



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2536/2015*, **, ***

<i>Communication submitted by:</i>	Hadji Hamid Japalali (represented by counsel, the Free Legal Assistance Group)
<i>Alleged victims:</i>	Bakar Japalali and Carmen Baloyo-Japalali
<i>State party:</i>	Philippines
<i>Date of communication:</i>	1 September 2014
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 20 January 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	28 March 2019
<i>Subject matter:</i>	Extrajudicial execution by the military
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation of claims; incompatibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to life; right to an effective remedy; fair trial
<i>Articles of the Covenant:</i>	2 (3), 6 and 14 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Hadji Hamid Japalali, a national of the Philippines. He files his claim on his own behalf and on behalf of his deceased brother, Bakar Japalali, and his brother's wife, Carmen Baloyo-Japalali, also deceased, both of whom were also nationals of the Philippines. The author claims that Mr. Japalali and Ms. Baloyo-Japalali were victims of a violation of article 6 of the Covenant, and that he himself was a victim of a violation of article 2 (3), read in conjunction with article 14 (1), of the

* Adopted by the Committee at its 125th session (4–29 March 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

*** An individual opinion by Committee member Gentian Zyberi (concurring) is annexed to the present Views.



Covenant. The Optional Protocol entered into force for the State party on 22 November 1989. The author is represented by counsel.

Factual background

2.1 In the early morning of 8 September 2004, while they were sleeping at home, Mr. Japalali and his wife, Ms. Baloyo-Japalali, were repeatedly shot with rifles by eight members of the Philippine Army. The eight soldiers, who formed one of the four squads of a platoon of 32 soldiers deployed in a “strike operation”, were shooting at the house for 10 minutes. Ms. Baloyo-Japalali was shot in the back while she was lying on the stairs of the house, already wounded, calling for help. Two neighbours of the Japalalis, Rosalim Padama and Osmalic Ladia, came to the aid of Ms. Baloyo-Japalali. After being told by a soldier that they could take her to hospital, they picked her up, but the soldiers allegedly continued to shoot at them, hitting Ms. Baloyo-Japalali’s feet as the neighbours were carrying her away. Mr. Japalali died immediately during the shooting at the house, while Ms. Baloyo-Japalali died shortly after arriving at hospital.

2.2 On 21 September 2004, the Office of the City Prosecutor for Tagum City charged the eight members of the 44th Division of the Philippine Army, based in Mawab, Compostela Valley province, Mindanao, with two counts of homicide.

2.3 On 23 October 2013, Regional Trial Court Branch 31 at Tagum City, Davao del Norte, acquitted all the accused. While the Court found as a proven fact that the accused had caused the death of Mr. Japalali and Ms. Baloyo-Japalali, it considered that they had been acting on a lawful order issued by a superior. The Court applied article 11 of the Revised Penal Code of the Philippines, which sets out a list of “justifying circumstances”. Article 11 (6) of the Revised Code states: “The following do not incur any criminal liability: ... Any person who acts in obedience to an order issued by a superior for some lawful purpose.”

2.4 The Court noted that, in the given case, it was not disputed that an order had been issued by the accused persons’ immediate superior for a lawful purpose, namely to verify the presence of an armed group and engage them in combat, if necessary. In determining whether the subordinates had used lawful means to carry out the order, the Court noted the City Prosecutor’s position that the squad was armed with rifles and opened fire on a fragile shanty house without any provocation and without first verifying whether there was indeed an armed group inside. It appeared that the victims had been sleeping, as evidenced by Mr. Japalali’s corpse found lying in a mosquito net. However, the Court considered that other elements, including Mr. Japalali’s camouflage clothing and the presence of blood on the fold of the mosquito net, suggested that the scene may have been tampered with and the body moved inside the net, noting that the scene of the killing was not secured by the soldiers immediately after the shooting, but was only cordoned off by the investigating police who arrived on the scene two hours later. The Court further considered that the accused were “battle-hardened veterans” and therefore that it was probable that they were indeed fired at before they opened fire themselves. Moreover, the Court found it “mystifying” that the soldiers would have continued to shoot at Ms. Baloyo-Japalali, Mr. Ladia and Ms. Padama after allowing the latter two to pick up Ms. Baloyo-Japalali and take her to hospital. This point, together with the presence of empty shells at the crime scene for rifles that were not standard-issue army rifles, were the factors that “created a reasonable doubt in the mind of the Court” as to the liability of the accused. The Court therefore concluded that there was insufficient evidence to establish their guilt beyond reasonable doubt.

2.5 The author claims that there is no possible appeal against an acquittal decision under Philippine law, based on the prohibition of double jeopardy enshrined in the Constitution.¹ An appeal would therefore not have had any prospect of success.

¹ Article III (21) of the Constitution provides that: “No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.”

The complaint

3.1 The author claims that the victims' rights under article 6 were violated. Even if the orders were given by a superior, those orders were unlawful and the resulting deaths still amounted to arbitrary deprivation of life. He adds that an order from a superior officer may not be invoked as a justification for serious human rights violations such as extrajudicial executions.²

3.2 The author maintains that his rights under article 2 (3) of the Covenant were violated as he was left without an effective remedy to establish the truth about his relatives' deaths and to obtain justice and adequate reparation. Although he would have liked to appeal the acquittal decision, he is not allowed to do so under Philippine law.

3.3 The author alleges that his right to a fair and public hearing by a competent, independent and impartial tribunal was violated, as the trial court that rendered the acquittal decision found insufficient evidence to convict the soldiers, justifying their actions with the argument that they had obeyed a lawful order, even though such obedience can never justify serious human rights violations, such as extrajudicial execution in this case. The author claims that this constitutes a violation of article 2 (3), read in conjunction with article 14 (1), of the Covenant.

3.4 The author invites the Committee to request the State party to: (a) take effective and immediate steps to remedy the violations suffered by the victims, establish the truth, ensure justice and provide adequate reparation; and (b) ensure that similar violations do not occur in the future.

State party's observations on admissibility and the merits

4.1 In its observations dated 20 March 2015, the State party submits that, in the first week of September 2004, the 44th Division of the Philippine Army received information from the intelligence division about the presence of between 30 and 40 armed men belonging to the Southern Philippines Secessionist Groups, which had been seen within the vicinity of Sitio Talaba. An order was issued to the commanding officer of the Division to conduct a "strike operation" in the area. In the early morning of 8 September 2004, a platoon was dispatched to Sitio Talaba to verify the presence of an armed group and to engage in combat, if necessary. They surrounded two houses, including the Japalalis' house. An Army officer peeped through an open window and saw a man pointing a gun at him. As the officer ran back to the squad, shots were fired from the house. Having been directed to be vigilant and engage against the adversary if necessary, the whole squad fired back using their M16 Armalite rifles. Mr. Japalali was killed immediately, while Ms. Baloyo-Japalali died shortly after arriving at hospital. The State party notes that Mr. Japalali was an active member of the Moro National Liberation Front, which is a faction of the Southern Philippines Secessionist Groups.

4.2 The State party contends that the communication is inadmissible because the author has failed to exhaust all available domestic remedies. Although an acquittal judgment is final and not subject to appeal under Philippine law, based on the constitutional prohibition of double jeopardy, article VIII (1) of the Constitution does allow for judicial review of acquittal decisions in criminal cases.³ An acquittal judgment may be reviewed through a petition for certiorari under rule 65 of the Revised Rules of Court, which is a special civil action for cases where there has been a "lack or excess of jurisdiction".⁴ Such petitions do

² The author cites, in this regard, article 2 (3) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 6 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance, and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

³ Article VIII (1) of the Constitution establishes that: "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

⁴ Rule 65 (1) of the Revised Rules of Court, which concerns the petition for certiorari, states: "When any ... tribunal, ... board or ... officer exercising judicial or quasi-judicial functions ... has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or

not serve to re-examine the facts and evidence in criminal cases. Their function is merely to annul or modify the proceedings before a tribunal, board or office that acted without jurisdiction or with grave abuse of discretion amounting to excess or lack of jurisdiction. A “grave abuse of discretion” generally refers to capricious or whimsical exercise of judgment that is equivalent to lack of jurisdiction. An abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty imposed by law or to act in contemplation of law or in an arbitrary and despotic manner by reason of passion and hostility. No grave abuse of discretion may be attributed to a court simply because of its alleged misapplication of facts and evidence, or erroneous conclusions based on such evidence. Certiorari will be issued to correct errors of jurisdiction only, not errors or mistakes in the findings and conclusions of the trial court.

4.3 The State party alleges that another domestic remedy available to the author was to file a civil claim independently from the criminal prosecution of the offence. Article 29 of the new Civil Code clearly and expressly provides for a remedy for the plaintiff in cases where the defendant has been acquitted in a criminal prosecution on the grounds that his guilt has not been proven beyond reasonable doubt.

4.4 The State party also alleges that the author could have claimed compensation under the Act Creating a Board of Claims Under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes and for Other Purposes. This Act allows victims of violent crimes to request grants of up to 10,000 Philippine pesos (approximately \$190) to reimburse expenses incurred as a result of their injury, including medical and psychological expenses. Section 6 of the Act provides that, in the case of the death of a victim, the claim may be filed by his or her relatives.

4.5 The State party argues that the author tacitly seeks to have a final decision reopened, with a view to having the acquittal reviewed, reversed or annulled. The relief sought by the author is incompatible with article 14 (7) of the Covenant, which protects the accused against double jeopardy. This prohibition is also a constitutional safeguard under Philippine law, embodied in the principle of *non bis in idem*, the aim of which is to: (a) prevent the State from using its criminal procedure as an instrument of harassment to wear out the accused by a multitude of cases with accumulated trials; (b) preclude the State from successively retrying an acquitted defendant in the hope of securing a conviction; and (c) prevent the State from retrying a convicted defendant in the hope of securing a greater penalty. The interest in the finality-of-acquittal rule, which is confined exclusively to verdicts of not guilty, is understood as a need for “repose” or a desire to know the exact extent of one’s liability. After all, the burden of proof remains at all times upon the prosecution to establish the guilt of the accused beyond reasonable doubt. As has often been reiterated by the Supreme Court of the Philippines, “it would be better to set free ten men who might probably be guilty of the crime charged than to convict one innocent man for a crime he did not commit”.

4.6 The State party adds that rights under national law are created by the State and are subject to its sovereign authority to legislate and to interpret its legislation. The court’s interpretation of the substantive provisions of the Philippine law on homicide can no longer be assailed by operation of the principle of *res judicata*. The present communication should therefore be considered inadmissible, as it would be tantamount to double jeopardy.

4.7 On the merits, the State party notes that the Philippine legal system provides that, in criminal cases, where a constitutional presumption of innocence exists, due process guarantees require that a defendant cannot be found guilty unless the State has borne the burden of proving his or her guilt beyond reasonable doubt, after a lawful hearing where issues and evidence are assessed through the direct examination and cross-examination of witnesses. The reasonable doubt standard is indispensable to ensure certitude about the facts in question. This standard is also indispensable to ensure the community’s respect for criminal law in a free society.

excess of jurisdiction, and ... there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, ... a person aggrieved thereby may file a verified petition in the proper court, ... alleging the facts with certainty and ... praying that the judgment be rendered ... annulling or modifying the proceedings of such tribunal, board or officer”.

4.8 All the due process requirements were present in this case: the Regional Trial Court of Tagum City was vested with judicial power to consider the matter before it; its jurisdiction was lawfully acquired over the accused and the offence; the prosecution and the accused were given the opportunity to be heard; and the judgment was rendered upon a lawful hearing. All the accused were duly subjected to a comprehensive trial with private prosecutors under the direct control and supervision of the public prosecutor. The prosecution presented 12 witnesses, while the defence presented 10. All parties had the opportunity and time to present their evidence. The prosecution failed to establish the guilt of the accused beyond reasonable doubt, resulting in their acquittal. The State party cites the following elements leading to this result: (a) the accused were ordered by their superior to conduct an operation in response to reliable intelligence information that there were 30 to 40 armed men in the vicinity of the victims' residence; (b) during the operation, conducted in darkness and fog, the accused were fired at, resulting in an armed firefight with an unidentified armed group who were using firearms different from those used by the accused, as was revealed from the cartridges later found at the scene; (c) Mr. Japalali was identified by the author as an active member of the armed secessionist group, the Moro National Liberation Front; (d) Mr. Japalali was wearing a camouflage outfit at the time of his death, attire regularly worn by members of secessionist groups; (e) the prosecution did not dispute the intelligence information about the presence of suspected armed secessionist rebels or the lawfulness of the order for a strike operation; (f) the Court observed the pool of blood in front of Mr. Japalali's knees, which did not show any indication of belonging to his body – nor did the blood on the fold of the mosquito net – and the absence of bullet holes in the net; (g) the crime scene was contaminated or tampered with, as civilians were already present at the location before the police arrived; (h) testimony was given that Mr. Japalali's body was seen on the floor but not inside the mosquito net; (i) Mr. Japalali's brother, Talab, was seen coming in and out of the victims' house before the police arrived; and (j) the accused would not have engaged in a gunfight unless they were provoked or fired upon first.

4.9 The State party contends that the author is contesting the evaluation of facts and evidence and the application of domestic legislation by the State party's courts. It notes that there is no evidence that the proceedings before the Regional Trial Court were arbitrary or amounted to a denial of justice. While the author questions the competence, independence and impartiality of the tribunal that rendered the acquittal, he has failed to substantiate such serious allegations. On the contrary, the State party states that the proceedings were fair and free from any taint of irregularity. The author was afforded procedural and substantive due process. The private complainants in the criminal proceedings hired private counsel of their choice to act as private prosecutors, and were given ample opportunity to present witnesses and to cross-examine the witnesses of the defence. The author does not identify any irregularities in the proceedings but merely challenges the findings of the Court. However, the Committee is not an appellate tribunal for failed prosecutions and does not intervene in matters within the State's exclusive jurisdiction, particularly on the determination of the guilt or innocence of an accused. Doing so would impinge on the independence of the judiciary and violate Article 2 (7) of the Charter of the United Nations.

4.10 The State party contends that the actions of the army officers that resulted in the deaths of the victims were neither unlawful nor arbitrary and therefore did not violate article 6 of the Covenant. Mr. Japalali and Ms. Baloyo-Japalali were killed during a legitimate military strike operation. The order was given by a superior for a lawful purpose and using lawful means.

4.11 By failing to prove the guilt of the accused beyond reasonable doubt, the prosecution also failed to overcome the presumption of their innocence. In that context, it is not only the right of the accused but the court's constitutional duty to acquit them. The Regional Trial Court correctly served justice in favour of the accused's innocence.

4.12 The State party argues that a disappointed litigant who has been given full access to procedures within a State's legal system cannot ask for treatment different to that accorded to other citizens, since that would violate the right of all citizens to equal protection under the law.

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

5.1 On 5 November 2015, the author submitted that no effective remedies were available in his case. The petition for certiorari under rule 65 of the Revised Rules of Court is available, but allows as the only possible ground a grave abuse of discretion amounting to lack or excess of jurisdiction. Under this remedy, there is no opportunity to raise errors of law or of fact, as it is limited to issues of jurisdiction.

5.2 As to the State party's argument that the author could have filed a separate civil action claiming compensation for damages under article 29 of the new Civil Code, or that he could have claimed compensation under the Act Creating a Board of Claims, the author states that equating justice for arbitrary deprivation of life to monetary compensation is unacceptable.

5.3 The author states that the remedies available are ineffective and that the State party has a duty to provide him with an effective remedy for a violation of article 6 of the Covenant. He adds that the defendant's right not to be subject to double jeopardy should not be used to diminish the right of victims to an effective remedy for arbitrary deprivation of life.

5.4 The author states that the arbitrary deprivation of life is confirmed, in particular, by the facts that the victims were shot at while they were sleeping and that the army squad opened fire on the shanty house without any provocation and without first verifying that there was an armed group composed of 30 to 40 men within the vicinity. The victims did nothing to justify the heavy onslaught to which they were subjected.

Issues and proceedings before the Committee*Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

6.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted because the author failed to file a petition for certiorari under rule 65 of the Revised Rules of Court, and also because he failed to seek compensation either under article 29 of the new Civil Code, for a civil claim, or under the Act Creating a Board of Claims, for a grant for victims of violent crimes.

6.4 With regard to the petition for certiorari remedy, the Committee notes that, as was acknowledged by the State party, such a petition can be used only to challenge the jurisdiction of the trial court, and not to challenge the assessment of facts and evidence, or even review errors of law. The State party has acknowledged that the acquittal decision rendered by the Regional Trial Court of Tagum City was final, with no possibility of appeal. Against this background, the Committee considers that a remedy limited to challenging the jurisdiction of the trial court would have practically no chance of success in the present case and would not address the substance of the violations alleged before the Committee. The Committee therefore considers that a petition for certiorari would be ineffective for the purpose of the present communication.

6.5 As to civil remedies aimed at seeking compensation, the Committee recalls that compensation for offences as serious as those alleged in the present communication – namely, arbitrary deprivation of life – does not substitute for the obligation of State authorities to investigate and bring charges against alleged perpetrators.⁵ Consequently, the

⁵ See for example, *Maharjan v. Nepal* (CCPR/C/105/D/1863/2009), para. 7.6; *Benaziza v. Algeria* (CCPR/C/99/D/1588/2007), para. 8.3; and *Purna Maya v. Nepal* (CCPR/C/119/D/2245/2013), para. 11.6.

civil claim seeking compensation cannot itself be considered either as an effective remedy to address serious human rights violations or as a remedy that needs to be exhausted for the purposes of bringing a complaint before the Committee.⁶ Therefore, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.6 The Committee takes note of the State party's assertion that the author expects to have a criminal case reopened with the purpose of reversing an acquittal decision, which would be incompatible with article 14 (7) of the Covenant. The Committee observes, however, that the author has based his complaint on the alleged violation of his relatives' right to life and on the lack of an effective remedy, with due process guarantees, to address that serious violation. The Committee considers that determining whether the author's rights to an effective remedy may conflict with the provisions of article 14 (7) is a question that is intimately linked to the merits of the case and that should be examined as part of the consideration of the merits. The Committee therefore considers that the requirements of article 2 of the Optional Protocol have been met.

6.7 The Committee takes note of the author's claims based on article 14 (1) of the Covenant. However, the Committee recalls that article 14 (1) of the Covenant protects the rights of persons facing criminal charges or whose rights and obligations are being determined in a suit at law. The Committee notes that the author was not a party to the national criminal proceedings against the persons responsible for the death of the author's brother and sister-in-law. Therefore, the Committee considers that this claim is incompatible with the provisions of the Covenant and declares it inadmissible pursuant to article 3 of the Optional Protocol.

6.8 The Committee declares the communication admissible insofar as it appears to raise issues under articles 6 (1), read alone and in conjunction with article 2 (3), of the Covenant and proceeds with its consideration of the merits.

Consideration of the merits

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

7.2 The Committee notes the author's claim that Mr. Japalali and Ms. Baloyo-Japalali were arbitrarily deprived of their lives by members of the Philippine Army because, even if those members were obeying an order from a superior, such an order was unlawful and resulted in deaths that amounted to arbitrary deprivation of life. The Committee notes that the State party has acknowledged that the army officers in question repeatedly shot at the Japalalis' shanty house, causing their death. It also notes the State party's argument that this was done in the context of a strike operation following a lawful order issued by the officers' military superior, with the purpose of verifying the alleged presence of a group of armed secessionist rebels and eventually engaging them in combat, and that the order was lawfully implemented as the army squad in question was shot at before opening fire.

7.3 In its general comment No. 36 (2018) on the right to life, the Committee recalls that the right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation. It further recalls that article 6 (1) of the Covenant prohibits arbitrary deprivation of life and that, as a rule, deprivation of life is arbitrary if it is inconsistent with international law or domestic law. In the same general comment, the Committee goes on to recall that deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The use of potentially lethal force for law enforcement purposes is an

⁶ See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principles 19 to 23, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as full and effective reparation for gross violations of international human rights law.

extreme measure that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.

7.4 In the present case, the Committee notes the uncontested fact that Mr. Japalali was killed at home and Ms. Baloyo-Japalali died shortly after arriving at hospital as a result of repeated rifle shooting by a squad of eight soldiers. While the State party has argued that the operation responded to intelligence information indicating the alleged presence of 30 to 40 armed men in the surrounding area and that the squad was shot at before opening fire, the Committee observes that the State party has not provided any information about the actual presence of any armed person in or around the Japalalis' house, other than by merely stating that ammunition different than that used by the military was found on the floor of the house. However, from the information available to the Committee, no other person was found in the house at the time of the shooting or was identified in the context of the criminal proceedings, and no other information has been provided that would show that the victims themselves were carrying any weapons at the time of the events. The Committee notes that the State party has not provided specific information about any verification measures taken by the armed forces concerned before or during the execution of the strike operation in an area inhabited by civilians to ensure that the lethal force used was no more than necessary, particularly in view of the uncontested account of the repeated firing at the house for 10 minutes and the shooting of Ms. Baloyo-Japalali in the back while she was lying on the stairs of the house, already wounded, calling for help. Against this background, the Committee considers that the State party has failed to justify how the indiscriminate use of lethal force against the victims' house responded to an actual threat to a squad of eight heavily armed soldiers, much less that this was strictly necessary to protect life or prevent serious injury. Nor has the State party otherwise presented any information indicating that it fulfilled its obligation to protect the victims' lives during the operation. In the light of all of the above, the Committee finds that the State party has directly and arbitrarily deprived Mr. Japalali and Ms. Baloyo-Japalali of their lives, in violation of article 6 (1) of the Covenant.⁷

7.5 The Committee notes the author's claim that he had no effective remedy to obtain truth, justice and reparation for his relatives' death. In particular, he has argued that the trial court based its decision on the fact that the perpetrators obeyed lawful orders from a superior and executed those orders lawfully, and that he had no opportunity to appeal the resulting acquittal decision. The State party has argued that the author is contesting the evaluation of facts and evidence and the application of domestic law, which belongs to the national courts, and that reopening the proceedings that resulted in the acquittal decision would be contrary to the prohibition of double jeopardy enshrined in article 14 (7) of the Covenant, as well as in the Constitution.

7.6 In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality (para. 26). It also recalls, in its general comment No. 36, that investigations into allegations of violation of article 6 must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction.

7.7 The Committee observes that, in the case at hand, the eight soldiers were tried and found to have caused the deaths of Mr. Japalali and Ms. Baloyo-Japalali, but were then acquitted of the charges of homicide, on the grounds that they had obeyed lawful orders from a superior and that they had carried out those orders lawfully. In reaching this conclusion, the trial court considered that the perpetrators' guilt had not been proven beyond reasonable doubt in the light of some inconsistencies at the crime scene that had been described, and because of some contradictions in the witness accounts of the incident.

⁷ See, in this regard, *Mezine v. Algeria* (CCPR/C/106/D/1779/2008), para. 8.4; and *Bousseloub v. Algeria* (CCPR/C/111/D/1974/2010), para. 7.4.

7.8 However, the Committee notes that the State party has not provided any specific information indicating that sufficient measures were taken to establish whether the lethal force used in an area of civilian residence, which resulted in the arbitrary deprivation of life of the victims, was no more than necessary. The Committee also notes that the State party has not established that an effective investigation was undertaken into the decisions and actions that resulted in the arbitrary deprivation of life of the victims, and highlights in particular the reports that the scene of the killing was not sealed off until two hours after the fatal shooting.

7.9 In the light of the above and the Committee's finding that the State party arbitrarily deprived Mr. Japalali and Ms. Baloyo-Japalali of their lives, in violation of article 6 (1) of the Covenant, the Committee finds that the author was deprived of an effective remedy for establishing truth and justice regarding the State party's responsibility for the deaths of his relatives. The Committee concludes that the State party has violated the author's rights under article 2 (3), read in conjunction with article 6 (1), of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of article 6 (1) of the Covenant with regard to Mr. Japalali and Ms. Baloyo-Japalali and of article 2 (3), read in conjunction with article 6 (1), of the Covenant, with regard to the author.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to (a) conduct a thorough and effective investigation into the arbitrary deprivation of life of Mr. Japalali and Ms. Baloyo-Japalali by army soldiers; (b) provide the author and his family with detailed information about the results of this investigation; and (c) provide adequate compensation to the author. Notwithstanding the terms of article III (21) of the Constitution, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for serious human rights violations such as extrajudicial executions. The State party is also under an obligation 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 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

Annex

Individual opinion of Committee member Gentian Zyberi (concurring)

1. While I am in agreement with the conclusions of the Committee concerning the violation of article 6 (1) of the Covenant with regard to Bakar Japalali and Carmen Baloyo-Japalali, and of article 2 (3), read in conjunction with article 6 (1), of the Covenant, with regard to the author (para. 8), the purpose of this concurring opinion is to discuss briefly the applicability of the fundamental principles of international humanitarian law of precaution in attack, distinction and proportionality. In explaining the relationship of article 6 with other articles of the Covenant and other legal regimes in its general comment No. 36 (2018) on the right to life, the Committee notes that, like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. The case at hand arises from a military operation conducted in the context of a non-international armed conflict between the Philippine armed forces and the Moro National Liberation Front, which is a faction of the Southern Philippines Secessionist Groups. This military operation resulted in the killing of Mr. Japalali and Ms. Baloyo-Japalali (para. 2.1). The facts of the case reveal what is public knowledge, namely the existence of an armed conflict in the southern Philippines, which has been ongoing with varied levels of intensity since the 1970s. By the State's own admission, the Japalali couple were killed during a legitimate military strike operation (para. 4.10).

2. Notably, the Committee has pointed out that the State party has not provided specific information about any verification measures taken by the armed forces concerned in an area inhabited by civilians, before or during the execution of the strike operation, to ensure that the lethal force used was no more than necessary, particularly in view of the uncontested account of the repeated firing at the house for 10 minutes and the shooting of Ms. Baloyo-Japalali in the back while she was lying on the stairs of the house, already wounded, calling for help (para. 7.3).

Principles of precaution, distinction and proportionality

3. The verification measures referred to by the Committee (para. 7.3) relate to precautionary measures that any armed force must take to ensure that its military operations are directed only against lawful targets. International humanitarian law requires that, in the conduct of military operations, constant care be taken to spare civilians and civilian objects. In that spirit, the Committee's general comment No. 36 provides that practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant. In explaining the obligation incumbent on the part of States parties to provide specific information concerning military operations, general comment No. 36 provides that States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.

4. If circumstances permit, advance warning must be given for military operations that may affect the civilian population. No such warning, nor a reason why giving such warning would not have been possible, has been provided by the State party. Additionally, an attack must be cancelled if it becomes apparent that it is prohibited. Ms. Baloyo-Japalali was shot in the back while she was lying on the stairs of the house, already wounded, calling for help. These circumstances indicate a violation of the fundamental international humanitarian law

principles of precaution and distinction. Such serious failures by an armed unit of the Philippine Army engage the responsibility of the State with regard to article 6.

Investigation

5. Another important aspect of the case relates to the investigation of the circumstances concerning the use of force that resulted in the death of the Japalali couple. The scene of the killing was not secured by the soldiers immediately after the shooting, and was only cordoned off by the investigating police who arrived on the scene two hours after the shooting (paras. 2.4 and 7.8). General comment No. 36 provides that States parties must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards. The Committee has noted that the State party has not established that an effective investigation was undertaken into the decisions and actions that resulted in the arbitrary deprivation of life of the victims, highlighting in particular the reports that the scene of the killing was not sealed off until two hours after the fatal shooting (para. 7.8). Hence, I agree with the Committee's finding of a violation of the author's right to an effective remedy under article 2 (3), read in conjunction with article 6 (1), of the Covenant.
