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Eighty-second session
18 October - 5 November 2004

VIEWS

Communication No. 1110/2002

Submitted by:	Pagdayawon Rolando (represented by counsel, Mr. Theodore O. Te, of the Free Legal Assistance Group, (FLAG).)
Alleged victim:	The author
State party:	Philippines
Date of initial communication:	22 July 1998 (initial submission)
Document references:	Special Rapporteur's rule 86/91 decision, transmitted to the Sate party on 28 August 2002. (not issued in document form)
Date of adoption of Views:	3 November 2004

On 3 November 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1110/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

Eighty-second session

concerning

Communication No. 1110/2002[**]

Submitted by:	Pagdayawon Rolando (represented by counsel, Mr. Theodore O. Te, of the Free Legal Assistance Group (FLAG).)
Alleged victim:	The author
State party:	Philippines
Date of initial communication:	22 July 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 2004,

Having concluded its consideration of communication No. 1110/2002, submitted to the Human Rights Committee on behalf of Mr. Pagdayawon Rolando, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of two individual opinions signed by Committee members Mr. Martin Scheinin, Ms. Christine Chanet, Mr. Rajsoomer Lallah, Ms. Ruth Wedgwood and Mr. Nisuke Ando.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Pagdayawon Rolando, a Filipino national, currently detained at New Bilibid Prisons, Muntinlupa City. He claims to be a victim of violations of article 5, paragraph 2, article 6 paragraphs 1 and 2, article 7, article 9 paragraphs 1, 2, 3 and 4, article 10, paragraph 1, and article 14 paragraphs 1, 2, and 5, of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 22 November 1989.

1.2 On 28 August 2002, the Human Rights Committee, through its Special Rapporteur on New Communications, requested the State party, pursuant to Rule 86 of its Rules of Procedure, not to carry out the death sentence against the author whilst his case was before the Committee.

1.3 On 20 October 2003, following information to the affect that the State party intended to execute the author, the Human Rights Committee, through its Special Rapporteur on New Communications, reiterated its request, pursuant to Rule 86 of its Rules of Procedure, not to execute the author whilst his case is before the Committee.

The facts as presented by the author

2.1 In September 1996, the author was arrested and detained at a police station, without a warrant. He was told that he was being detained after allegations made by his wife of the rape of his stepdaughter. Before, the author was employed as a police officer. He requested to see his arrest warrant and a copy of the formal complaint, but did not receive a copy of either. He claims that he was not informed of his right to remain silent or of his right to consult a lawyer, as required under Article III, section 12(1) of the Philippine Constitution of 1987. On 1 November 1996, he was released. Throughout his detention, he was not brought before any judicial authority, nor was he formally charged with an offence.

2.2 On 27 January 1997, he was arrested again and charged with the rape of his stepdaughter Lori Pagdayawon, under article 335, paragraph 3, of the Revised Penal Code, as amended. He claims that he was not informed of his right to remain silent or his right to consult a lawyer. He also claims that the first opportunity he had to engage a private lawyer was at the inquest. The same lawyer represented him throughout the proceedings. On 27 May 1997, the Regional Trial Court of Davao City found him guilty as charged and sentenced him to death, as well as to pay the sum of 50,000 pesos to the victim.[1] According to the author, the death penalty is mandatory for the crime of rape; it is a crime against the person by virtue of Republic Act No. 8353.

2.3 On 15 February 2001, under its automatic review procedure, the Supreme Court affirmed the death sentence of the Trial Court but increased the author's civil liability to 75,000 pesos and

[1] The judgment reads as follows: "The crime committed is statutory rape. The penalty imposable, considering the circumstances of relationship being present, is the supreme penalty of death. The court is left with no alternative but to obey the mandate of the law in the imposition of the penalty. In the language of the Supreme Court in People vs. Leo Echegaray, G.R. No. 117472, June 25, 1996, "The law has made it inevitable under the circumstances of this case that the accused-appellant face the supreme penalty of death.""

"an additional award of 50,000 pesos by way of moral damages."[2] According to the author, the Supreme Court followed its usual practice of not hearing the testimony of any witnesses during the review process, relying solely upon the lower courts' appreciation of the evidence. It reiterated its position, established in previous case law[3], about the weight given to the testimony of young women who make allegations of rape, by stating that "[t]he testimony of a rape victim, who is young and of tender age, is credible and deserves full credit, especially where the facts point to her having been the victim of a sexual assault. Certainly would not make public the offence and, undergo the trial and humiliation of a public trial if she had not in fact been raped." According to the author, the only effective test which the court has laid down to test the veracity of the alleged victim's allegation is the willingness of the victim to submit herself to a medical examination and endure the ordeal of court proceedings.

2.4 The author describes the procedure set out in paragraph 7(a) of EP 200, issued by the Bureau of Corrections pursuant to Republic Act 8177, for his execution. It provides that the condemned individual shall only be notified of the execution date at dawn on the date of execution and that the execution must take place within 8 hours of the accused being so informed. No provision is made for notifying the family of the condemned person. The only contact that the accused may have is with a cleric or with his lawyer. Contact can only take place through a mesh screen.

The Complaint

3.1 The author claims that his initial detention was illegal and in violation of article 9, paragraphs 1, 2, 3 and 4. He claims that the failure to grant him access to a lawyer during this first period in detention amounts to a violation of article 14, paragraph 1, as it reduced his chances of receiving a fair trial.

3.2 The author claims that the Supreme Court's position, reiterated in the present case, to accept the rape victim's testimony as being true per se, constitutes a violation of the his right to be presumed innocent and equal before the courts, in accordance with article 14, paragraph 2. It also is said to constitute a violation of the equality clause of article 14, paragraph 1, as well as his right to a fair trial. It is submitted that the court's failure to observe the author's right to be presumed innocent and to "effectively reverse the burden of proof in favour of the prosecution" demonstrates a manifest violation of the obligation of impartiality on the part of the judge. He

[2] The Supreme Court stated that the author was sentenced under section 11 of Republic Act No. 7659, which states inter alia that "The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age *and* the offender is a parent, ascendant, step parent, guardian, relative by consanguinity or affinity with the third civil degree, or the common-law spouse of the parent of the victim……". The court stated that "The qualifying circumstances of minority and relationship that would warrant imposition of the death penalty were specifically alleged and proven."

[3] People v. Tao, G.R. No. 133872, 5 May 2000; People v. Amigable, G. R No. 133857, 31 March 2000; People v. Sampior, G. R No. 117691, 1 March 2000.

argues that, as the same position was adopted in this case by the Regional Trial Court the presumption of innocence was no longer effective and the author did not receive a fair trial.

3.3 The author adds that the Supreme Court's practice not to hear the testimony of any witnesses during the review process and therefore relying upon the lower courts' appreciation of the evidence, amounts to a failure to undertake a review within the meaning of article 14, paragraph 5, of the Covenant. In this current case one of the author's arguments to the Supreme Court was that the trial court erred in weighting the testimony of Lori Pagdayawon. In his view, in order to have undertaken an adequate review, the Supreme Court should hear the victim to test the veracity of her testimony.

3.4 The author claims that the extension of the death penalty to crimes such as rape by virtue of the 1997 Republic Act No. 8353 violates the State party's obligation to restrict the death penalty to the "most serious crimes", in accordance with article 6. He argues that according to the ECOSOC 1984 resolution on the "safeguards guaranteeing the protection of rights and freedoms of those facing the death penalty" adopted in 1984, the phrase "most serious crimes" must be understood as crimes not going beyond intentional crimes with lethal or other extremely grave consequences.[4] The author refers to the growing international consensus against the death penalty and the fact that the statues of the International Criminal Tribunal for the Former Yugoslavia, he International Criminal Tribunal for Rwanda, and the International Criminal Court make no provision for the application of the death penalty.

3.5 He claims that if he were to be put to death, the procedure for executions in force in the Philippines, as set out in document EP 200, in which he would only be given a maximum of eight hours notice prior to execution, makes no provision to enable him to say his final farewell to family members, and only provides contact with his lawyer and cleric through a mesh screen, would subject him to inhuman and degrading punishment, and fail to respect the inherent dignity of the human person, guaranteed by articles 7 and 10, paragraph 1, of the Covenant. The author contends that such treatment is psychological/mental torture similar to the "death row phenomenon".

3.6 The author adds that by reintroducing the death penalty for "heinous crimes", as set out in RA 7659, the State party violated article 6 of the Covenant. He argues specifically that paragraphs 1, 2 and 6 of article 6 if read together, support the conclusion that once a State has abolished the death penalty, it is not open to that State to reintroduce it. Further an "extensive interpretation" of article 5, paragraph 2, of the Covenant which would allow a State party to reintroduce the death penalty would run counter to this provision.

Issues and proceedings before the Committee

Consideration of admissibility

4.1 The communication with its accompanying documents was transmitted to the State party on 28 August 2002. The State party did not respond to the Committee's request, under rule

[4] Resolution 39/118 of 14 December 1984.

86/91 of the rules of procedure, to submit information and observations in respect of the admissibility and merits of the communication, despite several reminders addressed to it. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been adequately substantiated.

4.2 Before considering the claims contained in the communication, the Human Rights Committee must, in accordance with rule 87 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement. With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that could be exhausted by the author.

4.4 As to the claim that the author was denied the right to be presumed innocent, in accepting the testimony of the minor victim, the Committee notes that on a review of the judgments of the Regional Trial Court and the Supreme Court, the judiciary did take the minor victim's age into account in assessing her testimony and did consider that a rape trial is of such an ordeal that it would be unlikely to institute such proceedings if a rape in fact had not occurred. However, these were not the only considerations addressed by the Regional Trial Court and the Supreme Court. Both courts took into account, inter alia, medical evidence and witness statements in the evaluation of the facts and evidence in the case. The Committee has also noted the statement, in the judgment of the Regional Trial Court, which confirms that "on the whole, the evidence for the prosecution has overcome the accused's constitutional presumption of innocence. The prosecution has established the guilt of the accused beyond reasonable doubt. The evidence of the accused, consisting merely of denial, did not overcome the probative weight of the prosecution's evidence which established his guilty beyond reasonable doubt." The Committee reiterates its jurisprudence[5] that the evaluation of facts and evidence is best left for the courts of States parties to decide, unless the evaluation of facts and evidence was clearly arbitrary or amounted to a denial of justice. As the author has provided no evidence to demonstrate that the courts' decisions were clearly arbitrary or amounted to a denial of justice, the Committee considers this claim inadmissible under article 2, of the Optional Protocol for non-substantiation for purposes of admissibility. For these reasons, the Committee concludes that this claim is inadmissible.

4.5 As to the author's claim that his rights were violated under article 14, paragraph 5, as the Supreme Court did not hear the testimony of the witnesses but relied on the first instance interpretation of the evidence provided, the Committee recalls its jurisprudence that a "factual retrial" or "hearing de novo" are not necessary for the purposes of article 14, paragraph 5[6].

[5] Ramil Rayos v. The Philippines, Case No. 1167/2003, Views of 27 July 2004.
[6] Perera v. Australia, Case No. 536/93, and H.T.B. v. Canada, Case No. 534/1993.

Accordingly, this part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.6 The Committee finds the remaining claims raised by the author to be admissible and therefore proceeds to a consideration of the merits of the claims relating to articles 6, 7; 10, paragraph 1; 9 and 14, paragraph 3 (d), of the Covenant.

Consideration of the merits

5.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

5.2 The Committee notes from the judgments of both the Regional Trial Court and the Supreme Court, that the author was convicted of statutory rape under Article 335 of the Revised Penal Code, as amended by Section 11 of Republic Act No. 8353 (see footnote 2 below), which provides that "[t]he death penalty shall be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim……." Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.[7] It also notes that rape, under the law of the State party is a broad notion and covers crimes of different degrees of seriousness. It follows that the automatic imposition of the death penalty in the author's case, by virtue of the application of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

5.3 In light of the above finding of a violation of article 6 of the Covenant, the Committee need not address the author's remaining claims under paragraphs 1, 2 and 6 of article 6, which all concern the imposition of capital punishment in this case.

5.4 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of the date of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organise his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not earlier than one (1) year

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[7] Thompson v. St. Vincent & The Grenadines, Case No. 806/1998, Views of 18 October 2000; and Kennedy v. Trinidad & Tobago, Case No. 845/1998, Views of 26 March 2002, Carpo v. The Philippines, Case No. 1077/2002, Views of 6 May 2002.

nor later than eighteen (18) months after the judgment has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times."[8] The Committee understands from the legislation that the author would have at least one year and at most eighteen months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under Section 16 of the Republic Act No. 8177, following notification of execution he would have approximately eight hours to finalise any personal matters and meet with members of his family The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimise this anguish as far as possible.[9] However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

5.5 As to the author's claims under article 9, in light of the State party's failure to contest the factual submissions of the author, the Committee concludes that, upon arrest in September 1996, the author was not informed, at the time of arrest, of the reasons for his arrest and was not promptly informed of the charges against him; that the author was arrested without a warrant and hence in violation of applicable domestic law; and that after his arrest, he was not brought promptly before a judge. Consequently, there has been a violation of article 9, paragraphs 1, 2 and 3, of the Covenant.

5.6 As to the author's uncontested claim that he did not have access to a lawyer during his initial period of detention, and that during both periods of detention, he was not informed of his right to legal assistance, the Committee finds a violation of article 14, paragraph 3(d), of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by the Philippines of articles 6, paragraphs 1, 9, paragraphs 1, 2 and 3 and 14, paragraph 3(d) of the International Covenant on Civil and Political Rights.

7. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has

[8] Section 1, Republic Act No. 8177.
[9] Pratt and Morgan v. Jamaica, Case no. 210/1986 and 225/1987, Views adopted on 6 April 1989.

undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual Opinion by Committee members, Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah (partly dissenting)

We are in full support of the Committee's finding of a violation of article 6, paragraph 1, of the Covenant, due to categorization of the author's mandatory death penalty as arbitrary deprivation of life. In this respect, the case affirms and builds upon the Committee's earlier case law, as established in *Thompson v. St. Vincent and the Grenadines* (Communication No. 806/1998), *Kennedy v. Trinidad and Tobago* (Communication No. 845/1998), *Carpo et al. v. the Philippines* (Communication No. 1077/2002) and *Ramil Rayos v. the Philippines* (Communication No. 1167/2003).

However, we dissent in respect of paragraph 5.3 of the Views where the Committee concluded that it need not address the author's other claims related to article 6. Although the majority also here follows the Committee's earlier Views in *Carpo*, decided on 28 March 2003, we are of the opinion that the time has come to address the question of the compatibility with article 6 of the reintroduction of capital punishment in a country that once abolished it. Since the decision in *Carpo* – in which we participated – two important developments have taken place, on the basis of which the issue now is in our view ripe for assessment by the Committee.

Firstly, in October 2003 the Committee considered the second periodic report by the Philippines, in which context the issue of capital punishment was addressed from various perspectives and the Committee's understanding of the law and practice of the State party was greatly enhanced (See, the State party report CCPR/C/PHL/2002/2, the Committee's summary records CCPR/C/SR.2138, 2139 and 2140, and the Committee's Concluding Observations CCPR/CO/79/PHL),

Secondly, already in the next session after the disposal of the *Carpo* case, the Committee addressed the compatibility with article 6 of the reintroduction of capital punishment, once abolished. This was done in the case of *Roger Judge v. Canada* (Communication No. 829/1998), decided on 5 August 2003, where the Committee held that Canada, despite having abolished capital punishment, violated article 6 by deporting the author of the communication to another country where he would face the risk of the death penalty. It is to be pointed out that the finding was not made on the basis that Canada was a party to the Second Optional Protocol, which it is not, nor on the basis that the author would risk a violation of article 6 in the receiving country. The issue was whether exposing a person to the risk of facing capital punishment in another country was *per se* in violation of article 6 when done by an abolitionist country.

The answer given by the Committee was affirmative:

'10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life…", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so

protect life in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty…") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. *For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application*. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.' (emphasis added)

To any reader familiar with the issue of capital punishment, it is clear that the Committee in the quoted paragraph decided not only its position in respect of "indirect" reintroduction of capital punishment, where an abolitionist country sending someone to face the death penalty in another country, but also what comes to direct reintroduction by allowing in its own law for the death penalty after first abolishing it.

Hence, the *legal* issue of whether reintroduction of capital punishment after once abolishing it is in breach of article 6 has been clarified after the adoption of the Committee's Views in *Carpo*. What remains undecided is the *factual* issue whether the constitutional and legislative changes made in the Philippines in 1987 amounted to the abolition of capital punishment. This is the issue that could – and in our view should – have now been addressed by the Committee. The majority of Committee members considered that there was no need to address the issue in the current case, without discussing its merits.

The Covenant entered into force in respect of the Philippines on 23 January 1987 without any reservations. From that date onwards it was bound by the full spectrum of obligations that stem from article 6 of the Covenant. Immediately on 2 February 1987, a new Constitution took effect following approval by the people consulted by plebiscite. That Constitution, in article 3(19)(1), removed the death penalty from the applicable law of the land in the following terms:

"Executive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

From 1987 to 1993, the legal order of the Philippines did not include a possibility to sentence a person to death, or even the institution of capital punishment. Hence, the situation was different from a mere moratorium where capital punishment remains in the law in books but its

application is suspended in practice. On 13 December 1993, the Philippine Congress, by way of Republic Act No. 7659, adopted new legislation that again included the death penalty for a number of crimes. As is clear from the above-quoted provision of the Constitution, capital punishment could be brought back to application only through new legislative decision. Such decision was taken in 1993, and although the constitutionality of the measure was contested, it was, for the purposes of domestic constitutional law, as distinct from compliance with the Covenant, upheld by the Supreme Court in the case of *People v Echegaray* (GR No 117472, judgment of 7 February 1997). In this ruling the Supreme Court, by a majority, held that new laws authorising capital punishment were not unconstitutional. A part of the majority's reasoning was:

'Article III, Section 19 (1) of the 1987 Constitution plainly vests in Congress the power to re-impose the death penalty "for compelling reasons involving heinous crimes". This power is not subsumed in the plenary legislative power of Congress, for it is subject to a clear showing of "compelling reasons involving heinous crimes." The constitutional exercise of this limited power to re-impose the death penalty entails (1) that Congress define or describe what is meant by heinous crimes; (2) that Congress specify and penalize by death, only crimes that qualify as heinous in accordance with the definition or description set in the death penalty bill and/or designate crimes punishable by reclusion perpetua to death in which latter case, death can only be imposed upon the attendance of circumstances duly proven in court that characterize the crime to be heinous in accordance with the definition or description set in the death penalty bill; and (3) that Congress, in enacting this death penalty bill be singularly motivated by "compelling reasons involving heinous crimes."'

What is clear to us on the basis of this and other passages of the ruling is that the Supreme Court's assessment was limited to the domestic constitutional issue and did not extend to the question whether the enactment of the 1987 Constitution amounted to an abolition in the meaning of article 6, paragraph 2, of the Covenant, and what would be the consequences under the Covenant if it did. Nevertheless, we find it proper to quote also a particularly articulate minority opinion, also written in the framework of domestic constitutional law rather than international law:

"… the Constitution did not merely suspend the imposition of the death penalty, but in fact completely abolished it from the statute books. The automatic commutation or reduction to reclusion perpetua of any death penalty extant as of the effectivity of the Constitution clearly recognizes that, while the conviction of an accused for a capital crime remains, death as penalty ceased to exist in our penal laws and thus may no longer be carried out. This is the clear intent of the framers of our Constitution.'

In the above description of the sequence of events we have avoided expressing a position as to whether what happened in the Philippines in 1987 amounted to an abolition of the death penalty in the sense of article 6, paragraph 2, of the Covenant. It is now time to answer that question.

As the Committee notes in paragraph 4.1 of its Views in the current case, the Philippines has not furnished the Committee with any submissions in response to the communication. This is of course regrettable but cannot prevent the Committee from establishing the facts in the light of the material it has in its possession.

In our view the distinction between abolition and a moratorium is decisive. In 1987 the Philippines removed capital punishment from it legal order, so that no provision of criminal law included a possibility to sentence any person to death. The death penalty could not be applied on the basis of the reference to it in the Constitution. On the contrary, the Constitution itself made it very clear that capital punishment had been removed from the legal order, i.e., abolished. The fact that the Constitution came to include a kind of domestic reservation, meaning that not every form of reintroducing capital punishment would be unconstitutional, has no relevance for the substantive contents or application of article 6 of the Covenant as an international treaty.

Hence, our conclusion is that, for purposes of article 6, paragraph 2, of the Covenant, the Philippines abolished capital punishment in 1987 and reintroduced it in 1993. Subsequent to that, the author of the current communication was sentenced to death. This constituted, in our view, a violation of article 6 of the Covenant. This violation is separate from and additional to the violation of article 6 established by the Committee on the basis of the mandatory nature of the death sentence.

Our conclusion is supported by the State party's own arguments submitted to the Committee in the earlier *Carpo* case. Although the State party failed to cooperate with the Committee in the current case, it is of relevance now that before the Committee's disposition of *Carpo*, the State party argued as follows:

(1) 'That the Philippines, under the 1987 Constitution, had decided to abolish it [the death penalty] did not disable its legislature from again imposing such a penalty for the Constitution itself allows for its imposition.'

(2) '… the constitutionality of the death penalty law is a matter for the State party to decide. The Committee is not empowered to interpret the constitution of a State party for purposes of determining whether such State party is complying with its obligations under the Covenants.'

(3) Article 6, paragraph 2, of the Covenant 'does not refer to countries that have once abolished the death penalty: it simply refers to countries that have existing death penalty statutes'.

Statement (1) is correct as a matter of Philippino constitutional law but at the same time amounts to an admission that the sequence of events should be categorised as abolition followed by reintroduction. Statement (2) is technically correct but does not affect the Committee's competence to interpret article 6 of the Covenant. Statement (3) is manifestly incorrect in the light of the opening words of article 6, paragraph 2: 'In countries that which have not abolished the death penalty, sentence of death may be imposed…'

Over the more than 25 years of its existence, the Human Rights Committee has developed singularly important jurisprudence on the issue of the right to life and its effect of narrowing down any application of capital punishment. Although it is clear that the drafters of the Covenant could not reach agreement about outlawing capital punishment, they nevertheless included in the detailed provisions of article 6 a number of restrictions on the application of this ultimate punishment which many states, supreme or constitutional courts in various parts of the world, eminent jurists, academics and members of the general public regard as inhuman. Through a rigorous application of the various elements of article 6 the Committee has in its jurisprudence managed to develop international scrutiny over the application of the death penalty without, however, reading a total ban against it into article 6. Some of the most important dimensions of this voluminous jurisprudence relate to the effect of a violation of the right to a fair trial in proceedings leading to capital punishment constituting not only a violation of article 14 but also of article 6, to the categorization of mandatory death penalty for a broadly defined crime as arbitrary deprivation of life, to the scope of the notion of "most serious crimes" in paragraph 2 of article 6 and, in *Judge,* to the issue of indirect reintroduction of capital punishment through an abolitionist country deporting a person to face a risk of it elsewhere, as violations of article 6. Furthermore, with reference to article 7 of the Covenant, the Committee has also decided that certain forms of execution, as well as prolonged stay on death row if accompanied by "further compelling circumstances", constitute violations of the Covenant. All this jurisprudence has, together with the exclusion of certain categories of persons from capital punishment in the text of article 6, in effect narrowed down any use of capital punishment. It may well be that one day the Committee will find sufficient grounds to conclude that in the light of evolving public opinion, state practice and case law from various jurisdictions, *any* form of execution constitutes an inhuman punishment in the meaning of article 7.

Future cases will show whether this will indeed be the line of further evolution in the Committee's jurisprudence. Be it as it may, in our view the Committee should in the current case have followed its interpretation already expressed in *Judge* and addressed the question whether the Philippines violated article 6 by reintroducing capital punishment in 1993, after abolishing it in 1987. As explained above, our answer is affirmative.

[*Signed*] Martin Scheinin
[*Signed*] Christine Chanet
[*Signed*] Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion of Committee members Ms. Ruth Wedgwood and Mr. Nisuke Ando

Consistent with our separate opinions in Carpo v. Philippines, Case No. 1077/20002, 6 May 2002, we are unable to join in paragraph 5.2 of the Committee's Views. In addition, we do not agree with the dissenting views of Mr. Scheinin, Ms. Chanet, and Mr. Lallah in this case. The Committee has never suggested, and does not suggest in this case, that a state party should be thwarted in its reform of penalty provisions by an expansionist reading of Article 6(2) of the Covenant. The state party here has amended its national constitution to limit the death penalty to "heinous offenses" and has accordingly rewritten its criminal statutes. This was a good-faith attempt to abide by the Covenant obligation to use the death penalty "only for the most serious crimes." Protocol II of the Covenant provides a separate modality for those states willing to abolish the death penalty in all cases. It would only discourage amelioration of penalty provisions to suggest that even a temporary suspension during a period of legislative reform should prohibit a narrowed application of the death penalty. Such a reading is not supported by the language or travaux preparatoires of Article 6(2), and would defeat the very ends its proponents seek.

[*Signed*] Ruth Wedgwood
[*Signed*] Nisuke Ando

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