



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-seventh session  
10 – 28 July 2006

**VIEWS**

**Communication No. 1421/2005**

<u>Submitted by:</u>	Francisco Juan Larrañaga (represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	The Philippines
<u>Date of communication:</u>	15 August 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 19 August 2005 (not issued in document form)
<u>Date of adoption of Views:</u>	24 July 2006

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Death sentence following unfair trial

*Procedural issues:* Interim measures

*Substantive issues:* Mandatory imposition of the death penalty, reintroduction of the death penalty, arbitrary deprivation of life, impartiality of the tribunal, failure to be presumed innocent, inadequate time and facilities to prepare defence, right to examine witnesses, right to choose counsel of own choosing, heavier sentence imposed on appeal, right to have sentence and conviction reviewed by a higher tribunal, right to be tried without undue delay

*Articles of the Covenant:* 6, 7, 9, and 14

*Article of the Optional Protocol:* none

On 24 July 2006, 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. 1421/2005. The text of the Views is appended to the present document.

[ANNEX]

**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-seventh session

concerning

**Communication No. 1421/2005\***

<u>Submitted by:</u>	Francisco Juan Larrañaga (represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saifee)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	The Philippines
<u>Date of communication:</u>	15 August 2005 (initial submission)

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

Meeting on 24 July 2006,

Having concluded its consideration of communication No. 1421/2005, submitted to the Human Rights Committee on behalf of Francisco Juan Larrañaga 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:

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The texts of two individual opinions signed by Committee members, Mr. Nisuke Ando and Ms. Ruth Wedgwood are appended to the present document.

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

1.1 The author of the communication, dated 15 August 2005, is Francisco Juan Larrañaga, a Filipino and Spanish national, born on 27 December 1977. He is sentenced to death and currently imprisoned at New Bilibid Prison, in the Philippines. He claims to be a victim of violations of article 6; article 7; article 9, and article 14 of the Covenant by the Philippines. The Optional Protocol entered into force for the State party on 22 November 1989. The author is represented by counsel, Ms. Sarah de Mas and Mr. Faisal Saiffee.

1.2 In accordance with rule 92 of the Committee's Rules of Procedure, the Committee, acting through its Special Rapporteur for New Communications, requested the State party on 19 August 2005 not to carry out the death sentence against the author so as to enable the Committee to examine his complaint.

### **The facts as submitted by the author**

2.1 On 5 May 1999, the author, along with six co-defendants, was found guilty of kidnapping and serious illegal detention of Jacqueline Chiong by the Special Heinous Crimes Court in Cebu City and was sentenced to *reclusion perpetua*. On 3 February 2004, the Supreme Court of the Philippines found the author also guilty of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong and sentenced him to death. He was also sentenced to *reclusion perpetua* for the simple kidnapping and serious illegal detention of Jacqueline Chiong.

2.2 According to the prosecution, the author, along with seven other men, kidnapped Marijoy and Jacqueline Chiong in Cebu City on 16 July 1997. On the same day, the two women were allegedly raped. Marijoy Chiong was then pushed down into a ravine, while Jacqueline Chiong was beaten. Jacqueline Chiong's body remains missing.

2.3 According to the author, he travelled from Cebu City to Quezon City on 8 June 1997 to pursue a Diploma at the Centre for culinary arts in Quezon City. On 16 July 1997, he was taking examinations during the entire day and then went to a restaurant in the evening. He stayed with friends until the next morning. On 17 July 1997, he took another examination before taking a plane back to Cebu City at 5pm.

2.4 On 15 September 1997, the police tried to arrest the author without a warrant. On 17 September 1997, author's counsel made a request to the prosecutor that the author be given a preliminary investigation and that he be granted a period of twenty days to file the defence affidavit. The prosecutor denied this request, arguing that the author was entitled only to an inquest investigation. On 19 September 1997, author's counsel appealed to the Court of Appeals to prevent the filing of criminal information against the author. However, criminal charges had already been filed on 17 September 1997 with the Regional Trial Court of Cebu City. On 22 September 1997, counsel filed a petition with the Court of Appeals requesting that the Regional Trial Court of Cebu City prevent the author's arrest. Nevertheless, he was arrested on that day with a warrant issued by that court. He remains incarcerated ever since. Another petition was filed in the Court of Appeals against his arrest and dismissed on 25 September 1997. This decision was appealed to the Supreme Court. Despite this pending appeal, the author was brought before a judge on 14 October 1997. He did not enter a plea and the judge thus entered a plea of not guilty to two counts of kidnapping with serious

illegal detention. On 16 October 1997, the Supreme Court temporarily restrained this judge from proceeding with the case to prevent the issues before the court from becoming moot. On 27 October 1997, the Supreme Court set aside the inquest investigation and held that the author was entitled to a proper preliminary investigation.

2.5 The trial began on 12 August 1998 in the Special Heinous Crimes Court in Cebu City. The prosecution presented its first and main witness, the defendant Davidson Valiente Rusia, who was promised immunity from prosecution if he told the truth. The prosecution witness was induced by the judge to testify against the author and his co-defendants. This cross-examination took place on 13 and 17 August 1998. During the hearings, the witness admitted for the first time that he had raped Marijoy Chiong. However, on the second day, the cross-examination was cut short just after the witness admitted that he lied about his previous convictions, which should have disentitled him from immunity, and claimed to feel dizzy. The witness was brought back to court on 20 August 1998, but his cross-examination was cut short again in the light of allegations that he had been bribed. On the same day, the trial judge thus decided that, in view of time constraints and to avoid the possibility of the witness being killed, kidnapped, threatened, or bribed, further cross-examination would be terminated at 5pm that day. In response, author's counsel refused to participate in the trial and asked the trial judge to recuse himself. On 24 August 1998, he was summarily found guilty of contempt of court, arrested and imprisoned. The trial was suspended.

2.6 The author gave written consent to the withdrawal of his counsel and requested three weeks to hire a new counsel. On 31 August 1998, the court refused to adjourn the trial any further, and offered the defendants the opportunity to rehire their counsel, who were in prison, as the trial was due to restart on 3 September 1998. On 2 September 1998, the court ordered the Public Attorney's Office to assign to the court a team of public attorneys who would act temporarily as defence counsel until the defendants hired new counsel. On 3 September 1998, the trial resumed and the court appointed three attorneys of the Public Attorney's Office as defence counsel for all the defendants who were without legal counsel, including the author. The author reiterated that he wanted to choose his own counsel.

2.7 From 3 to 18 September 1998, twenty-five prosecution witnesses testified while the author was represented by counsel from the Public Attorney's Office. By Order of 8 September 1998, the court deferred the cross-examination of several other prosecution witnesses in view of the defendants' insistence that the lawyer whom they had yet to choose would conduct the cross-examination. On 24 September 1998, the author's newly appointed counsel appeared in the proceedings and asked that the prosecution witnesses be re-examined. The court refused. It also refused to grant the author's new counsel an adjournment of either twenty or thirty days to acquaint himself with the case file and effectively conduct the cross-examination of the witnesses. Instead, the court ordered that the cross-examination would start on 30 September 1998, because the trial should be terminated within sixty days. From 1 to 12 October 1998, author's counsel cross-examined again the main prosecution witness Rusia. However, in response to a motion from the prosecution, he was discharged as a witness on 12 November 1998 and was granted immunity from prosecution. By Order of 8 October 1998, the trial court had given the new counsel only four days to decide whether to cross-examine the prosecution witnesses who had testified while the author was assisted by a counsel from the Public Attorney's Office. On 12 October 1998, counsel refused, in protest, to cross-examine these prosecution witnesses. By Order of 14

October 1998, the trial court decided that all the defendants had waived their right to cross-examine prosecution witnesses.

2.8 On 23 November 1998, fourteen witnesses testified in favour of the author and confirmed that he was in Quezon City immediately before, during and after the alleged crime committed in Cebu City, more than 500 kilometres away. Several pieces of evidence were presented to the court to the same effect. On 9 December 1998, the trial judge refused to hear other witnesses on the ground that their testimony would be substantially the same as the author's other witnesses. On 6, 12, 18, 20, and 25 January 1999, he refused to hear evidence from other defence witnesses on the ground that the evidence was "irrelevant and immaterial", whereas the author believes that it was of crucial importance to the defence of alibi. The transcripts reveal that, for example, the judge refused to hear a defence witness on 12 January 1999, since it would not prove that it was "physically impossible" for the author to be in Cebu City at the time of the commission of the crimes. On 1 February 1999, the author was not allowed to testify either. On 2 February 1999, the trial court issued an Order under which any further evidence on the author's alibi would only be cumulative or superfluous because he had already presented fourteen witnesses. On 3 February 1999, the trial court confirmed its refusal to allow the author to testify.

2.9 On 5 May 1999, the Special Heinous Crimes Court found the author guilty of the kidnapping and serious illegal detention of Jacqueline Chiong and sentenced him to *reclusion perpetua*. It decided that there was insufficient evidence to find him guilty of the kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. On 10 May 2000, the author appealed to the Supreme Court. This appeal raised four issues: (i) violations of rights of due process, including the right to choose counsel, the right to effective counsel, the refusal to hear the author's testimony, the refusal to allow the author to call defence witnesses, and the denial of an impartial trial through the actions of the presiding judge; (ii) improper handling of the main prosecution witness's evidence; (iii) insufficient prosecution evidence to convict him; and (iv) inappropriate standard of proof required for presenting alibi evidence.

2.10 While the Supreme Court has the power to conduct hearings under the Rules of Court, it followed its usual practice of not hearing the testimony of any witnesses during the review process, relying solely upon the lower court's appreciation of the evidence. On 3 February 2004, it found the author guilty not only of the kidnapping and serious illegal detention of Jacqueline Chiong, but also of the complex crime of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong. The author was sentenced to death by lethal injection. A motion for reconsideration was lodged with the Supreme Court on 2 March 2004; this was rejected on 21 July 2005.

### **The complaint**

3.1 The author alleges a violation of article 6 of the Covenant because the State party reintroduced the death penalty after abolishing it.<sup>1</sup> He claims that the death penalty was

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<sup>1</sup> Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah; and Communication No. 869/1999, *Piandong et al. v. The Philippines*, Views adopted on 19 October 2000, para.7.4. See also No. 829/1998, *Judge v. Canada*, Views adopted on 5

abolished when the new Constitution came into force on 2 February 1987 (article 3(19)(1)). On 13 December 1993, Congress adopted the Republic Act No.7659 which allowed the death penalty to be imposed again for a number of crimes. The author recalls that, while the majority in the Supreme Court has held that new laws authorising capital punishment were not unconstitutional, a minority stated that “the Constitution did not merely suspend the imposition of the death penalty, but in fact completely abolished it from the statute books.”<sup>2</sup> The minority view was reiterated when deciding the author’s case.

3.2 The author alleges a violation of article 6 on the ground that the Supreme Court automatically sentenced him to capital punishment under article 267 of the Revised Penal Code. Therefore, it did not take into account any possible mitigating circumstances which may have benefited him, such as his relative youth. He argues that mandatory death penalty violates his right not to be arbitrarily deprived of his life.<sup>3</sup>

3.3 The author alleges a violation of article 14, paragraph 2, and that the evaluation of facts and evidence by the Special Heinous Crimes Court and the Supreme Court were manifestly arbitrary and amounted to a denial of justice, in violation of his right to be presumed innocent until proved guilty.<sup>4</sup> Firstly, he claims that there was insufficient evidence of homicide or rape. He recalls that the trial court found that there was insufficient evidence of homicide or rape of either Marijoy or Jacqueline Chiong, and that the main prosecution witness did not even implicate the author in the homicide of Marijoy Chiong. Serious doubts were expressed by a forensic pathologist as to the evidence provided in court. However, the Supreme Court found the author guilty of homicide and rape of Marijoy Chiong by relying solely on the evidence before the trial court. Secondly, the prosecution was based on the testimony of one witness who had been charged with the same crimes. This witness gave evidence against the author in return for his own release and acquittal.<sup>5</sup> He recalls that the trial judge accepted that the witness had lied, but considered that his testimony was not entirely false. The Supreme Court did not consider the witness’s motives for testifying against his co-accused, nor did it assess the weight attributed to his testimony. Finally, the author argues that both the trial court and the Supreme Court incorrectly shifted the burden of proof on to him to prove that it was “physically impossible” for him to have been at the scene of the crime. The sole evidence against the author was given by prosecution witnesses

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August 2003, para.10.4; Communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, individual opinions by Mr. Fausto Pocar and Mr. Bertil Wennergren; and No. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994, individual opinions of Ms. Christiane Chanut, Mr. Fausto Pocar, and Mr. Francisco Jose Aguilar Urbina.

<sup>2</sup> *People of the Philippines v Echegaray*, GR No.117472, 7 February 1997.

<sup>3</sup> Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para.8.2; Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para.7.3; Communication No. 1077/2002, *Carpo et al. v. The Philippines*, Views adopted on 28 March 2003, para.8.3; Communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para.7.2; and Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para.5.2. See also *Concluding Observations of the Human Rights Committee on the Philippines*, CCPR/CO/79/PHL, 1 December 2003, para.10.

<sup>4</sup> General Comment 13/21 of 13 April 1984, para.7.

<sup>5</sup> Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para.6.4.

identifying him, whereas he had to provide “clear and convincing evidence” that he was not at the scene of the crime. He thus argues that he was not presumed innocent because of the reversal of the burden of proof.

3.4 The author alleges a violation of article 14, paragraph 1,<sup>6</sup> and article 14, paragraph 2,<sup>7</sup> because both the trial court and the Supreme Court were subject to outside pressure from powerful social groups, especially the Chinese-Filipino community, of which the victims are members and which argued for the execution of the defendants. The aunt of the victims was the secretary of President Estrada who called for the execution of the author after the judgement of the trial court. The defendants were subject to many negative media reports before judgement which led the judges to have preconceptions about the case. Finally, the author finds evidence of these preconceptions in the judgements.

3.5 The author alleges violations of article 14 because the convictions and sentences imposed by the Special Heinous Crimes Court were premised on serious procedural irregularities which either individually or cumulatively constitute violations of this provision.<sup>8</sup> Firstly, he was prevented from testifying at his own trial in violation of article 14, paragraphs 1,<sup>9</sup> 3(d)<sup>10</sup> and 3(e).<sup>11</sup> He argues that he had the right to present his case in the best manner possible, which means in practice the right of the accused to counter the prosecution’s allegations and to provide evidence of his own innocence. In its judgement, the Supreme Court merely noted the trial court’s refusal to allow the author to testify.

3.6 Secondly, the author argues that there was no equality to call and examine witnesses in violation of article 14, paragraph 3(e).<sup>12</sup> The trial judge refused to hear several defence witnesses and effectively withheld evidence indicating that another person or persons may have committed the crimes of which the author was accused.<sup>13</sup> Indeed, the author recalls that, on 25 January 1999, the trial court refused to issue a subpoena to hear the testimony of the director of the National Bureau of Investigation for Cebu, because the prosecution had questioned the relevance of such testimony. In fact, the director’s testimony would have established that there were initially twenty-five suspects for the kidnapping and that the

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<sup>6</sup> Communication No. 263/1987, *González del Rio v. Peru*, Views adopted on 28 October 1992, para.5.2.

<sup>7</sup> Communication No. 5/1977, *Ambrosini et al. v. Uruguay*, Views adopted on 15 August 1979, para.10; and Communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on 3 April 1990, para.16.

<sup>8</sup> Communication No. 815/1998, *Dugin v. Russian Federation*, Views adopted on 5 July 2004, para.9.3.

<sup>9</sup> Communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985, para.10; and Communication No. 32/1978, *Touron v. Uruguay*, Views adopted on 31 March 1981, para.12.

<sup>10</sup> General Comment 13/21 of 13 April 1984, para.11.

<sup>11</sup> *Ibid.*, para.12.

<sup>12</sup> Communication No. 480/1991, *Fuenzalida v. Ecuador*, Views adopted on 12 July 1996, para.9.5; Communication No. 1117/2002, *Khomidov v. Tajikistan*, Views adopted on 29 July 2004, para.6.5; and Communication No. 353/1988, *Grant v. Jamaica*, Views adopted on 31 March 1994, para.8.5.

<sup>13</sup> Communications No. 464/1991 and 482/1991, *Peart and Peart v. Jamaica*, Views adopted on 19 July 1985, para.11.5.

author was not one of them. The evidence was presented to the Supreme Court, but the Court determined that it was immaterial in its judgement of 3 February 2004.

3.7 Thirdly, the author argues that his right to cross-examine prosecution witnesses was unfairly restricted in violation of article 14, paragraph 3(e). He recalls that the trial judge was obstructive when author's counsel sought to cross-examine the main prosecution witness (see para.2.5 above). While his new counsel refused to cross-examine the prosecution witnesses, the author argues that this decision not to cross-examine was not a tactical consideration, but a decision not to accede to an unfair process, and that he should not be penalised for his insistence on the right to cross-examine prosecution witnesses in a fair way. He adds that his new counsel was unable to cross-examine the witnesses because he had not heard the examination-in-chief of the same witnesses. If he had cross-examined the witnesses, he would have been in an unequal position vis-à-vis the prosecution, which would have heard both the examination-in-chief and the cross-examination of the witnesses. The Supreme Court failed to correct these errors.

3.8 Fourthly, the author argues that bearing in mind the irreversible nature of the death penalty and the ineffectiveness of court-appointed lawyers in these cases,<sup>14</sup> his counsel did not have sufficient time to prepare the defence, in violation of article 14, paragraph 3(b),<sup>15</sup> and that he could not choose an effective counsel, in violation of article 14, paragraph 3(d).<sup>16</sup> The decision to send his counsel to jail for contempt of court constitutes a violation of the Covenant.<sup>17</sup> He adds that the refusal to grant a reasonable adjournment to find a new counsel was also unlawful,<sup>18</sup> and recalls that on 2 September 1998, the trial judge ordered a lawyer from the Public Attorney's Office to represent the author despite his insistence on an adjournment to seek his own counsel and the fact that he had the means to do so.<sup>19</sup> As a result, between 3 and 23 September 1998, the author was represented by a lawyer from the Public Attorney's Office who had had less than a day to prepare his defence and was denied

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<sup>14</sup> Communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 7 April 1994, para.11.4; and Communication No. 1167/2003, *Rayos v. The Philippines*, Views adopted on 27 July 2004, para.7.3.

<sup>15</sup> Communication No. 49/1979, *Marais v. Madagascar*, Views adopted on 24 March 1983, para.19; and Communication No. 283/1988, *Little v. Jamaica*, Views adopted on 1 November 1991, para.8.3.

<sup>16</sup> Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para.5.10.

<sup>17</sup> Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para.9.2.

<sup>18</sup> Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para.12.5; and Communication No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989, para.10.3.

<sup>19</sup> Communication No. 52/1979, *Sadias de Lopez v. Uruguay*, Views adopted on 29 July 1981, para.13; Communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983, para.10; Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para.12.5; and Communication No. 677/1996, *Teesdale v Trinidad and Tobago*, Views adopted on 1 April 2002, para.9.6.

any further time to prepare in violation of the Covenant.<sup>20</sup> During that period, twenty-five prosecution witnesses gave evidence and the author's appointed counsel did not object to any of the evidence. Lawyers from the Public Attorney's Office even complained that they had a conflict of interest since they had at one stage represented the main prosecution witness, who was one of the defendants, and were now representing the other defendants. The author argues that his new counsel should have been given sufficient time to acquaint himself with the case file. While these issues were raised on appeal, the Supreme Court failed to correct the irregularities which took place during the trial.

3.9 Fifthly, the author argues that he was not tried by an independent and impartial tribunal in violation of article 14, paragraph 1. He recalls that the trial judge led the main prosecution witness to testify against the author and that his counsel objected to this on several occasions. The trial judge obstructed the cross-examination of this witness on 13 August 1998, and made disrespectful remarks about the defence witnesses. In addition, the trial judge was the same judge who had evaluated the preliminary charges against the author on 14 October 1997; he should thus not have been involved in the trial.<sup>21</sup> Again, the issue was raised before the Supreme Court which failed to respond adequately.

3.10 The author alleges violations of article 6(2) and article 14 because the Supreme Court failed to correct any of the irregularities of the proceedings before the lower court.<sup>22</sup> Firstly, the Supreme Court judges harboured preconceptions about the trial, in violation of article 14(1).<sup>23</sup> He notes that two judges of the Court of Appeals who had evaluated the preliminary charges against the author in 1997 sat on the Supreme Court when deciding the author's case on 3 February 2004 and dismissing his motion for reconsideration on 21 July 2005. He argues that they did so in violation of Rule 137 of the Philippine Rules of Court. Another judge, whose wife was the great-aunt of the victims, also sat on the Supreme Court deciding the author's case on 3 February 2004 and dismissing the motion for reconsideration on 21 July 2005. Secondly, the Supreme Court violated the principle of *ex officio reformatio in peius* enshrined in article 14(1)<sup>24</sup> and his right to appeal as defined in article 14(5). He recalls that the Supreme Court found him guilty of the homicide and rape of Marijoy Chiong and sentenced him to death.<sup>25</sup> Thirdly, the author argues that the Supreme Court violated his right

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<sup>20</sup> Communication No. 796/1998, *Reece v. Jamaica*, Views adopted on 14 July 2003, para.7.2; and Communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, para.6.6.

<sup>21</sup> Communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991, individual opinion by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and Mr. Bertil Wennergren; and Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para.7.2.

<sup>22</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para.7.3.

<sup>23</sup> Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 August 2004, para.10.2; and Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para.7.2.

<sup>24</sup> Communication No. 207/1986, *Moraël v. France*, Views adopted on 28 July 1989, para.9.3.

<sup>25</sup> General Comment 13/21 of 13 April 1984, para.19.

to a public hearing as protected by article 14,<sup>26</sup> and in particular 14(1),<sup>27</sup> 6(2) and 14(2), and 14(5),<sup>28</sup> and his right to be present during the hearing as protected by article 14, paragraph 3(d).<sup>29</sup> He recalls that the Supreme Court did not hear oral testimony and that he was prevented from attending his appeal. There was no justification for refusing him an oral hearing,<sup>30</sup> especially since judgement on appeal was given four years and nine months later and expedition was therefore not a factor. Finally, the author argues that the Supreme Court violated his right to appeal to a higher tribunal according to law as required by article 14(5). He notes that he was convicted of homicide and rape and sentenced to death for the first time at last instance,<sup>31</sup> and could not appeal to a higher tribunal.<sup>32</sup> He also notes that his motion for reconsideration was considered on 21 July 2005 by twelve of the same judges who had sentenced him to death. He therefore argues that resolution on the motion cannot be said to have been impartial.

3.11 The author alleges violations of articles 9(3), 14(3)(c) and 14(5), because there were undue delays in the proceedings. The proceedings as a whole were conducted with undue delay,<sup>33</sup> as were the individual stages. The author recalls that information charging him with kidnap and serious illegal detention was filed on 17 September 1997, that his trial began eleven months later on 12 August 1998, and that judgement was delivered one year and eight months after charge, namely on 5 May 1999.<sup>34</sup> He filed his appeal on 10 May 2000 and the Supreme Court decided about three years and nine months later, on 3 February 2004.<sup>35</sup>

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<sup>26</sup> Communication No. 848/1999, *Orejuela v. Columbia*, Views adopted on 23 July 2002, para.7.3.

<sup>27</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para.7.3.

<sup>28</sup> General Comment 13/21 of 13 April 1984, para.17.

<sup>29</sup> Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para.12.5.

<sup>30</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, individual opinion by Mr. Bertil Wennergren.

<sup>31</sup> Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para.7.5; and Communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para.7.4.

<sup>32</sup> Communication No. 64/1979, *Salgar de Montejó v. Colombia*, Views adopted on 24 March 1982, paras.9.1 and 11.

<sup>33</sup> General Comment 13/21 of 13 April 1984, para.10; Communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, paras.12.1 and 14; Communication No. 864/1999, *Agudo v. Spain*, Views adopted on 31 October 2002, para.9.1; and Communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para.11.3.

<sup>34</sup> Communication No. 677/1996, *Teesdale v Trinidad and Tobago*, Views adopted on 1 April 2002, para.9.3; and Communication No. 56/1979, *de Casariego v. Uruguay*, Views adopted on 29 July 1981, para.11.

<sup>35</sup> Communication No. 938/2000, *Siewpersaud et al. v. Trinidad and Tobago*, Views adopted on 29 July 2004, para.6.2; Communication No. 683/1996, *Wanza v. Trinidad and Tobago*, Views adopted on 26 March 2002, para.9.4; Communication No. 580/1994, *Ashby v. Trinidad and Tobago*, Views adopted on 21 March 2002, para.10.5; Communication No. 677/1996, *Teesdale v Trinidad and Tobago*, Views adopted on 1 April 2002, para.9.4; Communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted

Accordingly, the delay between charge and the Supreme Court decision was six years and five months. The author filed a motion for reconsideration on 2 March 2004, which was decided on 21 July 2005, after a delay of one year and four months. Therefore, the delay between charge and final decision was seven years and ten months.<sup>36</sup> For the author, such delay is inexcusable since there was little investigation required, and the evidence consisted merely of direct eyewitness testimony and forensic evidence.

3.12 The author alleges a violation of article 6(1) because the imposition of the death penalty on him at the end of a process in which his fair trial guarantees were violated constitutes an arbitrary deprivation of life.<sup>37</sup>

3.13 The author alleges a violation of article 7, because he is being subject to a prolonged period of detention on death row.<sup>38</sup> He argues that the compelling circumstances are present<sup>39</sup> because of the trauma of other violations of the Covenant and the real risk that he will ultimately be wrongfully executed.<sup>40</sup> Indeed, the fear and uncertainty generated by a death sentence and exacerbated by the undue delay, in circumstances where there is a real risk that the sentence is enforced, give rise to much anguish.<sup>41</sup> The author recalls that he has not caused any of the delay,<sup>42</sup> and argues that there is a real risk of execution because executions continue to be scheduled. Although a moratorium on execution was announced by the President on 17 September 2002, the General Guidelines for recommending executive clemency were amended on 26 June 2003, so that petitions for clemency are not favourably recommended where the person was under the influence of drugs at the time of committal of the crimes. The author recalls that the Supreme Court found that he and his co-defendants had consumed marijuana before committing the alleged crimes.

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on 6 April 1989, para.13.4; and Communication No. 27/1977, *Pinkney v. Canada*, Views adopted on 29 October 1981, para.22.

<sup>36</sup> Communication No. 203/1986, *Hermoza v. Peru*, Views adopted on 4 November 1988, para.11.3; and Communication No. 43/1979, *Caldas v. Uruguay*, Views adopted on 21 July 1983, para.12.1.

<sup>37</sup> Communication No. 250/1987, *Reid v. Jamaica*, Views adopted on 20 July 1990, para.11.5; Communication No. 16/1977, *Mbenge v. Zaire*, Views adopted on 25 March 1983, para.17; and Communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, para.8.7.

<sup>38</sup> Communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, paras.15.2 and 15.3; and Communications No. 270-271/1988, *Barrett and Sutcliffe v. Jamaica*, Views adopted on 30 March 1992, para.8.4.

<sup>39</sup> Communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para.13.6; Communication No. 599/1994, *Spence v. Jamaica*, Views adopted on 18 July 1996, para.7.1; and Communication No. 720/1996, *Morgan and Williams v. Jamaica*, Views adopted on 3 November 1998, para.6.3.

<sup>40</sup> Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, individual opinion by Mr. Martin Scheinin, Ms. Christine Chanet and Mr. Rajsoomer Lallah.

<sup>41</sup> Communication No. 1167/2003, *Rayos v The Philippines*, Views adopted on 27 July 2004, para.7.1; and Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para.5.4.

<sup>42</sup> Communications No. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para.13.4.

3.14 The author alleges a violation of article 9 because in the light of the violations detailed above, he has not been deprived of his liberty on such grounds and in accordance with such procedures as are established by law. He argues that his guilt was not proven beyond reasonable doubt, and that he therefore should not have been imprisoned.

3.15 With regard to exhaustion of domestic remedies, the author argues that he has made several complaints on all the violations detailed above. All procedural irregularities encountered in the trial were raised in the appeal before the Supreme Court, while those procedural irregularities encountered before the Supreme Court were raised in the motion for reconsideration. The author argues that a second motion for reconsideration cannot be regarded as an “effective” remedy.<sup>43</sup>

### **State party’s submission on admissibility and merits**

4.1 On 3 March 2006, the State party commented on the admissibility and merits of the communication. With regard to the reintroduction of the death penalty, it argues that the death penalty was never abolished by the 1987 Constitution. It recalls that article III, section 19(1) of the Constitution provides that the death penalty shall not be imposed “unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it”. It refers to the drafting history of the provision in order to demonstrate that the provision was never meant to suppress the right of the State to impose capital punishment. It also refers to a decision of the Supreme Court in which the Court confirmed that there is nothing on article III, section 19(1) which expressly abolishes the death penalty.<sup>44</sup> It recalls that the imposition of the death penalty for certain crimes is purely a matter for domestic discretion, save for the limitation that it be imposed only for the “most serious crimes”. It also recalls that it is not a party to the Second Optional Protocol to the Covenant. While it acknowledges that there is a current trend toward the abolition of the death penalty even for the most serious crimes, it argues that this consideration is insufficient to entirely bar the imposition of the penalty. Accordingly, article 6 should be interpreted to mean that for countries which have abolished the death penalty, it cannot be reinstated, and that for countries which continue to impose it, its abolition is not compulsory, albeit highly encouraged.

4.2 With regard to the allegation that the imposition of death penalty on the author was mandatory, by operation of law, without regard to possible mitigating circumstances, the State party recalls that the Revised Penal Code provides that a person may be convicted for the criminal act of another where, between them, there has been conspiracy or unity of purpose and intention in the commission of the crime. Therefore, the conspirators are held liable for acts committed by each of them and the degree of actual participation of each is immaterial. In the present case, the author and his co-defendants were found by the Supreme Court to have the same objective to kidnap and detain the Chiong sisters. Conspiracy having been established, the author was thus liable for the complex crimes of kidnapping and serious illegal detention with homicide and rape, regardless of who in the group actually pushed Marijoy Chiong into the ravine. With regard to the author’s relative youth, the State party

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<sup>43</sup> Communication No. 1073/2002, *Terron v. Spain*, Views adopted on 5 November 2004, para.6.5; and Communication No. 1101/2002, *Cabriada v. Spain*, Views adopted on 1 November 2004, para.6.5.

<sup>44</sup> *People of The Philippines v. Echegaray*, GR No.117472, 7 February 1997.

notes that while the death penalty cannot be imposed on persons below the age of 18 at the time of the commission of the offence, the author was already 20 when he committed the offences. The State party recalls that “relative youth” is not a mitigating circumstance under domestic penal law, nor in the Committee’s jurisprudence.

4.3 The State party recalls that the death penalty was imposed by virtue of article 267 of the Revised Penal Code, but that even then, the imposition of such a sentence took into consideration the circumstances of both the offender and the offence. For capital crimes, the sole mitigating circumstances which can be raised are minority, incomplete justifying circumstances and incomplete exempting circumstances. The State party recalls that one of the author’s co-defendants was not sentenced to death on the ground that he was a minor at the time of the commission of the offences. It also recalls that adequate safeguards have been put in place before the imposition of the death penalty, and that these have worked well since 1993. The State party thus argues that “mandatory” is in no way synonymous with “arbitrary”, and that there is no violation of article 6(1). It refers to the Committee’s jurisprudence and argues that a death sentence becomes mandatory (understood, in this sense, as arbitrary) when it is imposed without due regard to the circumstances of both the offence and the offender, i.e. by virtue of an undifferentiated murder statute or in disregard of the offender’s participation in the commission of the offence.<sup>45</sup> It invokes General Comment no.14/23 of 2 November 1984 on article 6 of the Covenant, in which the Committee elaborates on the notion of arbitrary deprivation of life. It also refers to two individual opinions appended to the Committee’s Views in *Carpo*.<sup>46</sup>

4.4 With regard to the allegation that the evaluation of facts was manifestly arbitrary and constituted a denial of justice, the State party argues that the Supreme Court judgement demonstrates that there was clear evidence of homicide and rape. It recalls that a criminal appeal opens up the entire case for review and that to have oral arguments before the Supreme Court is not a matter of right. The Supreme Court carefully assessed the evidence before it and decided to disagree with the trial court’s imposition of a life sentence on the author and his co-defendants.

4.5 With regard to the allegation that the prosecution was based on evidence from an accomplice charged with the same crime, the State party recalls that the trial court chose to give credence to his testimony. His testimony was corroborated by disinterested witnesses and compatible with the physical evidence. Both the trial court and the Supreme Court were satisfied with his testimony.

4.6 On the alleged incorrect standard and burden of proof, the State party argues that while it is the duty of the prosecution to prove the allegations in the indictment regarding the elements of the crime, it is the duty of the defence to prove the existence of an alibi, or of justifying or exempting circumstances. As to the motives of the main prosecution witness, the State party recalls that the Supreme Court could not discern any motive on the part of the witnesses why they should testify falsely against the defendants. It concludes that the author

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<sup>45</sup> Communication No. 806/1998, *Thompson v. Saint Vincent and the Grenadines*, Views adopted on 18 October 2000, para.8.2; and Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para.7.3.

<sup>46</sup> Communication No. 1077/2002, Views adopted on 28 March 2003, individual opinions of Mr. Nisuke Ando and Ms. Ruth Wedgewood.

was not deprived of his right to be presumed innocent, and that the prosecution was able to satisfy the burden of proving each element of the crimes charged beyond reasonable doubt.

4.7 With regard to the alleged outside pressure on specific judges, the State party notes that the decision of the Supreme Court was rendered by the court as a whole, rather than by specific Justices. In any case, President Estrada was ousted from power in January 2001 and the author was sentenced to death three years later. It is therefore inconceivable that the Supreme Court could have been pressured by an ousted president to convict the author. As to the allegation that both the trial court and the Supreme Court had preconceptions about the case, it argues that this is grounded on speculation and conjectures, and that the judiciary has maintained its independence in the present case.

4.8 With regard to the allegation that fair hearing violations invalidate the decision of the Special Heinous Crimes Court, the State party argues that the author was not prevented from testifying, since the prosecution and the defence agreed to dispense with his testimony, as mentioned in the author's own submission to the Committee. The author cannot thus attribute his failure to testify to the trial court. The State party recalls that domestic courts, subject to the agreement of the prosecution and the defence, may admit in evidence the testimony of a witness even if that person was not placed in the witness stand, and that this is especially true if the testimony to be presented would be merely corroborative, as was in the present case.

4.9 With regard to the allegation that there was no equality of arms to call and examine witnesses, the State party recalls that it is the responsibility of the trial judge to ensure that there is an orderly and expeditious presentation of witnesses and that time was not wasted. Therefore, the trial court may dispense with the testimony of witnesses who would offer the same testimonies given by witnesses who already testified. The State party argues that the circumstances surrounding the trial court's decision to dispense with the testimonies of some of the defence witnesses have been sufficiently justified: such witnesses would only have confirmed what the trial court had already heard.

4.10 With regard to the allegation that the right to cross-examine prosecution witnesses was unfairly restricted, the State party refers to the judgement of the Supreme Court of 3 February 2004 in which the Court denied that the defendants had not been given sufficient opportunity to cross-examine the main prosecution witness during the trial. The Supreme Court also argued that it was the right and duty of the trial court to control the cross-examination of witnesses, both for the purpose of conserving time and protecting the witnesses from prolonged and needless examination.

4.11 With regard to the allegation that counsel did not have sufficient time to prepare the defence and that the author's right to choose effective counsel was violated, the State party recalls that the author's counsel was found guilty of direct contempt of court and hence imprisoned. It explains that direct contempt of court is committed in the presence of or near a court or judge and can be punished summarily without hearing. It distinguishes the Committee's Views in *Fernando* from the present situation because, in that case, the summary conviction for contempt of court had been made without the court citing any reason for it.<sup>47</sup> In response to the allegation that the appointed counsel was inadequately prepared,

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<sup>47</sup> Communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para.9.2.

the State party recalls that the Supreme Court argued that the trial court can appoint a counsel whom it considers competent to enable the trial to proceed. The State party explains that there was no conflict of interest since Rusia's lawyer, who was also from the Public Attorney's Office, never participated in the prosecution of the author and that his participation was merely to obtain immunity from prosecution for his client. It refers again to the judgement of the Supreme Court, where the Court argued that the decision to grant an adjournment is made at the discretion of the court, and that a refusal is not ordinarily an infringement of the defendant's right to counsel.

4.12 With regard to the allegation that the author's right to an impartial tribunal was violated, the State party argues that the trial judge has the power to ask questions to witnesses, either directly or on cross-examination. There is no basis for the claim of partiality and bias on the part of the trial judge because he was the same judge who had informed the author of the charges against him and asked him to enter his plea. In addition, it was the prosecutors of the Department of Justice, and not the trial judge, who conducted the preliminary investigation of the case.

4.13 With regard to the alleged violations of the Covenant by the Supreme Court, the State party explains that former Chief Justice Davide took no part in the case, as indicated in the notation in the decision next to his name. As for the two other judges referred to by the author, it explains that neither of them presided over the trial court which convicted the author. As to the principle of *ex officio reformatio in peius*, the State party argues that it provides that an appellate court cannot aggravate an earlier verdict without inviting the parties to present their observations. The proceedings before the Supreme Court are adversarial in nature, although the number of pleadings to be filed is at the discretion of the Court. An appeal in a criminal case opens up the entire case for review, and that it becomes the duty of the appellate court to correct any error in the judgement appealed. The author was given ample opportunity to present his arguments and observations before the Supreme Court. As to the right to a public hearing, the State party argues that the right to a public hearing at the appeal stage is not absolute, and that this right applies only to proceedings at first instance. In the present case, the Supreme Court did not consider it necessary to hear the parties orally.<sup>48</sup>

4.14 With regard to the alleged violation of the right to appeal to a higher tribunal according to law, the State party recalls that the author appealed his conviction pronounced by the trial court to the Supreme Court, and argues that his claim has no merit.

4.15 With regard to the allegation of undue delay, the State party argues that the initial delay was due to the fact that the author sought to annul the charges filed against him. During the course of the trial, the author alone presented fourteen witnesses and the defence employed "strategic machinations" to delay the proceedings. It explains that each defendant filed a separate appeal and that the Supreme Court had to first dispose of all collateral issues which had been raised by the author and his co-defendants before it could finally rule on their appeal. It submits that, given the complexity of the case and the fact that the author availed himself of all the remedies available, the courts have acted with all due dispatch. As to the issue of bail, the State party explains that no bail shall be granted where an accused is

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<sup>48</sup> Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para.4.5.

charged with an offence punishable by death or life imprisonment, and the evidence of guilt is strong.

### **Author's comments**

5.1 On 10 May 2006, the author commented on the State party's submission. He takes note of the recent State party decision to commute all death sentences to life imprisonment, announced on 16 April 2006. However, he remains on death row and has received no documents from the President's Office indicating that his death sentence has been commuted. Moreover, he argues that the President's decision could be overturned by herself or her successor. In any case, he argues that there would still be a violation of the principle of *ex officio reformatio in peius* because life imprisonment constitutes a heavier sentence than *reclusion perpetua* under domestic law.<sup>49</sup>

5.2 The author reiterates that the death penalty was abolished and subsequently reintroduced in the Philippines. He also argues that he was not found guilty of a "most serious crime", since the Supreme Court did not find that the author either committed, was complicit in or even anticipated that Marijoy Chiong would be pushed into a ravine. He submits that on the basis of the facts accepted by the Supreme Court, he could have been convicted only of kidnapping, false imprisonment and rape, which do not constitute "most serious crimes" for the purposes of article 6, paragraph 2.

5.3 The author reiterates that the mandatory imposition of the death sentence constitutes a violation of article 6 of the Covenant. He also argues that it violates the prohibition of cruel and unusual punishment in article 7.

5.4 On the State party's argument that the author had the same objective as his co-defendants to kidnap and detain the Chiong sisters and is thus guilty of conspiracy, he argues that there was no direct evidence of conspiracy and that neither the trial court, nor the Supreme Court found that he had any knowledge of the elements of the offence. He reiterates that there were serious procedural irregularities in his trial. In response to the claim that he dispensed with his testimony, he emphasises that he never agreed to do so and that the trial judge refused to hear it. With regard to the refusal to hear more defence witnesses, he recalls that more than twenty-two prosecution witnesses were allowed by the court to testify and corroborate the evidence given by the main prosecution witness, whereas the author's right to call those witnesses who would have corroborated his version of events was unfairly restricted.

5.5 With regard to the State party's suggestion that the Supreme Court was entitled to increase the penalty imposed by the trial court and even reverse its decision, the author argues that this is mistaken because an appeal to the Supreme Court is primarily for the protection of the accused. Under domestic law, the prosecution is not entitled to appeal an acquittal or sentence imposed by a trial court. Therefore, he insists that the principle of *ex officio reformatio in peius*, which is applied in many countries, was violated.

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<sup>49</sup> *Reclusion perpetua* means imprisonment for between 20 and 40 years, with a possibility of parole after 30 years, whereas life imprisonment means life without parole.

5.6 With regard to the State party's claim that delays were due to the author, he argues that delays were caused by the lack of judicial discipline, including long and unnecessary annual leave by the presiding judge. As for the claim that delay in the appeal proceedings was partly due to the fact that each defendant filed a separate appeal, he recalls that all appeals were consolidated.

## **Issues and proceedings before the Committee**

### **Consideration of admissibility**

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2(a), of the Optional Protocol.

6.3 The Committee notes that the State party has not raised any objections to the admissibility of the communication. On the basis of the material before it, it concludes that there are no obstacles to the admissibility of the communication, and declares it admissible.

### **Consideration of the merits**

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

7.2 The Committee notes from the judgments of both the trial Court and the Supreme Court, that the author was convicted of kidnapping and serious illegal detention with homicide and rape under article 267 of the Revised Penal Code which provides that "when the victim is killed or dies as a consequence of the detention or is raped [...], the maximum penalty shall be imposed". Thus, the death penalty was imposed automatically by the operation of article 267 of the Revised Penal Code. 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.<sup>50</sup> It follows that his rights under article 6, paragraph 1, of the Covenant were violated. At the same time, the Committee notes that the State party has adopted Republic Act No. 9346 prohibiting the imposition of death penalty in the Philippines.

7.3 The Committee has noted the arguments of the author that the reintroduction of the death penalty for "heinous crimes", as set out in Republic Act No. 7659, constitutes a

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<sup>50</sup> Communication No. 806/1998, *Thompson v. St. Vincent and The Grenadines*, Views adopted on 18 October 2000; Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002; and Communication No. 1077/2002, *Carpo v. The Philippines*, Views adopted on 28 March 2003.

violation of article 6 of the Covenant. In the light of the State party's recent repeal of the death penalty, the Committee considers that this claim is no longer a live issue and that it need not consider it in the circumstances of the case.

7.4 With regard to the allegation of a violation of the presumption of innocence, the author has pointed to a number of circumstances which he claims demonstrate that he did not benefit from this presumption. The Committee is cognizant that some States require that a defence of alibi must be raised by the defendant, and that a certain standard of proof must be met before the defence is cognizable. However, here, the trial judge did not show sufficient latitude in permitting the defendant to prove this defence, and in particular, excluded several witnesses offered in the alibi defence. A criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is for the prosecution to dispel any such doubt. In the present case, the trial judge put a number of leading questions to the prosecution which tend to justify the conclusion that the author was not presumed innocent until proven guilty. Moreover, incriminating evidence against a person provided by an accomplice charged with the same crime should, in the Committee's opinion, be treated cautiously, particularly where the accomplice was found to lie about his previous criminal convictions, was granted immunity from prosecution, and eventually admitted to raping one of the victims. In the present case, it considers that, despite all the issues mentioned above having been raised by the author, neither the trial court nor the Supreme Court addressed them appropriately. Concerning the public statements made by senior officials portraying the author as guilty, all of which were given very extensive media coverage, the Committee refers to its General Comment No.13 on article 14, where it stated that: 'it is, therefore, a duty for all public authorities to refrain from pre-judging the outcome of a trial'. In the present case, the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them, especially taking into account the repeated intimations to the trial judge that the author should be sentenced to death while the trial proceeded. Given the above circumstances, the Committee concludes that the author's trial did not respect the principle of presumption of innocence, in violation of article 14, paragraph 2.<sup>51</sup>

7.5 The Committee notes that the information before it reveals that the author's appointed counsel requested the court to allow him an adjournment, because he was unprepared to defend his client, since he had been appointed on 2 September 1998 and the trial resumed on 3 September 1998. Similarly, the author's chosen counsel also requested the court to allow him an adjournment, because he was unprepared to defend his client, since he made his first appearance in court in this case on 24 September 1998 and the trial resumed on 30 September 1998. The judge refused to grant the requests allegedly because the trial had to be terminated within sixty days. The Committee considers that in a capital case, when counsel for the defendant requests an adjournment because he was not given enough time to acquaint himself with the case, the court must ensure that the defendant is given an opportunity to prepare his defence. In the instant case, both the author's appointed and chosen counsel should have been

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<sup>51</sup> Communication No. 971/2001, *Arutyuniantz v. Uzbekistan*, Views adopted on 30 March 2005, para.6.4.

granted an adjournment. In the circumstances, the Committee finds a violation of article 14, paragraph 3 (b) and (d), of the Covenant.<sup>52</sup>

7.6 As to the author's representation before the trial court, the Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. In the instant case, it is uncontested that counsel was assigned to the author when his previous counsel was found guilty of contempt of court and jailed. From the material before the Committee, it is clear that the author did not wish his court-appointed counsel to represent him and requested an adjournment to hire a new counsel, which he had the means to do. In the circumstances, and bearing in mind that this is a case involving the death penalty, the trial court should have accepted the author's request for a different counsel, even if this entailed an adjournment of the proceedings. To the extent that the author was denied effective representation by counsel of his own choosing and that this issue was raised before the Supreme Court which failed to correct it, the requirements of article 14, paragraph 3(d), have not been met.<sup>53</sup>

7.7 Concerning the author's claim that there was no equality of arms because his right to cross-examine prosecution witnesses was restricted, the Committee notes that the cross-examination of the main prosecution witness was repeatedly cut short by the trial judge and prematurely terminated to avoid the possibility of harm to the witness (see para.2.5 above). The Committee also notes that the trial judge refused to hear the remaining defence witnesses. The court refused on the ground that the evidence was "irrelevant and immaterial" and because of time constraints. The Committee reaffirms that it is for the national courts to evaluate facts and evidence in a particular case. However, bearing in mind the seriousness of the charges involved in the present case, the Committee considers that the trial court's denial to hear the remaining defence witnesses without any further justification other than that the evidence was "irrelevant and immaterial" and the time constraints, while, at the same time, the number of witnesses for the prosecution was not similarly restricted, does not meet the requirements of article 14. In the above circumstances, the Committee concludes that there was a violation of article 14, paragraph 3(e), of the Covenant.

7.8 As to the author's claim that his rights were violated under article 14, in particular paragraphs 1 and 5, because 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.<sup>54</sup> However, in the present case, the Committee notes that whereas the author's appeal to the Supreme Court concerned the decision at first instance to find him guilty of kidnapping and serious illegal detention of Jacqueline Chiong, the Supreme Court found him guilty also of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong, a crime for which he had been acquitted at first instance and for

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<sup>52</sup> Communication No. 594/1992, *Philip v. Trinidad and Tobago*, Views adopted on 20 October 1998, para.7.2; and Communication No. 913/2000, *Chan v. Guyana*, Views adopted on 31 October 2005, para.6.3.

<sup>53</sup> Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990, para.12.5.

<sup>54</sup> Communication No. 536/93, *Perera v. Australia*, Views adopted on 28 March 1995, para.6.4; Communication No. 534/1993, *H.T.B. v. Canada*, Views adopted on 19 October 1993, para.4.3; and Communication No. 1110/2002, *Rolando v. The Philippines*, Views adopted on 3 November 2004, para.4.5.

which the prosecutor did not request any change of the sentence. The Supreme Court, which did not find it necessary to hear the parties orally, sentenced the author to death. The Committee considers that, as the Supreme Court in the present case, according to national law, had to examine the case as to the facts and the law, and in particular had to make a full assessment of the question of the author's guilt or innocence, it should have used its power to conduct hearings, as provided under national law, to ensure that the proceedings complied with the requirements of a fair trial as laid down in article 14, paragraph 1.<sup>55</sup> The Committee further notes that the Supreme Court found the author guilty of rape and homicide after he had been acquitted of the same crime at first instance. As a result, the author had no possibility to have the death sentence reviewed by a higher tribunal according to law, as required by article 14, paragraph 5.<sup>56</sup> The Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1 and 5, of the Covenant.

7.9 As to the author's claim that his rights were violated under article 14, paragraphs 1, because the trial court and the Supreme Court were not independent and impartial tribunals, the Committee notes that the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997. In the present case, the involvement of these judges in the preliminary proceedings was such as to allow them to form an opinion on the case prior to the trial and appeal proceedings. This knowledge is necessarily related to the charges against the author and the evaluation of those charges. Therefore, the involvement of these judges in these trial and appeal proceedings is incompatible with the requirement of impartiality in article 14, paragraph 1.

7.10 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. Nevertheless, it finds that the delay was caused by the authorities and that no substantial delay can be attributable to the author. In any case, the fact that the author appealed cannot be held against him. Article 14, paragraph 3(c), requires that all accused shall be entitled to be tried without undue delay, and the requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that a delay of seven years and ten months from the author's arrest in September 1997 to the final decision of the Supreme Court dismissing his motion for reconsideration in July 2005 is incompatible with the requirements of article 14, paragraph 3(c).<sup>57</sup>

7.11 With regard to the alleged violation of article 7, the Committee considers that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed,

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<sup>55</sup> Communication No. 387/1989, *Karttunen v. Finland*, Views adopted on 23 October 1992, para.7.3. See also European Court of Human Rights, *Ekbatani v. Sweden*, application no.10563/83, 26 May 1988, para.32.

<sup>56</sup> Communication No. 973/2001, *Khalilov v. Tajikistan*, Views adopted on 30 March 2005, para.7.5.

<sup>57</sup> Communication No. 390/1990, *Lubuto v. Zambia*, Views adopted on 31 October 1995, para.7.3.

as the Committee has previously observed<sup>58</sup>, the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.<sup>59</sup>

7.12 In the light of the finding in 7.11 above, the Committee need not consider whether, since the author's death sentence was affirmed upon conclusion of proceedings which did not meet the requirements of article 14, his rights under article 6 were also violated because of the imposition of the death penalty on him (see para.3.12 above). Nor does it consider it necessary to address the author's claim under article 9 (see para.3.14 above).

8. 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 before it reveal violations by the State party of article 6, paragraph 1; article 7; and article 14, paragraphs 1, 2, 3 (b), (c), (d), (e), 5, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including commutation of his death sentence and early consideration for release on parole. The State party is under an obligation to take measures to prevent similar violations in the future.

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 or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized 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 the Committee's Views. The State party 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 also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>58</sup> Communication No.588/1994, *Errol Johnson v. Jamaica*, Views adopted on 22 March 1996, paras.8.2 and 8.3.

<sup>59</sup> European Court of Human Rights, *Öcalan v. Turkey*, application no.43221/99, 12 May 2005, paras.167-175.

## APPENDIX

### **Individual opinion by Committee member Mr. Nisuke Ando**

1. Reference is made to my individual opinion in case *Carpo et al v. The Philippines* (Case No. 1077/2002).
2. I do not think it proper for the Committee to quote here a judgment of the European Court of Human Rights in footnote 59.

[signed] Nisuke Ando

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**Individual opinion by Committee member Ms. Ruth Wedgwood**

There is a lawyer's adage, of grave moral import, that "Death is different." When a capital penalty for a criminal act may be pronounced on a defendant, every trial court and appellate court bears an especially weighty obligation to assure that the adjudicative process has been fair. In the present case, the trial conducted by the Philippines' Special Heinous Crimes Court and the review by the Philippines' Supreme Court involved a number of decisions that were taken without a wise latitude towards the defense.

Nonetheless, the opinion of the Human Rights Committee, in finding violations of the Covenant by the state party, offers a number of sweeping conclusions that are not adequately supported in its explication of the trial record. Were we appointed as the trial judges, we might decide an issue of case management in a different way. But we cannot find a violation of the Covenant on that basis alone. At a minimum, it is our obligation to show how, in the context of a particular trial and its development of the facts, the matter violated a rule of the Covenant.

For example, in paragraph 7.4, the Committee expresses concern about the admission of accomplice testimony and the use of leading questions, in the development of the state's case against the defendant for "kidnapping and serious illegal detention with homicide and rape." See paragraph 7.2. The Committee says that these two issues were not "addressed ... appropriately" and suggests that they contributed to a violation of the presumption of innocence, in violation of Article 14(2). But leading questions are permitted in many trial systems, and judges are often permitted to ask questions of witnesses. The Philippines judicial system entrusts fact-finding to the judge, and does not provide for a jury, so there is no issue of potentially influencing the views of a jury by the court's intervention. And if the issue is instead styled as sufficiency of the evidence, one is obliged to note the state's uncontested assertion that 25 other prosecution witnesses testified at trial, and physical evidence was offered, and that the witnesses included "disinterested" persons.

The Committee has also concluded, in paragraph 7.5, that the defendant's rights under Article 14(3)(b) and (d) of the Covenant were violated, because various requests for adjournments in the middle of the trial were denied by the trial judge. But the defendant was on trial with six co-defendants, and any delay granted to one defendant would also have affected the speedy trial rights of other defendants. Defendant's initial counsel could have preserved for appeal his complaint about the scope of cross-examination of the major accomplice, instead of refusing to participate further in the trial. The trial court gave the defendant a week to hire new counsel, or to rehire prior counsel, and thereafter appointed public defenders to conduct cross-examination of the prosecution witnesses. The author has not suggested, and the committee has not found, any way in which that cross-examination was inadequate. When the defendant hired new private counsel three weeks later, this counsel requested 20 to 30 days to review the case. But there are very few trial judges who would permit such an extended interruption of a *viva voce* trial, and the author has not offered any account of why such a lengthy period was required in preparing, or any avenue that new counsel failed to pursue in his defense. The judge set a deadline for counsel's decision whether to cross-examine prior prosecution witnesses, but this was a full eighteen days after his appointment. There has been no suggestion why this length of time was inadequate to get ready, such as, *inter alia*, any absence of written transcripts or other specific impediments.

As another example, the Committee asserts in paragraph 7.9 that the defendant's rights under Article 14(1) to a "competent, independent and impartial tribunal" were violated because "the trial judge and two Supreme Court judges were involved in the evaluation of the preliminary charges against the author in 1997." But many legal systems provide for preliminary proceedings in criminal cases, in which a defendant may contest issues concerning arrest, probable cause, and the rendering of charges for trial. The idea of prejudice in a judge usually refers to some extraneous matter that might bias him against a particular party. It does not refer to his review of the case in prior proceedings. Indeed, some court systems choose to assign any related criminal cases to the same judge, in order to benefit by the judge's familiarity with the issues. It would be radical, indeed, to suggest that because a judge had passed on an issue of bail or remand, or the adequacy of an indictment, that he was thereafter barred from any further participation in the case. There is no suggestion of why, in this particular case, there was any prejudice formed from the earlier judgments undertaken in prior professional review.

Nor has the Committee, in regard to this claim under Article 14(1), attempted to justify the departure from our settled jurisprudence. The Committee's opinion, at paragraph 7.9, footnote 21, cites our prior decision in *Collins v. Jamaica*, Communication No. 240/1987, Views adopted on 1 November 1991, and in particular, the concurring views of four members. But it is well to recall that the majority of the committee, in the *Collins* case, took the opposite view to that adopted by the Committee today. In the *Collins* case, a Magistrate had heard and granted an application for a change of venue for the conduct of a preliminary hearing in a criminal case, and allegedly remarked "as an aside, that if he were to try the author he would ensure that a capital sentence be pronounced." See *Collins v. Jamaica*, supra, paragraph 2.3. After a hung jury occurred in the initial trial of the case, the matter was set for retrial. The same Magistrate who made prejudicial remarks at the preliminary hearing, was remarkably assigned to hear the second trial of the merits.

Even on these aggravated facts, the Committee stated that "[a]fter careful consideration of the material before it, the Committee cannot conclude that the remark attributed to Justice G. [the magistrate] in the committal proceedings before the Portland Magistrates Court resulted in a denial of justice for [the defendant] during his re-trial ...", noting as well that defense counsel had concluded that "it was preferable to let the trial proceed." See *Collins v. Jamaica*, supra, paragraph 8.3. The separate opinion of four members of the Committee also noticed "[l]es remarques attribuées au Juge G.", although they noted as well that "Il appartient à l'Etat partie d'édicter et de faire appliquer les incompatibilités entre les différentes fonctions judiciaires."

The second case cited by the Committee is *Karttunen v. Finland*, Communication No. 387/1989, decided 23 October 1992, but it offers no greater support. In that criminal case, two lay judges sat on a panel of six, even though the judges were compromised by family relationships to two of the corporate complainants in the case. The state party forthrightly noted the impropriety of their selection as judges in this case, since they had a potential private interest. In this context, the Committee stated, in *Karttunen v. Finland*, paragraph 7.2, that "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." The Committee also noted in *Karttunen* that the judges should have been disqualified under Finnish law itself, and concluded that state law on disqualification should be enforced *proprio moto* by a court. See *Karttunen v. Finland*, paragraph 7.2. But the

Committee did not question the majority holding in *Collins v. Jamaica*. It is unclear why, in the instant case, the Committee has now dismissed its own jurisprudence.<sup>60</sup>

Finally, the Committee has taken this occasion to pronounce an innovative doctrine that any procedural irregularities in a capital trial, violating Article 14, will serve to transform the sentence itself into a violation of Article 7. The rationale offered is that a person wrongly convicted, in a procedurally imperfect trial, must suffer greater anguish than a defendant in a procedurally sound capital trial. To be sure, there is no doubt that the prospect of a death sentence is the occasion for anguish on the part of any defendant. But the Covenant did not abolish the death penalty. Within the Covenant itself, the commitments of Article 7 against “torture” or “cruel, inhuman or degrading or punishment” are profound, and should not be used as a redundant form of chastisement of states parties that have not chosen to abolish capital punishment.

The Committee’s cryptic statement that “the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7” is not supported by the cited case of *Errol Johnson v. Jamaica*, communication no. 588/1994, adopted 22 March 1996. The case of *Errol Johnson v. Jamaica* rather focuses on whether a prolonged presence on death row would itself constitute a form of inhuman treatment, and concludes that there is no set term of years to measure such an assertion.

Rather, the Committee’s abrupt holding seems to be an importation from the European Court of Human Rights, from the case of *Ocalan v. Turkey*, application no. 43221/99, 12 May 2005, paras. 167-175. But the Strasbourg court has argued that the wide consensus within the European Community on the abolition of the death penalty is itself justification for using a teleological mode of interpretation. See *Ocalan v. Turkey*, paras. 162-164. In contrast, the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, which came into force on 11 July 1991, currently is limited to 57 states parties and 7 additional signatories. This is a minority out of the 156 states parties and 6 signatories who have adhered to the Covenant itself. The conscientious views of members of the Committee concerning the death penalty do not supply a warrant for setting aside the treaty text and disregarding the consent of sovereign states. In any event, as the record of this case shows, the Philippines has now abolished capital punishment.<sup>61</sup>

[signed] Ruth Wedgwood

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<sup>60</sup> The author in this case has alleged that one of the judges on the Supreme Court of the Philippines had a wife who was a great-aunt of one of the victims of the crime. See Views of the Committee, paragraph 3.10. This would be an exceedingly troubling fact, and based on our decision in *Karttunen*, would be enough to find a violation of Article 14(1). But the State Party has asserted that the judge took no part in the proceedings “as indicated in the notation in the decision next to his name.” See Views of the Committee, paragraph 4.13. The Committee has not attempted to gainsay that assertion or to further clarify the record of the case.

<sup>61</sup> In regard to the Committee’s observations in paragraph 7.2, I would reference my separate opinion in *Carpo v. Philippines*, No. 1077/2002, 28 March 2003.

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