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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3666/2019*, **

Communication submitted by:	Arthur William Taylor, Sandra Hinemanu Ngaronoa and Sandra Wilde (represented by counsel, Richard Francois)
Alleged victims:	The authors
State party:	New Zealand
Date of communication:	15 October 2019 (initial submission)
Document references:	Decisions taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 November 2019 (not issued in document form)
Date of adoption of Views:	5 July 2023
Subject matter:	Voting rights of prisoners
Procedural issues:	Exhaustion of domestic remedies; *ratione materiae*; substantiation of claims; victim status
Substantive issues:	Conditions of detention; cruel, inhuman or degrading treatment or punishment; discrimination; discrimination on the ground of race; effective remedy; Indigenous Peoples; treatment of prisoners; voting and election
Articles of the Covenant:	2 (1)–(3), 5, 7, 10, 25 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1. The authors of the communication are Arthur William Taylor, Sandra Hinemanu Ngaronoa and Sandra Wilde, nationals of New Zealand. They claim that the State party has violated their rights under articles 2 (1)–(3), 5, 7, 10, 25 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 26 August 1989. The authors are represented by counsel.

* Adopted by the Committee at its 138th session (26 June–26 July 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

Factual background

Legislative history – voting rights of prisoners

2.1 In New Zealand, legislation affecting the voting rights of prisoners has been modified several times over the past half century. Under section 42 (1) (b) of the Electoral Act 1956, persons detained pursuant to convictions in any penal institution were disqualified from voting in New Zealand. The blanket ban on voting by prisoners was repealed in 1975 then was reinstated in 1977.

2.2 In a report published in 1986, the Royal Commission on the Electoral System recommended the repeal of the blanket voting restriction for prisoners. In the report, the Royal Commission stated that a voting restriction for prisoners serving sentences of three years or more could be justified, taking into account the triennial election cycle and minimizing the possibility of arbitrary application. That proposed restriction was likened to the loss of the right to vote by nationals of New Zealand who were absent from the country for three years or more. In 1992, the Solicitor-General was asked to provide his opinion on whether the restriction contemplated was consistent with the New Zealand Bill of Rights Act 1990. The Solicitor-General considered that such a restriction involved a prima facie interference with the right to vote and that it was therefore necessary to determine whether the limitation of that right was reasonable, prescribed by law and justified in a free and democratic society. He concluded that the aim of deterring and denouncing criminality was legitimate and that the voting limitation pursued that aim in a rational and proportionate manner that went no further than necessary to advance the aim. He opined that, if the restriction were to apply to prisoners serving sentences of three years or more, it may be legitimate since it was limited only to individuals who had been convicted of criminality of a certain seriousness.

2.3 In 1993, a prisoner claimed before the High Court that the disenfranchisement of all prisoners under the Electoral Act 1956 breached his right to vote.[1] The High Court considered that there was a clear conflict between the blanket ban and the right to vote under the New Zealand Bill of Rights Act 1990. Nonetheless, the Court concluded that the Electoral Act 1956 prevailed over the New Zealand Bill of Rights Act 1990, in accordance with section 4 of the latter Act.

2.4 However, in 1993, Parliament passed the Electoral Act 1993, which came into effect in 1994. Section 80 (1) (d) of the Electoral Act 1993 eliminated the blanket ban on voting for prisoners and replaced it with a provision under which prisoners who were serving a prison sentence of three years or more were disqualified from registering to vote. Following their release from prison, prisoners were eligible to apply to be reregistered on the electoral roll.

2.5 In 2010, New Zealand amended section 80 (1) (d) of the Electoral Act 1993 by passing the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 ("2010 Act"). As a result of the amendment, which became law on 15 December 2010, a person who was detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the 2010 Act was disqualified from registration as an elector. Thus, such persons could not vote while serving their sentences. The 2010 Act became law despite an opinion that had previously been issued in 2010 by the Attorney-General, who opposed the amendment. In his opinion, the blanket voting restriction for all sentenced prisoners was inconsistent with section 12 of the New Zealand Bill of Rights Act 1990, which incorporates article 25 (b) of the Covenant.

2.6 On 25 February 2020, the State party introduced a legislative bill that removed the blanket ban on electoral registration that had applied to all sentenced prisoners since 2010. It restored electoral law to its position prior to the enactment of the 2010 Act, according to which prisoners serving a sentence of imprisonment of three years or more were disqualified from registering to vote.[2] On 24 June 2020, Parliament passed the bill. On 29 June 2020, the

[1] *Re Bennett* (1993) 2 HRNZ 358 (HC).

[2] Also disqualified under that provision (both under the Electoral Act 1993 and 2020 Act) were individuals serving sentences of imprisonment for life or sentences of preventive detention.

Electoral (Registration of Sentenced Prisoners) Amendment Act 2020 ("2020 Act") became law.

Subject of the communication

2.7 At different times, the authors were imprisoned pursuant to criminal sentences in New Zealand.[3] The present communication arises from their domestic challenges to the 2010 Act. Those proceedings took place – and the communication was submitted – before the adoption of the 2020 Act. Thus, during the time period at issue in the communication, the authors were not eligible to vote, under the blanket voting restriction for all prisoners serving sentences of imprisonment.

Proceedings seeking interim orders

2.8 On 28 August 2014, the authors filed a claim for judicial review and declarations before the High Court.[4] They sought interim orders to preserve their right to vote in a general election that was scheduled for 20 September 2014. They challenged the lawfulness of the 2010 Act. In a judgment of 12 September 2014, the High Court considered that, notwithstanding the numerous and weighty constitutional criticisms that had been made of section 80 (1) (d) of the Electoral Act 1993, it could not be invalidated.

2.9 On an unspecified date, the authors appealed against the judgment of the High Court to the Court of Appeal. On 16 September 2014, the President of the Court of Appeal rejected the appeal on the ground of undue delay in the filing of the claim. In particular, the disenfranchisement had occurred on 15 December 2010, and the authors had filed their claim before the High Court on 5 September 2013.

2.10 On 19 September 2014, the authors applied to the Court of Appeal for review by a full bench of the judgment of 16 September 2014. The authors argued that the President of the Court of Appeal had erred by placing the burden on them to file a claim at an earlier time when they had not been aware of their legal rights. The President denied the application for review on the basis that there was insufficient time to review it, convene a hearing and deliver a decision before the general election in question. However, he stated that the issues at stake were important.

Proceedings seeking a declaration of inconsistency

2.11 On 5 September 2013, the authors filed a claim before the High Court in which they sought a declaration that the 2010 Act was inconsistent with various provisions of the New Zealand Bill of Rights Act 1990 (including the provision protecting the right to vote) and with the Human Rights Act 1993. The Attorney-General requested the High Court to strike out the application on the ground that the Court lacked jurisdiction to consider the application. On 11 July 2014, the High Court dismissed the request of the Attorney-General and requested the authors to procedurally amend their claim and file the amended claim within 10 days.

2.12 On 10 April 2015, the High Court held a hearing on the substance of the authors' claim. In a judgment dated 24 July 2015, the High Court declared that the 2010 Act was inconsistent with the right to vote under section 12 (a) of the New Zealand Bill of Rights Act 1990. The authors maintain that it was the first declaration of inconsistency made in any common law country in the absence of legislation that authorized the judiciary to make such a declaration. According to the State party, when the judgment was issued, Mr. Taylor was serving a sentence of 19 years imposed in 2004 for serious and violent drug-related offending; Ms. Ngaronoa had been sentenced on 10 May 2012 to a prison term of 7 years and 2 months for serious drug-related offences; and Ms. Wilde was serving a sentence of 2 years and 9 months imposed on 11 March 2013 for unspecified offences.

[3] The authors do not state when they were convicted or imprisoned or on what basis, or when their sentences ended.

[4] In New Zealand, judicial review may be used to challenge executive actions of the Government.

2.13 The Attorney-General appealed against the judgment of the High Court to the Court of Appeal. On 26 May 2017, the Court of Appeal confirmed that the higher courts of New Zealand had the authority to make a declaration of inconsistency.

2.14 The Attorney-General subsequently sought leave to appeal, and did appeal, against the decision of the Court of Appeal to the Supreme Court, again on the ground that the High Court had lacked the authority to make a declaration of inconsistency. On 9 November 2018, the Supreme Court dismissed the appeal, thus finding in favour of the authors.

Proceedings challenging the 2010 Act

2.15 After obtaining the judgment of the High Court that contained the declaration of inconsistency, in 2016, the authors filed separate claims against the Attorney-General before the High Court. They argued, inter alia, that the 2010 Act was inconsistent with their rights to inherent dignity, personal autonomy, liberty, humane treatment and freedom from disproportionately severe and degrading treatment under the New Zealand Bill of Rights Act 1990. They also argued that the 2010 Act constituted indirect discrimination against Māori individuals because Māori were overrepresented in the prison population.[5]

2.16 On 4 March 2016, the High Court dismissed the authors' claims. It reasoned, inter alia, that the loss of the right to vote could not be characterized as degrading and disproportionate and severe treatment, in the sense in which those terms were used in section 9 of the New Zealand Bill of Rights Act 1990; that the loss of the right to vote did not breach the individual prisoner's right to be treated with humanity, respect and inherent dignity; that there was no discrimination, since the legislation affected all prisoners equally; and that, although Māori might be disproportionately affected by the loss of voting because they were ordinarily eligible to vote in both general and Māori elections, that did not constitute material discrimination of the type envisaged by the Covenant, the intent of which was reflected in the New Zealand Bill of Rights Act 1990.[6]

2.17 The authors appealed against the judgment of the High Court to the Court of Appeal, arguing, inter alia, that given the disproportionately high numbers of Māori in the prison population, the 2010 Act would give rise to indirect discrimination. The authors pointed to several material consequences of the prohibition for Māori, namely: a reduction in the number of Māori on the Māori and general electoral rolls, a reduction in the total Māori electoral population and a reduction in the number of Māori electoral districts.

2.18 On 17 August 2017, the Court of Appeal dismissed the authors' appeal on various grounds. The Court referred to its previous jurisprudence on the issue of discrimination, according to which the first step in the analysis was to ask whether there was differential treatment or effects between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step related to whether that treatment had a discriminatory impact. Differential treatment on a prohibited ground of a person or group in comparable circumstances was discriminatory if, when viewed in context, it imposed a material disadvantage on a person or group differentiated against. Applying that established approach, the Court determined that the appropriate comparator group was Māori and non-Māori prisoners. Because the 2010 Act applied equally to all prisoners, Māori and non-Māori prisoners were treated in exactly the same way. On that basis, it could not be said that the measure gave rise to discrimination. The Court stated that, if section 80 (1) (d) of the Electoral Act 1993 were discriminatory under the New Zealand Bill of Rights Act 1990, because the disproportionate representation of Māori in prisons meant that they would be disproportionately disadvantaged, "the same will apply to all prison policies that have a negative effect on prisoners' lives. The limits to the freedom of prisoners, to what they may eat and do and who they may consort with, as they apply to Māori and non-Māori prisoners, could all be criticised on the same basis. No prisoner has the right to any of these basic

[5] The authors also argued that the 2010 Act was unlawful because the right to vote was a so-called entrenched provision for which amendments required a majority of 75 per cent, whereas the 2010 Act had been enacted by a simple majority of the House of Representatives. The State party maintains that the issue of entrenchment is not relevant to the present communication.

[6] On the issue of entrenchment, the High Court found that a supermajority requirement of 75 per cent did not apply to the adoption of the 2010 Act.

freedoms. Māori prisoners are not deprived of something that other prisoners can enjoy. Further, other groups in addition to Māori are overrepresented in prisons. For instance … both males and young persons are seriously overrepresented in prisons."[7]

2.19 The Court of Appeal also considered the authors' argument that the loss of Māori voters might negatively affect the voting rights of the Māori because the number of Māori electorates (i.e. voting areas) was determined by the size of the Māori electoral roll. The Court rejected that argument on the ground that the census data determined the number of Māori electorates, not the number of individuals enrolled on the Māori roll. In addition, the establishment of the Māori electorate was a measure of positive discrimination and it was not necessarily discriminatory to indirectly neutralize a provision that facilitated positive discrimination.

2.20 The Court of Appeal went on to consider whether the measure was discriminatory if the comparison were made between the impact of the measure on the general Māori and non-Māori population. The Court considered that, as a matter of proportion, the impugned provision of the 2010 Act deprived more Māori voters than non-Māori voters of the right to vote, because a greater percentage of Māori were in prison compared with other groups. That difference was sufficiently great for the Court to accept that there was an indirect difference in treatment. Nevertheless, as the Court reasoned, in terms of the overall number of votes, the difference was not significant, since less than 1 per cent of each group (i.e. Māori and non-Māori) was in prison. Thus, the impact of the prohibition on Māori as a group was so small that the 2010 Act did not materially disadvantage Māori. The Court further stated that it had already analysed the downstream effects of the policy on Māori voters, and was not able to accept the authors' more specific arguments of significant prejudice to Māori voters when they could not exercise their choice to register on the Māori roll.

2.21 With respect to the authors' arguments regarding the right to protection from cruel, inhuman and degrading treatment or punishment under section 9 of the New Zealand Bill of Rights Act 1990, the Court of Appeal considered that the voting restriction did not constitute shocking maltreatment; that disenfranchisement did not relate to securing bodily integrity; that there was no allegation of harm to bodily integrity; and that even taken cumulatively with other conditions of imprisonment, disenfranchisement did not meet the threshold required to demonstrate a violation.

2.22 Addressing the authors' arguments concerning the right of persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the person, the Court of Appeal stated that the relevant test was whether the impugned conduct would be considered unacceptable by New Zealand society. The Court cited several examples of conduct that had been previously deemed unacceptable (e.g. lengthy unlawful segregation from other prisoners, poor cell hygiene, bedding and clothing falling below prison regulation standards, inadequate monitoring of inmate mental health and inadequate exercise conditions). The Court considered that the voting restriction under the 2010 Act did not approach the level of any of those examples.

2.23 On 14 September 2017, the authors requested leave to appeal to the Supreme Court against the judgment of the Court of Appeal on the issues of entrenchment and discrimination. On 6 December 2017, the Supreme Court granted the authors' request for leave to appeal with respect to entrenchment and denied it on the issue of discrimination. The Supreme Court stated, "The issues of discrimination and Māori over-representation in prison potentially raise matters of general or public importance. We do not, however, consider this is the right case to consider these issues and, in particular, the intersection between them. We would be considering the issues in a very particular context. Further, a legislative provision is involved and all that is sought is a declaration."[8] After an appeal hearing on 26 March 2018, the Supreme Court dismissed the authors' appeal with respect to entrenchment in a judgment dated 14 December 2018.

[7] Court of Appeal of New Zealand, *Ngaronoa and others v. Attorney-General of New Zealand and others*, Judgment, 17 August 2017, para. 138.

[8] Supreme Court of New Zealand, *Ngaronoa and others v. Attorney-General of New Zealand and others*, Judgment, 6 December 2017, para. 2.

Waitangi Tribunal claim

2.24 In 2014, the two Māori authors, Ms. Ngaronoa and Ms. Wilde, filed a claim before the Waitangi Tribunal in which they alleged that the 2010 Act violated the rights of Māori to vote and to enjoy political representation and self-determination under the Treaty of Waitangi. The Waitangi Tribunal is a standing commission of inquiry, not a court of law; it has jurisdiction to consider claims that the State party has breached the principles of the Treaty of Waitangi. Only Māori individuals may file claims before the Waitangi Tribunal. The recommendations of the Waitangi Tribunal are not binding on the State party. However, the State party usually accords the findings and recommendations of the Tribunal considerable respect. In 2019, the Waitangi Tribunal published *He Aha i Pērā Ai? The Māori Prisoners' Voting Report*, in which it addressed three claims – including those filed by Ms. Ngaronoa and Ms. Wilde in 2014 – that sought the repeal of section 80 (1) (d) of the Electoral Act 1993. The Waitangi Tribunal considered that Māori had been disproportionately affected by section 80 (1) (d) of the Electoral Act 1993, exacerbating a pre-existing and already disproportionate removal of Māori from the electoral roll. The Waitangi Tribunal did not address discrimination within the meaning of section 19 of the New Zealand Bill of Rights Act 1990, but rather the principles of equity and protection that arose under the Treaty of Waitangi. The Waitangi Tribunal did not find that the pre-2010 restriction on voting for prisoners serving sentences of three years or more gave rise to a breach of the Treaty of Waitangi. The Waitangi Tribunal did, however, recommend the repeal of section 80 (1) (d) of the Electoral Act 1993 and that there be no voting restrictions for any prisoners. The authors maintain that they have exhausted domestic remedies and have not submitted the same matter to another international body.

Complaint

3.1 The authors submit that, by enacting the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, the State party has violated their rights under articles 2 (1)–(3), 5, 7, 10, 25 and 26 of the Covenant.

3.2 The voting rights of prisoners are subject to frequent political changes in New Zealand. Centre-right political parties have favoured blanket bans on voting regardless of the severity of a prisoner's criminal offending. Centre-left political parties have favoured allowing some prisoners to vote, depending on the gravity of their crimes; that position has led to the three-year threshold for sentences of imprisonment. Such vacillating between blanket and qualified voting restrictions should not occur, because voting is a fundamental right under the New Zealand Bill of Rights Act 1990.

3.3 The Members of Parliament who voted for the 2010 Act were fully aware that the law targeted a specific sector of society, as they knew that more than half of prisoners were Māori. One Member of Parliament (who voted against the law) stated that the law directly discriminated against Māori and several Members referred to the disproportionate number of Māori in prison. The loss of the right to vote under the 2010 Act represented an indignity. Mr. Taylor stated that, after it had been passed, most prisoners did not know that they had lost the right to vote. Ms. Ngaronoa stated that she felt like a refugee in her own country and that voting was a right guaranteed to the Māori under the Treaty of Waitangi. The Supreme Court should not have denied the authors' application for leave to appeal against the decision of the Court of Appeal with respect to their claim of discrimination.

3.4 The 2010 Act also restricted voting rights even after the release of an individual from prison. After such release, re-enfranchisement did not automatically occur. Many individuals who had been released from prison did not rejoin the electoral roll owing to literacy problems or disillusionment with the system. Accordingly, the Māori electoral population declined each year.

3.5 The authors cite the standards in the Committee's general comment No. 25 (1996) that apply to the right to vote, including for those convicted of an offence (paras. 4 and 14). The Supreme Court of Canada, the European Court of Human Rights and the Constitutional Court of South Africa have all indicated that disenfranchising prisoners contravenes the

ideals of humanity and dignity of the person.[9] The authors also cite the report of the Working Group on the Universal Periodic Review on its second cycle review of New Zealand, in which various States made recommendations concerning the rights of Māori.[10] The authors further cite a report of a visit to New Zealand in 2014, in which the Working Group on Arbitrary Detention expressed concern regarding the overrepresentation of Māori in the prison population.[11]

3.6 Māori face several disadvantages in New Zealand, including systemic bias in the criminal justice system, overrepresentation in carceral populations and high rates of suicide and illiteracy. According to official statistics published in 2012, Māori represented 51 per cent of the sentenced male prisoner population and 58 per cent of the female prisoner population. In 2012, Māori comprised approximately 15 per cent of the total population of New Zealand.[12] The act of disenfranchisement further disadvantages Māori prisoners compared with non-Māori prisoners. Those consequences in a free and democratic society constitute discrimination.

State party's observations on admissibility and the merits

Admissibility

4.1 In its observations of 16 July 2020, the State party considers that various aspects of the communication are inadmissible. The authors' claims under articles 2 (1), 7, 10 and 26 are inadmissible because the domestic authorities examined and issued reasonable decisions on those claims.[13] The Committee is not a body of appeal or a fourth instance, and the authors have not challenged the fairness of the domestic proceedings. The findings of the Waitangi Tribunal in 2019 cast no doubt on the fairness of the courts' decisions. Different courts and tribunals may reach different conclusions on the same subject. While the authors do take issue with the denial by the Supreme Court of their request for leave to appeal, the Court provided a reasoned judgment in declining that request and no principle of domestic or international law required it to grant the request.

4.2 The authors' claims under articles 7 and 10 are inadmissible because the authors did not exhaust domestic remedies. When contesting the judgment of the Court of Appeal to the Supreme Court, the authors did not invoke section 9 or section 23 (5) of the New Zealand Bill of Rights Act 1990, which incorporates into domestic law articles 7 and 10 of the Covenant, respectively.

4.3 The claim under article 25 (b) is inadmissible because the State party provided the authors with an effective remedy for any breach of their rights under that provision. The State party accepts that the 2010 Act was inconsistent with article 25 (b) of the Covenant because it restricted voting for all sentenced prisoners, irrespective of the seriousness of the criminality of which they had been convicted. However, the authors enjoyed access to the domestic courts to challenge the 2010 Act on the basis that it was inconsistent with the right to vote. The High Court found in the authors' favour and made a formal declaration that the 2010 Act was inconsistent with section 12 of the New Zealand Bill of Rights Act 1990, which incorporates the rights under article 25 (b) of the Covenant. The Supreme Court upheld the validity of the decision of the High Court. The declaration of the High Court amounts to an effective remedy within the meaning of the Covenant. It is a mark of its effectiveness that the State party presented a bill to Parliament to amend the legislation in order to ensure that it is consistent with section 12 of the New Zealand Bill of Rights Act 1990 and thus with

[9] Supreme Court of Canada, *Sauvé v. Canada*, Case No. 27677, Judgment, 31 October 2002, para. 35; European Court of Human Rights, *Hirst v. United Kingdom (No. 2)*, Application No. 74025/01, Judgment, 6 October 2005, paras. 36 and 38; and Constitutional Court of South Africa, *August and Another v. Electoral Commission and Others*, Case No. CCT 8/99, Judgment, 1 April 1999, paras. 17 and 18.

[10] A/HRC/26/3, paras. 128.38, 128.76, 128.81–128.84 and 128.90.

[11] A/HRC/30/36/Add.2, paras. 54 and 57.

[12] Statistics New Zealand, *NZ Official Yearbook 2012* (Wellington, 2013).

[13] Although the State party referred to article 19 of the Covenant, it would appear that it should have referred to article 19 of the New Zealand Bill of Rights Act 1990, which protects freedom from discrimination.

article 25 (b) of the Covenant. In doing so, the State party made it clear that the legislation was a response to the declaration of the courts and the recommendation of the Waitangi Tribunal. Alternately, if the Committee is of the view that only the amendment of the primary legislation could amount to an effective remedy in the present case, the passing of the 2020 Act, which restored the right to vote of all prisoners serving sentences of less than three years, has now provided that remedy.

4.4 The communication is entirely inadmissible with respect to Mr. Taylor and Ms. Ngaronoa because they do not have the status of victims within the meaning of article 1 of the Optional Protocol. Mr. Taylor and Ms. Ngaronoa were not "actually affected" by the 2010 Act because they were removed from the electoral register before the 2010 Act was passed. Before the passage of the 2010 Act, the law (section 80 (1) (d) of the Electoral Act 1993, as originally enacted) restricted the voting rights of prisoners who had received prison sentences of three years or more. That restriction was consistent with article 25 (b) of the Covenant in that it was confined to those prisoners who were serving sentences for serious criminality. Mr. Taylor and Ms. Ngaronoa received sentences of more than three years' imprisonment. Had the 2010 Act not been passed, Mr. Taylor and Ms. Ngaronoa would have been subject to section 80 (1) (d) of the Electoral Act 1993 as originally enacted. Thus, their rights were not engaged by the 2010 Act. The authors challenge the impact of the 2010 Act and not section 80 (1) (d) of the Electoral Act 1993 as originally enacted. Only Ms. Wilde, who was removed from the electoral register as a result of the 2010 Act, was actually affected by that Act.

4.5 In addition, Mr. Taylor is not Māori and therefore cannot claim to be a victim of racial discrimination under article 26 of the Covenant.

Merits

4.6 The communication is without merit. Regarding article 25 (b) of the Covenant, the State party cites several international and domestic judicial decisions, including the judgment of the European Court of Human Rights in *Scoppola v. Italy (No. 3)*.[14] In that case, the Court considered that a voting restriction that applied only to prisoners who had received a sentence of three years or more was a proportionate and justified limitation on that right. In a separate case, the Court of Justice of the European Union found that a similar restriction by France that applied to prisoners serving a sentence of five years or more represented a lawful, rational and proportionate restriction on the right to vote.[15] Taken together, the various judgments cited – consistent with the Committee's general comment No. 25 (1996) – stand for the propositions that: (a) the public interest in deterring and denouncing criminality may provide a rational basis for limiting the right to vote of those who are serving a sentence for criminal conduct of a certain seriousness; (b) a blanket restriction on all prisoners from voting will rarely be a rational and proportionate means of achieving that aim; and (c) restrictions that apply only to those prisoners who are serving a sentence of a certain length and thereby affect only those prisoners who have been convicted of criminality of a certain gravity may represent a proportionate limitation on the right to vote.

4.7 The State party describes the various reasons for which the pre-2010 (and post-2020) restriction on voting for prisoners serving a sentence of three or more years complies with article 25, as well as article 10 (3), of the Covenant. The voting restriction applied only as long as prisoners were serving their sentences. Following release, the prisoner was entitled to readmission to the electoral roll. The State party acknowledges that its obligations under article 25 (b) of the Covenant were breached by the 2010 Act. The authors have received a remedy for that violation in the form of a declaration of inconsistency from the High Court and the amendment to domestic law (through the 2020 Act), which removed the inconsistency with article 25 (b) of the Covenant. Mr. Taylor and Ms. Ngaronoa were serving sentences for substantial criminality and would have been subject to the pre-2010 voting restriction.

[14] European Court of Human Rights, *Scoppola v. Italy (No. 3)*, Application No. 126/05, Judgment, 22 May 2012.

[15] Court of Justice of the European Union, *Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde*, Case No. C-650/13, Judgment, 6 October 2015.

4.8 With respect to articles 2 (1) and 26 of the Covenant, for the reasons stated by the Court of Appeal, the 2010 Act did not give rise to discrimination. Before the Committee, the authors appear to advance an argument that they did not present before the domestic courts, namely, that the 2010 Act was intended to disenfranchise Māori. Such a grave allegation should only be made on the basis of clear evidence and the authors have not provided such evidence. The comments cited by the authors were made by Members of Parliament who opposed the bill; they shed no light on the intent of those who voted in favour of it. If the Members of Parliament were aware that a disproportionate number of Māori were in prison, this does not permit an inference that the purpose of those who voted for the bill was to disenfranchise Māori. On its face, the 2010 Act applies equally to all prisoners. The fact that a disproportionately high percentage of Māori are represented in the prison population does not indicate direct discrimination. The appropriate comparator group for the purpose of assessing whether the measure is indirectly discriminatory is that of Māori and non-Māori prisoners. In practice, the 2010 Act equally affects Māori prisoners and non-Māori prisoners. It is not, therefore, indirectly discriminatory. If the alternative approach of comparing the differing impact of the 2010 Act on the wider Māori and non-Māori voting population is adopted, then the fact that a significantly higher proportion of Māori are in prison means that it will have a disproportionately greater impact on the Māori voting population. However, given that the proportions of the Māori and non-Māori voting populations who are in prison at any one time are very small, the impact of the restriction is too small to give rise to a significant disadvantage to Māori voters as a group.

4.9 With respect to article 7 of the Covenant, one of the authors stated that the voting restriction made her feel like an immigrant or a refugee. That was the only evidence of mental suffering adduced by the authors and it does not suffice to establish inhuman or degrading treatment or punishment. The jurisprudence of the Committee and the Committee against Torture does not suggest that a voting restriction could give rise to inhuman treatment.

4.10 Regarding article 10 of the Covenant, the State party cites numerous Views by the Committee that indicate that the cumulative circumstances at issue must reach a minimum threshold of severity that has not been met in the present case. The domestic courts rejected the authors' arguments with reasoning that was consistent with article 10 of the Covenant and a minimum level of humane treatment.

Authors' comments on the State party's observations on admissibility and the merits

5.1 In their comments of 17 December 2021, the authors respond to the State party's arguments in paragraph 4.1 above and consider that the most authoritative interpretation of their rights was not provided by the State party's highest court. The authors are not requesting the Committee to serve as an appellate body.

5.2 Regarding the exhaustion of domestic remedies, while the authors' claims under articles 7 and 10 of the Covenant were not specifically invoked in their application for leave to appeal to the Supreme Court, it is clear from the Court's judgment on that application that it was aware that those rights arose from or intersected with the authors' claim of racial discrimination.

5.3 The authors reject the State party's position that they have already received an effective remedy for the violation of article 25 (b) of the Covenant. The declaration of inconsistency made by the High Court is not an effective remedy because the Court did not instruct the executive or legislative powers to remedy the inconsistency. The 2020 Act does not allow prisoners serving sentences of three years or more to vote. As a result, it does not provide a remedy for Mr. Taylor or Ms. Ngaronoa. Moreover, the 2020 Act could be repealed or amended by subsequent governments.

5.4 Contrary to the State party's argument, all three authors have victim status to contest the 2010 Act. The length of their sentences is inconsequential, as the law disenfranchised all prisoners. Even if the State party's claim were valid, Ms. Wilde was serving a sentence of less than three years.

5.5 Mr. Taylor and Ms. Ngaronoa are not permitted to vote under the 2020 Act because their sentences exceed the three-year threshold. However, that would not prevent them from challenging the legitimacy of the law. One of the domestic courts stated that Mr. Taylor

would have standing to challenge a three-year limitation imposed by statute on the right of prisoners to vote.

5.6 With respect to articles 2 and 26 of the Covenant, the Court of Appeal referred instead to the non-discrimination provision under article 19 of the New Zealand Bill of Rights Act 1990, which is more restrictive than article 26 of the Covenant. While it is true that the 2010 Act did not directly discriminate, it did not apply equally because Māori are disproportionately represented in prison. The analysis of the Court of Appeal (with respect to comparator groups) was flawed. While the law did not affect Māori prisoners more heavily than non-Māori prisoners, substantive equality underpins the electoral laws relating to Māori. In comparing Māori and non-Māori groups, the Court of Appeal applied an unjustifiably high standard of materiality. In 2019, the Waitangi Tribunal found that Māori were disproportionately affected by the impugned provision of the 2010 Act in view of the following four factors: (a) Māori were significantly more incarcerated than non-Māori, especially for less serious crimes; (b) young Māori were more likely to be imprisoned than non-Māori, which impeded the development of positive voting habits; (c) the practical effect of disenfranchisement was wider than its effect on individual prisoners, affecting their whanau[16] and communities; and (d) the Act operated as a de facto permanent disqualification due to low rates of re-enrolment among released prisoners. The causal link between the number of Māori on the Māori electoral roll and the total number of Māori electorates is unequivocal. Just as the number of Māori electorates rose from 4 in 1993 to 7 in 2008, the number of Māori on the Māori electoral roll rose from 101,585 in 1993 to 229,666 in 2008. It was also estimated in 2009 that, if all Māori were enrolled on the Māori roll, there would be approximately 13 Māori electorates. The Court of Appeal mistakenly concluded that the number of Māori electorates was unaffected by the disqualification of Māori prisoners. Expert witnesses informed the Waitangi Tribunal that disenfranchisement could suppress the number of Māori electorates. The authors acknowledge, as the Court of Appeal stated, that the ratio of Māori prisoners to the Māori voting community was slightly below 1 per cent. However, the Supreme Court of Canada used the same comparator in its own analysis of the same issue in Canada and reached a different conclusion because it considered the disproportionate impact of the voting ban on already disadvantaged Indigenous Peoples.[17] That factor was not considered by the Court of Appeal.

5.7 Article 7 of the Covenant encompasses mental suffering and article 10 covers psychological integrity and blanket disenfranchisement.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the authors did not exhaust domestic remedies with respect to their claims under articles 7 and 10 of the Covenant. The Committee also notes the authors' acknowledgement that they did not invoke the substance of those claims in their application for leave to appeal to the Supreme Court of 14 September 2017. While the authors assert that the Supreme Court demonstrated in its judgment of 9 November 2018 that the authors' claim of racial discrimination intersected with articles 7 and 10 of the Covenant, the Committee considers that the judgment does not indicate that the Court examined the substance of those articles. Separately, the Committee notes the State party's argument that the authors did not raise before the domestic authorities their claim

[16] Based on a Māori and a tribal world view, the term whanau may refer, for example, to extended family groups. See https://teara.govt.nz/en/whanau-maori-and-family/print.

[17] *Sauvé v. Canada*, para. 60.

under article 26 of the Covenant that the 2010 Act was motivated by racially discriminatory legislative intent. The Committee notes the authors' response that they did raise that claim before the High Court and Court of Appeal, but observes that they did not provide copies of their court filings to substantiate that assertion and do not allege to have raised the issue of legislative intent before the Supreme Court in their request for leave to appeal. Accordingly, the Committee considers that the authors have not substantiated that they exhausted domestic remedies with respect to that aspect of their claim (concerning legislative intent) under article 26 of the Covenant. For the aforementioned reasons, the Committee is precluded by article 5 (2) (b) of the Optional Protocol from examining that aspect of the authors' claim under article 26 of the Covenant and their claims under articles 7 and 10 of the Covenant.

6.4 The Committee further notes the claims of Mr. Taylor and Ms. Ngaronoa that, although the subject of the domestic proceedings at issue was the legitimacy of the 2010 Act, their rights under article 25 of the Covenant have not been restored because they remain unable to vote under the 2020 Act. However, the Committee also notes the authors' statement that Mr. Taylor and Ms. Ngaronoa are able to challenge the legitimacy of the 2020 Act at the domestic level, and that Mr. Taylor was informed by a domestic court that he had standing to do so. Accordingly, the Committee considers that Mr. Taylor and Ms. Ngaronoa have not demonstrated that they have exhausted domestic remedies to contest the 2020 Act. Thus, that aspect of the claims of Mr. Taylor and Ms. Ngaronoa under article 25 (b) of the Covenant is inadmissible under article 5 (2) (b) of the Optional Protocol.

6.5 The Committee recalls its jurisprudence according to which the provisions of articles 2 and 5 of the Covenant lay down general obligations for States parties and do not give rise, when invoked separately, to claims in a communication under the Optional Protocol.[18] The Committee therefore declares the authors' claims under articles 2 (1)–(3) and 5 of the Covenant inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.6 The Committee notes the State party's argument that the communication is entirely inadmissible with respect to Mr. Taylor and Ms. Ngaronoa because they were not actually affected by the 2010 Act. Mr. Taylor and Ms. Ngaronoa were subject to pre-existing voting restrictions under the Electoral Act 1993, as they were serving sentences of imprisonment of more than three years when the 2010 Act came into force and thus would already have been removed from the electoral roll. The Committee recalls that, according to its jurisprudence, a person can only claim to be a victim of a violation of a right protected under the Covenant, in the sense of article 1 of the Optional Protocol, if that person is actually affected.[19] That requires showing that either a State party has, by act or omission, already impaired the exercise of the claimant's right or that such impairment is imminent, based on existing legislation or on a judicial or administrative decision or practice.[20] The Committee notes that, while Mr. Taylor and Ms. Ngaronoa were disqualified from registering to vote under the relatively less restrictive Electoral Act 1993, they remained disqualified under the terms of the more restrictive 2010 Act. The Committee also notes that, when the communication was submitted in 2019 – when the 2010 Act was in force – none of the authors had the right to vote. Accordingly, the Committee considers that Mr. Taylor and Ms. Ngaronoa were actually affected by the 2010 Act, for the purpose of article 1 of the Optional Protocol.

6.7 The Committee notes the State party's view that the claim under article 25 of the Covenant is inadmissible because the State party has already provided remedies for that violation to the authors (namely, judicial recognition that the 2010 Act violated their right to vote and enactment of the 2020 Act, which removed the blanket ban on voting by prisoners). The Committee recalls that, in situations in which a violation of the Covenant is remedied at the domestic level before the submission of a communication, the Committee may consider the communication inadmissible owing to a lack of victim status.[21] On the other hand, when

[18] For example, *M.L. v. Croatia* (CCPR/C/127/D/2505/2014), para. 6.4; *Devi Maya Nepal v. Nepal* (CCPR/C/132/D/2615/2015), para. 6.6; and *Billy et al. v. Australia* (CCPR/C/135/D/3624/2019), para. 7.4;

[19] For example, *X v. Hungary* (CCPR/C/125/D/2901/2016), para. 6.3.

[20] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 8.4.

[21] *Wilson v. Philippines* (CCPR/C/79/D/868/1999), para. 6.3; and *Minogue v. Australia* (CCPR/C/82/D/954/2000), para. 6.2.

the alleged remedy is provided after the submission of a communication, the Committee may address whether there was a violation of the Covenant and then examine the adequacy of the remedy.[22] In the present case, the Committee notes that, while one of the remedies (the declaration of inconsistency by the High Court) was provided before the submission of the communication, the declaration did not in and of itself permit the authors to vote. The other remedy (invalidation of the 2010 Act through enactment of the 2020 Act) was provided after submission of the communication. The Committee recalls that, when the communication was submitted, none of the authors enjoyed the right to vote. Thus, the Committee considers that for the purpose of admissibility, the authors generally have victim status with respect to their claim regarding the denial of the right to vote under article 25 of the Covenant.

6.8 However, the authors' argument that the 2020 Act could in the future be amended to their detriment given the State party's legislative and political history relates to a hypothetical violation of the Covenant, which the Committee does not have the competence to examine.[23] The Committee thus considers that the authors lack victim status with respect to that aspect of their claim under article 25 of the Covenant and that it is therefore inadmissible under article 1 of the Optional Protocol.

6.9 The Committee notes the State party's argument that Mr. Taylor's claim under article 26 of the Covenant is inadmissible. The Committee notes that, according to the communication, Mr. Taylor is not Māori and does not explain his claim of discrimination. The Committee considers that that aspect of the communication is therefore insufficiently substantiated under article 2 of the Optional Protocol with respect to Mr. Taylor.

6.10 The Committee notes the State party's assertion that the authors' claim under article 26 of the Covenant is inadmissible because it was already considered by the domestic authorities, which issued reasonable decisions after fair proceedings. The Committee recalls that it is generally for the courts of States parties to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[24] The Committee notes that the latter standard applies primarily to the enforcement, not the substance, of domestic legislation. In contrast, the Committee considers that the essence of the authors' claim under article 26 of the Covenant is that the substance of the 2010 Act disparately affected Ms. Ngaronoa and Ms. Wilde as Māori prisoners. While the authors do take issue with the analysis of that matter by the Court of Appeal, their arguments originate in the text of the Act, rather than the manner in which the Court of Appeal applied it. The Committee recalls that, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.[25] Accordingly, the Committee considers that the authors have provided sufficient arguments to substantiate – for the purpose of article 2 of the Optional Protocol – the claim of Ms. Ngaronoa and Ms. Wilde under article 26 of the Covenant with respect to the allegedly racially discriminatory effects of the 2010 Act.

6.11 With the aforementioned limitations, the Committee declares the authors' claims under articles 25 and 26 of the Covenant admissible and proceeds to examine them on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

[22] *Wilson v. Philippines*, para. 6.3.
[23] *V.M.R.B. v. Canada*, communication No. 236/1987, para. 6.3.
[24] General comment No. 32 (2007), para. 26.
[25] General comment No. 18 (1989), para. 12.

7.2 The Committee recalls its general comment No. 25 (1996), in which it stated that the right to vote could not be suspended or excluded except on grounds that were established by law and were objective and reasonable (paras. 4 and 14).[26]

7.3 The Committee notes, as observed by the State party, that the High Court declared that the blanket voting ban for prisoners under the 2010 Act was inconsistent with the right to vote under section 12 (a) of the New Zealand Bill of Rights Act 1990, which incorporates article 25 (b) of the Covenant; that the Supreme Court upheld the decision of the High Court; and that, when the 2020 Act rendered the 2010 Act without effect, the Government made it clear that the new legislation was a response to the High Court's declaration and the recommendation of the Waitangi Tribunal. The Committee notes that, in its observations, the State party accepts that the 2010 Act was inconsistent with article 25 (b) of the Covenant because it imposed a restriction on voting that applied to all sentenced prisoners, irrespective of the seriousness of the criminality of which they had been convicted.

7.4 In its own assessment of whether the 2010 Act violated the authors' rights under article 25 (b) of the Covenant, the Committee notes the State party's position that limiting the right to vote of prisoners serving sentences for criminality of a certain gravity is proportionate to the legitimate objective of serving the public interest in deterring and denouncing such criminality (see para. 4.6 above). The Committee considers that the information on file does not indicate that automatic disenfranchisement of prisoners who have committed serious offences is effective in deterring further offending at either a specific or general level, thus raising questions as to whether it is proportionate to that objective. Furthermore, the Committee notes that disenfranchisement is not among the restrictions that are unavoidable in a closed environment.[27] Indeed, the Committee considers that imprisonment and the corollary deprivations that inevitably accompany it (for example, restrictions on visitation, movement and contact with the outside world; and an obligation to abide by other prison rules and regulations) constitute a constellation of serious punishments for criminal offending, and that disenfranchisement represents an additional and separate punishment.[28]

7.5 The Committee construes paragraph 14 of its general comment No. 25 (1996) to mean that, if the disenfranchisement of prisoners constitutes a form of punishment to further the aim of retribution, clear legal standards and assessments should be applied in order to specifically determine the reasonableness of disenfranchisement in the same manner as for other forms of penal sanctions.[29] The Committee observes that, absent certain circumstances – such as, for example, sentencing for voter or ballot fraud, voter suppression, election tampering and related civil rights violations, crimes related to campaign finance, bribery, corruption, treason, sedition, mail fraud, identity theft, or other offences that may target elections, democratic order, processes or institutions, or the State itself – deprivation of the right to vote is unrelated to the specific nature of the offence. The Committee also considers that prisoners who are resident citizens of a State party remain subject to the laws of that State and thus should – absent compelling reasons – have an opportunity, on an equal footing with others, to participate in democratic electoral processes. In that regard, the Committee notes that, without the ability to vote, those prisoners are excluded from the political processes and decisions that affect their interests and the way in which they are governed by elected representatives. The Committee thus considers that automatic disenfranchisement resulting from a criminal conviction or sentence violates article 25 (b) of the Covenant in the absence of a reasonable connection between the nature of the offence and the act of disenfranchisement. Therefore, because the 2010 Act did not require such a connection, it

[26] See also *Dissanayake v. Sri Lanka* (CCPR/C/93/D/1373/2005), para. 8.5; and *Yevdokimov and Rezanov v. Russian Federation* (CCPR/C/101/D/1410/2005), para. 7.4.

[27] General comment No. 21 (1992), para. 3.

[28] *Hirst v. United Kingdom (No. 2)*, para. 70; and *Yevdokimov and Rezanov v. Russian Federation*, individual opinion of Committee member Fabián Omar Salvioli (concurring), para. 7. See also *August and Another v. Electoral Commission and Others*, para. 18.

[29] *Hirst v. United Kingdom (No. 2)*, para. 70; *Scoppola v. Italy (No. 3)*, dissenting opinion of Judge David Thór Björgvinsson; and European Court of Human Rights, *Frodl v. Austria*, Application No. 20201/04, Judgment, 8 April 2010.

did not meet the required standards of reasonableness and objectivity and was incompatible with article 25 (b) of the Covenant.

7.6 The Committee notes the State party's information that Mr. Taylor and Ms. Ngaronoa were convicted of serious drug offences and that neither party has indicated the offences committed by Ms. Wilde. In the absence of an assessment of a reasonable connection between the specific nature of their offences and the act of disenfranchisement, the Committee considers that the 2010 Act violated the authors' rights under article 25 (b) of the Covenant.

7.7 Having found a violation of article 25 (b) of the Covenant, the Committee does not deem it necessary in the present case to examine the remaining claim under article 26 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the authors' rights under article 25 (b) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. That requires it to make full reparation to individuals whose Covenant rights have been violated, while taking into account that, in the present case, the authors have not requested pecuniary compensation. Accordingly, the Committee considers that, in the present case, its Views on the merits of the claim constitute sufficient remedy for the violation found. However, 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 legislation on voting restrictions for prisoners and its implementation thereof, in order to align it with the State party's obligations under article 25 (b) of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.