September 2003 [***Köbler***]. Mr Köbler brought an action for damages against Austria for reparation of the loss he allegedly suffered as a result of non-payment of a special length of service increment. He argued that the Verwaltungsgerichtshof (Supreme Administrative Court)'s judgment dismissing his claim for the special increment breached Community law: at [12]. Austria contended that the decision of its national court adjudicating at last instance could not found an obligation to afford reparation as against the State, relying on arguments based on the finality of litigation and judicial independence: at [13] and [20].

[91] *Köbler* at [41]–[42].

[92] *Köbler* at [41]–[42]. The CJEU considered "reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary": at [43]. The CJEU discussed the conditions governing State liability under Community law: (i) the rule of law infringed must be intended to confer individual rights; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach and the damage: at [51]–[59]. Criteria (ii) was not met in this case: at [124].

[93] *Köbler* at [33].

[94] *McFarlane v Ireland* Grand Chamber of the ECtHR, Application 31333/06, 10 September 2010 at [121]. The ECtHR was assessing whether Ireland, as a State, had provided an effective remedy for the breach of Mr McFarlane's right to a trial within a reasonable period of time. Ireland had not demonstrated that a domestic action for damages for breach of a constitutional right to reasonable expedition would be available to remedy an individual judge's delay in delivering a judgment. Ireland accepted that there was likely to be an exception to the right to damages for a breach of a constitutional right when the delay was caused by the failure of an individual judge to deliver judgment within a reasonable time, given the principle of judicial immunity. As the ECtHR was concerned with the State's responsibility to ensure an effective remedy, it was not required to examine the specifics of domestic judicial immunity.

[95] App Subs at [50]; and Resp Subs at [30].

before it.

32. As a previous authority of this Court, *Chapman* must be given careful consideration and should not lightly be departed from.[96] But if this Court determines that the correct legal position is different from that expressed in past authority then the Court is not only free to depart from that past authority, it is required to do so.[97]

33. From the perspective of human rights, a position developed by judges (such as the majority position in *Chapman*) may need to be reappraised to ensure or maintain consistency with international law. As discussed above, this is orthodox common law method.[98] The Committee's views in *Thompson* have put New Zealand, including the courts, on notice that such reappraisal may be necessary.[99]

Dated 14 February 2025

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[96] *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 [***Couch (No 2)***] at [32] per Elias CJ, [104]–[105] per Tipping J.
[97] See *Couch (No 2)* at [32] per Elias CJ ("It is open to this Court to depart from a decision of its own … if it is right to do so because the rigid adherence to precedent would lead to injustice in the particular case or would unduly restrict the proper development of the law to meet the needs of New Zealand society.")
[98] See above at [3]. Contrary to Resp Subs at [32.2].
[99] Applying *Chapman*, the Court in *Thompson v Attorney-General* [2016] NZCA 215, [2016] 3 NZLR 206 held that Ms Thompson was not entitled to compensation for a breach of s 22 of BORA because the effective cause of her arbitrary detention was a judicial act. Leave to appeal was denied: [2016] NZSC 134. Subsequently in *Thompson v New Zealand*, the Committee adopted Views upholding Ms Thompson's communication. In doing so, the Committee rejected the New Zealand State's observations on the merits of the communication, which in turn had relied on the majority's reasoning in *Chapman*. The Committee's Views "represent an authoritative determination by the organ established under the [ICCPR] itself charged with the interpretation of that instrument": *General Comment 33* CCPR/C/GC/33 (25 June 2009) [**GC 33**] at [13]. Ms Thompson could submit a communication to the Committee because New Zealand has ratified the Optional Protocol, art 1 of which provides that New Zealand "recognize[s] the competence of the Committee" to receive and consider such communications. The New Zealand State also has "[a] duty to cooperate with the Committee" and to do so in good faith: GC 33 at [15]. The Committee has said that "[i]n any case, States parties must use whatever means lie within their power in order to give effect to the Views issued by the Committee": GC 33 at [20]. Given that the judiciary's conduct is attributable to the State as a matter of international law, the Committee's Views in *Thompson* criticising the underlying reasoning in *Chapman* is relevant to the assessment in this appeal of whether to depart from *Chapman*: see *Thompson v Attorney-General* [2023] NZSC 27 at [8], n 8.