



International Covenant on Civil and Political Rights

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Views

Communication No. 1559/2007

Submitted by: Evangeline Hernandez (represented by Marie Hilao-Enriquez, from the Alliance for the Advancement of People's Rights - KARAPATAN)

Alleged victim: Benjaline Hernandez

State Party: The Philippines

Date of communication: 9 March 2006 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 7 May 2007 (not issued in document form)

Date of adoption of Views: 26 July 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Arbitrary execution of a human rights defender
<i>Substantive issues:</i>	Right to life; duty to investigate
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies, procedure of international investigation, abuse of the right of submission, non-substantiation
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 3; 6, paragraph 1; 7; 9, paragraph 1; 10, paragraph 1; 17; and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

On 26 July 2010, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1559/2007.

[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 (ninety-ninth session)

concerning

Communication No. 1559/2007**

Submitted by: Evangeline Hernandez (represented by Marie Hilao-Enriquez, from the Alliance for the Advancement of People's Rights - KARAPATAN)

Alleged victim: Benjaline Hernandez

State Party: The Philippines

Date of communication: 9 March 2006 (initial submission)

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

Meeting on 26 July 2010,

Having concluded its consideration of communication No. 1559/2007, submitted to the Human Rights Committee on behalf of Ms. Benjaline Hernandez 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:

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

1. The author of the communication is Ms. Evangeline Hernandez, who submits the communication on behalf of her daughter, Ms. Benjaline Hernandez, who died on 22 April 2003. She claims that her daughter was a victim of violations by the Philippines of her rights under article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the International Covenant on Civil and Political Rights.¹ She is represented by Ms. Marie Hilao-Enriquez, from the Alliance for the Advancement of People's Rights - KARAPATAN.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli, and Mr. Krister Thelin.

¹ The Covenant entered into force for the State party on 23 January 1986 and the Optional Protocol on 22 November 1989.

Facts as presented by the author

2.1 Ms. Benjaline Hernandez was the Deputy Secretary-General of KARAPATAN-Southern Mindanao Region, a human rights advocacy group, and also the Vice-President of the College Editor's Guild of the Philippines (CEGP), an alliance of school publications. She was conducting research on the impact of the peace process on the local community in Arakan, a province in Mindanao, when the incident occurred. On 5 April 2002, Ms. Hernandez and three local people were about to take their lunch when six paramilitaries from the Citizens Armed Force Geographical Unit (CAFGU), led by 7th Battalion (Airborne) M/Sgt. T., strafed the hut they were in. Four members of the militia were named by the author. All four members of KARAPATAN were shot, despite pleading for mercy. The autopsy disclosed, inter alia, that two bullets had been fired at Ms. Hernandez from close range and that she had been lying on her back when she was shot. There was an eyewitness to the incident.

2.2 The author's representatives filed a complaint against the security forces for violations of the Comprehensive Agreement to Respect Human Rights and International Humanitarian Law (CARHRIHL). The CARHRIHL, which took effect on 7 August 1998, was signed by the Government of the Philippines and the National Democratic Front of the Philippines as part of the peace negotiations. This case has not yet been discussed by the Joint Monitoring Committee, formed under the CARHRIHL. Since August 2004, the peace talks have been suspended.

2.3 The author acknowledges that domestic remedies have not been exhausted. She submits that the Department of Justice, "after a long time", filed "criminal informations" for murder against M/Sgt. T. and three others, who are members of CAFGU, before the Regional Trial Court of Kidapawan City, South Cotabato. According to the author, a junior military officer, who was the principle suspect, was not included in the charge. Despite the fact that bail is not normally granted in murder cases, it was granted in this case. Subpoenas for the attendance of military witnesses, as hostile witnesses for the prosecution, were disobeyed or ignored. The author argues that, although the case is ongoing, remedies have been unreasonably prolonged and will prove to be ineffective. It is argued that political killings continue in the State party, and that between 2001 and 2005 23 human rights defenders from KARAPATAN were killed by State security forces or by others under their control, inducement, acquiescence or tolerance. It is also claimed that 33 more have already been summarily executed in a similar fashion at the time of filing the communication. The author refers to reports from this Committee, Amnesty International, and the Asian Human Rights Commission to demonstrate the continuing impunity in the State party.

The complaint

3. The author claims a violation by the State party of article 2, paragraphs 1 and 3; article 6, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant.

State party's observations on admissibility and merits

4.1 On 8 August and 3 September 2007, the State party filed its observations on the admissibility and merits of the communication. On admissibility, the State party claims that the author has not exhausted all available domestic remedies and thus the case is inadmissible. The complaints filed for murder before the Philippine Commission on Human Rights and criminal actions before the Regional Trial Court in Kidapawan City, South Cotabato, are still pending and the State party denies that they have been unreasonably prolonged. M/Sgt. T. and "his men" are undergoing trial before the Regional Trial Court for the murder and it is still at the stage of receiving the prosecution's evidence. It refers to domestic case law, to the effect that the right to a trial without delay is only deemed

violated when the delay is “vexatious, capricious, and oppressive”.² It submits that remedies remain to be exhausted, and that if the author believes that the Supreme Court judge unlawfully neglected to act, she may file a petition for mandamus or an administrative case against the judge before the Supreme Court for delay. In addition, administrative charges could be brought against the military officials involved in the case with the Office of the Ombudsman, which could result in the removal from office or immediate suspension of the officials even while the case is pending.

4.2 In view of the above, the State party argues that the author has chosen not to pursue available domestic remedies due to impatience. Therefore, despite an acknowledgement that “the judicial system in the Philippines may not be ideal”, the State party contends that it is premature for the author to conclude that domestic remedies are ineffective.

4.3 As to the complaint for violations of the CARHRIHL, the State party submits that until guidelines are finalized between the GRP security forces and the National Democratic Front, such complaints cannot be considered under its complaints procedure. Such complaints are however transmitted to the appropriate government agency. It submits that these guidelines have not been finalized due to the breakdown in negotiations and points out that it was the National Democratic Front which withdrew from the negotiations in 2004.

4.4 The State party argues that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter is being examined by the Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country from 12-21 February 2007. It challenges the admissibility of the communication on grounds of abuse of the right of submission, as the author’s failure to wait until the end of ongoing domestic legal proceedings amounts to a refusal to recognize and respect the State party’s authority to investigate, prosecute and resolve criminal acts within its territorial jurisdiction. In the State party’s view, the author is trying to involve the international community in the handling of a case relating to the State party’s domestic criminal laws, which constitutes an undue interference with the State party’s domestic affairs. It also argues that the author has not sufficiently substantiated the alleged violations of the Covenant, and that as this case is pending before the Courts, discussion of it is sub judice.

4.5 On the merits, the State party submits that it actively pursues remedies concerning alleged extrajudicial killings, and refers to Administrative Order No. 157 of 21 August 2006 issued by President Macapagal-Arroyo, which creates an independent commission (the Melo Commission) to investigate the killings of media workers and activists. On 22 February 2007, the Melo Commission released its 86-page preliminary report, which is being studied by various branches of the Government. In addition, the Supreme Court of the Philippines has drafted guidelines for Special Courts, which will handle cases of alleged extrajudicial killings. The State party refers to the preliminary report by the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the Philippines, which recognizes that efforts have been made by the State party to fight extrajudicial killings (A/HRC/4/20/Add.3*, para. 4).

4.6 The State party contends that the communication fails to establish how the State party has violated the Covenant. It submits that the killing of Ms. Hernandez is not attributable to its armed forces or to the State but to individuals acting in their own interest. Nevertheless, it is doing its best to ensure that the fundamental rights and liberties of its citizens are respected. It recalls that if a State fails to investigate, prosecute or redress, private non-State acts in violation of fundamental rights, it is in effect aiding the

² *Gonzales v. Sandiganbayan*, 199 SCRA 298 (1991).

perpetrators of such violations for which it could be held responsible under international law. The establishment of the independent Melo Commission to investigate extrajudicial killings demonstrates the State party's resolve to respond to this problem.

4.7 The State party submits that it regrets the failure of human rights organizations to inform the Commission of the numbers of victims of extrajudicial killings and the reasons why they believe that the military is responsible for these killings. It regrets that these organizations refused to cooperate with investigations conducted by bodies created by the State party and instead invoked the Committee's authority.

Author's comments on the State party's observations

5.1 On 17 December 2007 and 2 February 2008, the author commented on the State party's submission. On the issue of exhaustion of domestic remedies, she reiterates that this requirement does not apply when remedies are unreasonably prolonged or ineffective. More than six years since the victim was murdered and two years since the communication was submitted to the Committee, the criminal case filed before the Regional Trial Court remains pending. According to the author, the defense only began to present its evidence in chief one month prior to this submission to the Committee, the proceedings to date have been delayed, despite the uncomplicated nature of this case, and judging by the events to date, the proceedings are likely to be even further delayed. As to the other remedies available against a judge acting unlawfully, the author considers this procedure another layer of bureaucracy which would prove ineffective.

5.2 The author submits that the circumstances of this case have been aggravated by other factors, including the transfer to different assignments and places of deployment of the alleged perpetrators of the crime. Thus, despite several attempts to summon the accused, they could not be found or produced in court in time. The author accuses the National Bureau of Investigation of being complicit in the failure of material witnesses to appear in court to give evidence despite their having been subpoenaed. As a result, only one of several accused military personnel (M/Sgt. T.) and a few paramilitary forces are standing trial and the military personnel are out on bail for a crime for which bail is not normally granted. Earlier in the proceedings, superior military officers allegedly involved in the victim's murder were exonerated for technical reasons, i.e. as they were not the immediate or direct superiors or in command of the low-ranking military and paramilitary forces who perpetrated the crime. Also the principal eyewitness to the killing has been "maligned and harassed"³ and his evidence may not be given the appropriate weight by the court mainly due to his anxiety and unfamiliarity with legal proceedings.

5.3 As to the guidelines drafted by the Supreme Court for the Special Courts to handle extrajudicial killing cases, the author submits that it is too early to establish whether such a positive initiative will effectively address the cases of extrajudicial killings in practice. In her view, this step falls short of correcting the multifarious failings and obstacles which cause such lengthy delays. The author highlights the continual pattern of consistent human rights violations, including extrajudicial killings, in the State party, which makes domestic remedies ineffective and meaningless. She adds that, despite the claims to the contrary by the State party, not a single perpetrator has been convicted.⁴

5.4 With respect to the claim by the State party that the communication is inadmissible, as it is being examined by another procedure of international investigation or settlement, the author considers it to be inapplicable to the present case. Firstly, the Special Rapporteur

³ No further information is provided on who was/is harassing this witness.

⁴ The author provides numerous reports from human rights NGOs and the United Nations to support these arguments.

on extrajudicial, summary or arbitrary executions has concluded his investigation and therefore the matter is no longer “being examined”. Secondly, the visit by a Special Rapporteur to the State party cannot be considered as an international procedure of investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.5 The author adds that the communication does not constitute an abuse of the right of submission. She states that the circumstances that give rise to such an abuse, like the deliberate submission of false information or excessive delay in filing a complaint, does not exist in this case. The author submits that she is not refusing to recognize the State party’s authority, but is claiming that domestic remedies are ineffective. With respect to the alleged lack of sufficient substantiation, the author refers to the extensive supporting documentation attached to her initial communication. On the argument that the case is sub judice, she submits that such an argument would preclude the taking of any acts, steps or procedures in the international arena and render them nugatory.

5.6 On the merits, the author questions what the State party has done to accelerate consideration of this case before the Regional Court. With respect to the Melo Commission, she notes that its preliminary report was released in February 2007, under much public pressure, but that the final report has still not been issued. The Melo Commission suffered from lack of credibility and had little power to conduct investigations. Furthermore, several months after the release of the preliminary report, the State party is still studying its recommendations. They invoke the final report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to the Philippines, which states that, “[t]he many measures that have been promulgated by the Government to respond to the problem of extrajudicial executions are encouraging. However, they have yet to succeed, and the extrajudicial executions continue” (A/HRC/8/3/Add.2, summary, p. 3).

5.7 The author alleges that it is clear from the presentation of the facts, as well as the supporting documents, that the perpetrators identified were members of the State party’s security forces i.e. CAFGU and the 7th Battalion (Airborne)/12th Special Forces Company of its Armed Forces. According to the author, the involvement of the State party has been attested to by various NGOs and the Commission on Human Rights itself recommended the filing of charges against the security forces for this murder.⁵ The author refers to the *Sarma* case,⁶ where the Committee held Sri Lanka responsible for the disappearance perpetrated by a corporal who abducted a victim, despite the State’s contention that the corporal acted beyond authority and without the knowledge of his superior officers.

5.8 On the argument that the “activists/militant” groups refused to cooperate with the authorities, the author submits that the executive branch, including the police, military and intelligence agencies, does not inspire any credibility or confidence from the victims, their families and human rights defenders. The author denies the claim that she has failed to participate, cooperate and engage with government agencies and submits that she does so to the extent that they are at least organizationally and formally distinct from the executive branch, including the Commission on Human Rights, the pertinent committees of its Congress and the courts.

⁵ The author provides the following to support her arguments: Reporters without Borders, in its address to the fifty-eighth session of the United Nations Commission on Human Rights in April 2002; Amnesty International 2003 Report, p. 200; Commission on Human Rights resolution dated 21 June 2002. This resolution was not provided and could not be found on the Commission website thus it is impossible to verify.

⁶ Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 Firstly, the State party argues that, by refusing to recognize the State party's authority to investigate, prosecute and resolve criminal acts within its jurisdiction and by involving the international community in a case concerning the State party's domestic laws, the author has abused her right of submission. The Committee recalls its jurisprudence in relation to article 3 of the Optional Protocol.⁷ In the absence of any valid reason offered as to why the present communication constitutes an abuse of right of submission, the Committee rejects the State party's argument, and finds that the case is not inadmissible on this ground.

6.3 Secondly, the Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to exhaust domestic remedies. The author concedes that domestic remedies have not yet been exhausted but claims that these remedies have been ineffective and unreasonably prolonged. The Committee refers to its case law, to the effect that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must both be effective and available, and must not be unreasonably prolonged. The victim's body was found in April 2002 and over eight years later, at the time of examination of this communication, it would appear that criminal proceedings initiated against the accused have not yet been finalized. In addition, the State party has not provided any reasons why this case could not have been considered more expeditiously, nor has it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case preventing its determination for over eight years. The Committee considers that, in the circumstances of the present case, domestic remedies have been unreasonably prolonged. The Committee accordingly finds that article 5, paragraph 2 (b), does not preclude it from considering the complaint.

6.4 The Committee also notes the State party's contention that the case is inadmissible because the subject matter of the communication is being or was examined by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the country in February 2007. However, the Committee recalls that fact-finding country visits by a Special Rapporteur do not constitute a "procedure of international investigation or settlement" within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.⁸ The Committee further recalls that the study of human rights problems in a country by a Special Rapporteur, although it might refer to or draw on information concerning individuals, could not be regarded as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. Accordingly, the Committee considers that the 2007 country visit by the Special Rapporteur on extrajudicial, summary or arbitrary executions, does not render the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.5 As regards the author's claims relating to article 2, paragraph 1; article 7; article 9, paragraph 1; article 10, paragraph 1; article 17; and article 26 of the Covenant, the

⁷ Communication No. 1560/2007, *Marcellana and Gumanoy v. the Philippines*, Views adopted on 30 October 2008.

⁸ Communications Nos. 146/1983 and 148/1983-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views of 4 April 1985, para. 9.1; No. 540/1993, *Laureano v. Peru*, Views of 25 March 1996, para. 7.1; and *Marcellana and Gumanoy* (note 7 above).

Committee observes that the author does not provide any explanation on how the victim's rights under these provisions were violated. The Committee considers that the author has not substantiated these claims, for purposes of admissibility and thus finds them inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the facts of the case give rise to issues under article 6, paragraph 1, read alone and in conjunction with article 2, paragraph 3, of the Covenant. In the absence of any other obstacles to the admissibility of these claims, the Committee considers them to be sufficiently substantiated, for purposes of admissibility.

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 by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the merits of the communication, the Committee notes that criminal proceedings, against several of the alleged perpetrators, have still not been finalized over eight years after the victim's death. It recalls its jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.⁹

7.3 The Committee notes that it is undisputed that the victim died as a consequence of her being shot by members of the paramilitaries from the Citizens Armed Force Geographical Unit (CAFGU), led by 7th Battalion (Airborne) M/Sgt T. The author referred to various incidents of political killings of human rights defenders, allegedly committed by the State party's security forces, or other groups under its control, inducement, or acquiescence (see para. 2.3 above). The State party denied that the killing of the author's daughter was attributable to its military organization, without advancing convincing evidence that M/Sgt T. from the 7th Battalion, against whom a criminal action is pending, was acting in his own interest. Nor did the State party submit convincing information on any effective measures it undertook, in compliance with its obligation to protect the right to life under article 6, paragraph 1, to prevent and refrain from arbitrary deprivation of life.¹⁰ The Committee, based on the material before it, finds that the State party is responsible for the death of Ms. Benjaline Hernandez, and concludes that there has been a violation of article 6, paragraph 1, of the Covenant, with regard to Ms. Benjaline Hernandez.¹¹

7.4 The Committee notes the State party's argument that the author is currently availing herself of domestic remedies. However, though over eight years have elapsed since the killing took place, the State party's authorities have, apart from the pending and overdue case against M/Sgt T. and a few others, neither prosecuted nor brought to justice anyone else in connection with these events. While the State party provides information on general initiatives in the State party, including the establishment of the Melo Commission and new guidelines for "Special Courts" designed to consider cases of alleged extrajudicial killings, it does not indicate how these initiatives will contribute to the efficient and effective finalization of this case. Nor does it explain the reasons for the lack of significant progress in this case before the courts. In fact, even basic information on the number of alleged perpetrators indicted has been omitted in the State party's submission. 7.5 Under article

⁹ Communication No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4 and *Marcellana and Gumanoy v. the Philippines* (note 7 above).

¹⁰ See, for example, communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, Views adopted on 30 October 2008, para. 9.4.

¹¹ See *ibid.*, para. 9.5, and communication No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

2, paragraph 3, of the Covenant, the State party has an obligation to ensure that remedies are effective. The Committee recalls that a State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when the remedies relied upon by the State party have been unreasonably prolonged.¹² For all of these reasons, the Committee also finds that the State party has violated article 2, paragraph 3, read in connection with article 6 of the Covenant.

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 the Committee reveal a violation by the Philippines of article 6, as well as a violation of article 2, paragraph 3, read in connection with article 6 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to take effective measures to ensure that the criminal proceedings are expeditiously completed, that all perpetrators are prosecuted, and that the author is granted full reparation, including adequate compensation. The State party should also take measures to ensure that such violations do not recur 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, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the 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.]

¹² Communication No. 1250/2004, *Rajapakse v. Sri Lanka*, Views adopted on 14 July 2006.