



**Convention on the Elimination
of All Forms of Discrimination
against Women**

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**Committee on the Elimination of Discrimination
against Women**
Forty-sixth session
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Views

Communication No. 18/2008^{1*}

Submitted by:	Karen Tayag Vertido
Alleged victim:	The author
State party:	The Philippines
Date of the communication:	29 November 2007 (initial submission)
References:	Transmitted to the State party on 5 February 2008 (not issued in document form)
Date of adoption of decision:	16 July 2010

The Committee on the Elimination of Discrimination against Women,
established under article 17 of the Convention on the Elimination of All Forms of
Discrimination against Women,

Meeting on 16 July 2010,

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

¹ Ms. Nicole Ameline, Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Violet Tsisiga Awori, Ms. Barbara Evelyn Bailey, Ms. Meriem Belmihoub-Zerdani, Mr. Niklas Bruun, Ms. Saisuree Chutikul, Ms. Dorcas Coker-Appiah, Mr. Cornelis Flinterman, Ms. Naela Mohammed Gabr, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Indira Jaising, Ms. Soledad Murillo de la Vega, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Victoria Popescu, Ms. Zohra Rasekh, Ms. Dubravka Simonovic, Ms. Zou Xiaoqiao.

* The text of one individual opinion (concurring), signed by Yoko Hayashi, is included in the present document.

1. The author of the communication, dated 29 November 2007, is Karen Tayag Vertido, a Filipino national who claims to be a victim of discrimination against women within the meaning of article 1 of the Convention in relation to general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. She also claims that her rights under articles 2 (c), (d), (f) and 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women have been violated by the State party. The author is represented by counsel, Evalyn G. Ursua. The Convention and its Optional Protocol entered into force in the Philippines on 4 September 1981 and 12 February 2004, respectively.

Facts as presented by the author

2.1 The author is a Filipino woman who is now unemployed. She served as Executive Director of the Davao City Chamber of Commerce and Industry (“the Chamber”) in Davao City, the Philippines, when J. B. C. (“the accused”), at that time a former 60-year-old President of the Chamber, raped her. The rape took place on 29 March 1996.

2.2 The accused offered to take the author home, together with one of his friends, after a meeting of the Chamber on the night of 29 March 1996. When the author realized that Mr. C. intended to drop off his friend first, she told him that she would rather take a taxi because she was in a hurry to get home. Mr. C., however, did not allow her to take a taxi and sped away. Shortly after the accused dropped off his friend, he suddenly grabbed the author’s breast. This action caused her to lose her balance. While trying to regain her balance, the author felt something in the accused’s left-hand pocket that she thought was a gun. She tried to stop him from driving her anywhere other than to her home, but he very quickly drove the vehicle into a motel garage. The author refused to leave the car but the accused dragged her towards a room, at which point he let her go in order to unlock the door (the car was only three to four metres away from the motel room). The author ran inside to look for another exit, but found only a bathroom. She locked herself in the bathroom for a while in order to regain her composure and, as she could hear no sounds or movements outside, she went out to look for a telephone or another exit. She went back towards the room, hoping that the accused had left, but then saw him standing in the doorway, almost naked, with his back to her and apparently talking to someone. The accused felt her presence behind him, so he suddenly shut the door and turned towards her. The author became afraid that the accused was reaching for his gun. The accused pushed her onto the bed and forcibly pinned her down using his weight. The author could hardly breathe and pleaded with the accused to let her go. While pinned down, the author lost consciousness. When she regained consciousness, the accused was raping her. She tried to push him away by using her nails, while continuing to beg him to stop. But the accused persisted, telling her that he would take care of her, that he knew many people who could help her advance in her career. She finally succeeded in pushing him away and freeing herself by pulling his hair. After washing and dressing, the author took advantage of the accused’s state of undress to run out of the room towards the car, but could not manage to open it. The accused ran after her and told her that he would bring her home. He also told her to calm down.

2.3 On 30 March 1996, within 24 hours of being raped, the author underwent a medical and legal examination at the Davao City Medical Centre. A medical

certificate mentions the “alleged rape”, the time, date and place it was said to have occurred, as well as the name of the alleged perpetrator.

2.4 Within 48 hours of being raped, the author reported the incident to the police. On 1 April 1996, she filed a complaint in which she accused J. B. C. of raping her.

2.5 The case was initially dismissed for lack of probable cause by a panel of public prosecutors, which conducted a preliminary investigation. The author filed an appeal regarding the dismissal of her complaint with the Secretary of the Department of Justice, which reversed the dismissal and, on 24 October 1996, ordered that the accused be charged with rape. J. B. C. subsequently filed a motion for reconsideration, which was denied by the Secretary of Justice.

2.6 The information was filed in court on 7 November 1996 and the Court issued an arrest warrant for J. B. C. that same day. He was arrested more than 80 days later, after the chief of the Philippine National Police issued an order on national television directing the police to make the arrest within 72 hours.

2.7 The case remained at the trial court level from 1997 to 2005. The reasons for the prolonged trial included the fact that the trial court judge was changed several times and the accused filed several motions before the appellate courts. Three judges recused themselves from the case. The case was referred to Judge Virginia Hofileña-Europa in September 2002.

2.8 At the trial, an expert in victimology and rape trauma, Dr. June Pagaduan Lopez, testified that having counselled the author for 18 months prior to her testifying in court, she had no doubt that the author was suffering from post-traumatic stress disorder as a result of a rape. She also testified that she was sure that the author had not fabricated her claim. She explained that the lack of physical injury in the author’s case was due to the fact that the incident was an “acquaintance or confidence rape” and because the common coping mechanism was dissociation. Asked by the accused’s defence counsel if fantasies of rape were common among women, she replied unequivocally that this was not true. Another psychiatrist, Dr. Pureza T. Oñate, also found that the author was suffering from post-traumatic stress disorder. A witness for the defence, a room boy from the motel where the rape took place, testified that he had not heard any shouts or commotion from the room. A motel security officer testified he had not received any reports of an incident on the night of 29 March 1996. The accused also testified, claiming that the sexual intercourse was consensual and that he and the author had been flirting for a long time before the alleged rape took place. The case was submitted for resolution in June 2004. Both parties submitted their respective memorandums.

2.9 On 26 April 2005, the Regional Court of Davao City, presided by Judge Virginia Hofileña-Europa, issued a verdict acquitting J. B. C.. In her decision, Judge Hofileña-Europa was guided by the following three principles, derived from previous case law of the Supreme Court: (a) it is easy to make an accusation of rape; it is difficult to prove but more difficult for the person accused, though innocent, to disprove; (b) in view of the intrinsic nature of the crime of rape, in which only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (c) the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence of the defence. The Court challenged the credibility of the author’s testimony. Although the Court allegedly took into account a Supreme Court ruling

according to which “the failure of the victim to try to escape does not negate the existence of rape”, it concluded that that ruling could not apply in this case, as the Court did not understand why the author had not escaped when she allegedly appeared to have had so many opportunities to do so. The Court found the allegations of the complainant as to the sexual act itself to be implausible. Guided by a Supreme Court ruling, the Court concluded that should the author really have fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties. It also concluded that the testimony of the accused was corroborated on some material points by the testimony of other witnesses (namely the motel room boy and the friend of the accused). The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction. Again applying the guiding principles derived from other case law in deciding rape cases, the Court therefore declared itself unconvinced that there existed sufficient evidence to erase all reasonable doubts that the accused committed the offence with which he was charged and acquitted him.

Complaint

3.1 The author argues that she suffered revictimization by the State party after she was raped. She refers to article 1 of the Convention in relation to general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women. She claims that by acquitting the perpetrator, the State party violated her right to non-discrimination and failed in its legal obligation to respect, protect, promote and fulfil that right. She further claims that the State party failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary. She submits that this shows the State party’s failure to comply with its obligation to address gender-based stereotypes that affect women, in particular those working in the legal system and in legal institutions. She further submits that the acquittal is also evidence of the failure of the State party to exercise due diligence in punishing acts of violence against women, in particular, rape.

3.2 The author argues that the defendant’s acquittal is a violation of the positive obligations of the State party under the following articles of the Convention: article 2 (c), “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”; article 2 (d), “to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”; and article 2 (f), “to take all appropriate measures ... to modify or abolish ... customs and practices which constitute discrimination against women”.

3.3 The author submits that the decision of acquittal is discriminatory within the meaning of article 1 of the Convention in relation to general recommendation No. 19, in that the decision was grounded in gender-based myths and misconceptions about rape and rape victims, and that it was rendered in bad faith, without basis in law or in fact.

3.4 The author alleges that the decision was grounded in gender-based myths and misconceptions about rape and rape victims in violation of article 5 (a) of the Convention, which requires States parties “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. She also refers to the specific comments in general recommendation No. 19 on articles 2 (f), 5 and 10 (c).

3.5 The author further alleges that in her case, the Court relied on the gender-based myths and stereotypes described below, without which the accused would have been convicted.

3.5.1 The first myth and stereotype is that a rape victim must try to escape at every opportunity. The author argues that the evidence of her trying to escape has been distorted in the decision and alleges that Judge Hofileña-Europa discriminated against her because she insisted on what she considered to be the rational and ideal response of a woman in a rape situation, that is, to take advantage of every opportunity to escape. She submits that such a demand requires the woman to actually succeed in defending herself, thereby eliminating even the possibility of the rape, and notes that according to the Supreme Court, the failure of the victim to try to escape does not negate the existence of rape. She claims that Judge Hofileña-Europa did not consider the expert testimonies of Dr. Lopez or Dr. Oñate, in which they explained that victims exhibit a wide range of behavioural responses when threatened with rape, as well as during and after the rape.

3.5.2 To be raped by means of intimidation, the victim must be timid or easily cowed is the second myth and stereotype challenged by the author. She argues that the Court perpetuated the stereotype of a rape victim, according to which women who are not timid or not easily cowed are less vulnerable to sexual attacks. She further submits that she found it difficult to understand the Court’s attention to her character, which is not an element of the crime of rape.

3.5.3 A third myth and stereotype challenged by the author is that to conclude that a rape occurred by means of threat, there must be clear evidence of a direct threat. The author submits that, instead of employing a context-sensitive assessment of the evidence and looking at the circumstances as a whole, the Court focused on the lack of the objective existence of a gun. The author also submits that according to case law and legal theory, it is the lack of consent, not the element of force, that is seen as the constituent element of the offence of rape. She further contends that the element of force or intimidation in Philippine rape law should be construed broadly so as to include other coercive circumstances in a manner consistent with the commentary to the Anti-Rape Law of 1997 (Republic Act No. 8353). More generally, the author alleges that requiring proof of physical force or the threat of physical force in all circumstances risks leaving certain types of rape unpunished and jeopardizes efforts to effectively protect women from sexual violence.

3.5.4 The fact that the accused and the victim are “more than nodding acquaintances” makes the sex consensual constitutes a fourth myth and stereotype. The author submits that it is a grave misconception that any relationship between the accused and the victim is valid proof of the victim’s consent to the sexual act.

3.5.5 A fifth myth and stereotype identified by the author is that when a rape victim reacts to the assault by resisting the attack and also by cowering in submission because of fear, it is problematic. The author submits that, contrary to the ruling issued by Judge Hofileña-Europa, there is no testimony indicating that she actually cowered in submission. She alleges that, on the contrary, she resisted as much as she could and that although there were moments when she dissociated, this did not negate her many verbal and physical expressions of lack of consent. She submits that she was perceived by the Court as not being “a timid woman who could be easily cowed”. She was deemed to have consented to the intercourse because she did not resist the advances of the accused and “she did not escape when she appeared to have had so many opportunities to do so”. She also submits that the Court unjustly imposes a standard of “normal” or “natural” behaviour on rape victims and discriminates against those who do not conform to these standards.

3.5.6 The rape victim could not have resisted the sexual attack if the accused were able to proceed to ejaculation is a sixth myth and stereotype. The author claims that whether or not the accused ejaculated is completely immaterial to a prosecution for rape, as it is not an element of the crime, does not prove that the intercourse was consensual and does not negate the resistance of the victim. She further claims that the statement of the Court perpetuates the false notion that rape is a crime of lust or passion associated with love and desire.

3.5.7 The Court relied on a seventh myth and stereotype, according to which it is unbelievable that a man in his sixties would be capable of rape. The author claims that, as a rape victim, she does not have the burden of proving the sexual prowess of the accused, which is not an element of the crime of rape but a matter of the defence. She further claims that should such a myth be applied to all accused men in their sixties, every case where a person would claim to have been raped by an old man would invariably result in the acquittal of the accused.

3.5.8 With regard to the myths embodied in the “guiding principles in deciding rape cases” which were followed by the judge in deciding her case (see para. 2.9 above), the author claims that an accusation of rape is not easy to make and that to say that a rape charge is more difficult for the accused to disprove is unwarranted. She further claims that this presumption unjustifiably and immediately places rape victims under suspicion.

3.6 The author alleges that the decision was rendered in bad faith, without basis in law or in fact. She alleges that distortions of evidence, as well as inconsistencies between the findings and conclusions of Judge Hofileña-Europa, led to the acquittal of the accused. She further alleges that Judge Hofileña-Europa, while citing all the Supreme Court doctrine that favours the rape victim, ruled without an evidentiary basis that they were not applicable to the author’s case. She submits that this legal manoeuvring under the pretence of fair reasoning amounts to bad faith and a gross disregard of the author’s rights. She refers to article 2 (c) of the Convention, by which a “competent tribunal” is required to ensure the effective protection of women against any act of discrimination. She also submits that a decision grounded in gender-based myths and misconceptions or one rendered in bad faith can hardly be considered as one rendered by a fair, impartial and competent tribunal.

3.7 The author argues that she had to endure eight years of litigation and that she and her family suffered immeasurably from the public coverage of the case. She was also forced to resign from her job as Executive Director of the Davao City Chamber

shortly after the rape and was told by her former employer that they had hired a man (paying him double her salary) to avoid a repetition of her case. She also alleges that she and her family had to move to escape the community, which became hostile to her because she dared to prosecute a wealthy and influential man. She further alleges that all of these factors aggravated the post-traumatic stress disorder from which she had been suffering as a direct result of the rape and that the State did not protect her and her family. She also maintains that her physical and mental integrity were affected, and prevented her from rebuilding her life. She was unable to find a job after her dismissal. Finally, she alleges that the discriminatory decision of Judge Hofileña-Europa revictimised her all over again, that she suffered from a lengthy bout of depression after the decision and that she needed quite some time to find the will and energy to even consider filing her communication.

3.8 The author argues that her case is not an isolated one and that it is one among many trial court decisions in rape cases that discriminate against women and perpetuate discriminatory beliefs about rape victims. She further argues that those insidious judgements violate the rights and freedoms of women, deny them equal protection under the law, deprive them of a just and effective remedy for the harm they suffered and continue to force them into a position subordinate to men. The author presents as examples seven decisions of trial courts from 1999 to 2007 illustrating the systematic discrimination that rape victims experience when they seek redress. From those seven cases, she drew the following similarities with her case:

(a) The “sweetheart defence” or a variation thereof, by which it is asserted that the sexual act is consensual because intimate or sexual relations existed or exist between the complainant and the accused;

(b) The Court’s appreciation of the complainant’s conduct before, during and after the alleged rape, with the main line of reasoning being that the complainant did not exhibit the “natural” reaction of a woman who claims to have been violated;

(c) The absence of injury, on the part of both the accused and the complainant;

(d) The nature, amount or severity, and the perceived effects of the force, threat or intimidation as applied to the complainant;

(e) The understanding of the concept of consent and how it is manifested or communicated.

3.9 The author submits that Philippine rape law and the way it has been interpreted by the Supreme Court is a collection of contradictions. She further submits that more than 25 years after the Philippines ratified the Convention, myths, misconceptions and discriminatory assumptions in jurisprudence continue to place rape victims at a legal disadvantage and significantly reduce their chances of obtaining redress for the violation they suffered. She explains that the reasons for the tremendously underreported number of rape cases include the fact that victims are afraid of the stigma that will most likely result from seeking justice, lack confidence in the legal process and often fail to obtain appropriate redress.

3.10 The author further alleges that because rape cases are subject to a rigorous screening process by law enforcement agencies and prosecutorial offices prior to reaching the judicial system, the dismissal by a court of a rape case grounded in

gender-based myths and misconceptions is the ultimate revictimization of the victim.

3.11 The author claims that Judge Hofileña-Europa and all judges responsible for deciding rape cases lack adequate training and therefore sufficient understanding of the dynamics of sexual abuse. She further claims that the legislative reforms, such as the penal code amendments on rape, as well as the protective measures put in place by Republic Act No. 8505, become insignificant, as the law still will not provide adequate and effective legal remedies for victims. While acknowledging and giving a very detailed account of all training undertaken by both the Philippine Judicial Academy and the Supreme Court Committee on Gender Responsiveness in the Judiciary, the author states that much still needs to be done, given the extent of the prejudice against the female victims of rape and other forms of sexual violence. This requires that training for the judiciary be specifically focused on sexual violence and rape. She alleges that no programmes are in place for training judges to hear cases of sexual violence or rape involving adults.

3.12 As to the exhaustion of domestic remedies, the author maintains that an acquittal puts an end to the process for the victim. She further submits that under Philippine law, she would be barred from filing any appeal against a judgement of acquittal because of the constitutional right of double jeopardy, which forbids a defendant from being tried twice for the same crime. Regarding the existence of an extraordinary remedy of certiorari under rule 65 of the Revised Rules of Court, which could be used in cases of acquittal under certain circumstances, the author argues that the requirements have not been met in the present case. Firstly, one must prove that the decision of the Court is null and void because an error in jurisdiction or one amounting to a lack of jurisdiction has occurred. Secondly, the remedy is available only to the people of the Philippines represented by the Office of the Solicitor General, but not to the victim herself. Thirdly, the Solicitor General should have used the remedy within 60 days of the date of the acquittal.

3.13 The author maintains that the matter has not been and is currently not being examined under any other international investigation or settlement procedure.

3.14 The author asks the Committee to find that she has been a victim of discrimination and that the State party has failed to fulfil its obligations under article 2 (c), (d) and (f) of the Convention. She also asks the Committee to recommend that the State party provide her with financial compensation in an amount proportionate to the physical, mental and social harm caused to her and to the seriousness of the violation of her rights, and to enable her to continue her therapy and other treatment.

3.15 She further asks that it be recommended to the State party's judiciary to investigate Judge Hofileña-Europa to determine the regularity of her actions in rendering the judgement of acquittal, to include in that investigation a review of her other judicial decisions and administrative actions as a former executive judge, and to develop a specific sexual violence education and training programme for trial court judges and public prosecutors designed to make them understand sexuality issues and the psychosocial effects of sexual violence, properly appreciate medical and other evidence, adopt an interdisciplinary approach in investigating and deciding cases, and rid them of myths and misconceptions about sexual violence and its victims. Such a programme should include a system to monitor and evaluate the effectiveness of such education and training on the judges and prosecutors

concerned; undertake a serious review of jurisprudential doctrines on rape and other forms of sexual violence with a view to abandoning those that are discriminatory or that violate the rights guaranteed by the Convention and other human rights conventions; establish monitoring of trial court decisions in cases of rape and other sexual offences to ensure their compliance with the proper standards in deciding cases and their consistency with the provisions of the Convention and other human rights conventions; compile and analyse data on the number of sexual violence cases filed in the prosecution offices and in the courts, the number of dismissals and the reasons for such dismissals; and provide for the right to appeal for rape victims when the perpetrator has been acquitted owing to discrimination against the victim on grounds of her sex.

3.16 The author also asks the Committee to recommend that the Congress of the State party review the laws against rape and other forms of sexual violence, including their enforcement and implementation by law enforcement and prosecutorial agencies and the courts in order to remove or amend the provisions of laws that lead to discriminatory practices and doctrines; clarify that rape is about the lack of consent of the victims; and provide adequate funds for the implementation of the Rape Victim Assistance and Protection Act of 1998 (Republic Act No. 8505), in particular its mandate to establish a rape crisis centre in every province and city to ensure that appropriate support services are available and accessible to victims of rape and other sexual violence.

3.17 Finally, the author also requests, in general, the respect, protection, promotion and fulfilment of women's human rights, including their right to be free from all forms of sexual violence; the exercise of due diligence in investigating, prosecuting and punishing all complaints of rape and other sexual violence; efforts to ensure that victims of sexual violence have effective access to justice, including free, competent and sensitive legal aid, where necessary, as well as to just and effective complaints procedures and remedies; efforts to ensure that victims of sexual violence and their families receive appropriate protective and support services; and efforts to seriously address graft and corruption in law enforcement agencies, prosecutorial offices and the judiciary to ensure that rape and other cases of sexual violence are not compromised or dismissed.

State party's submission on admissibility and merits

4.1 In its submission of 7 July 2008, the State party explains that a verdict of acquittal is immediately final and that a re-examination of the merits of such an acquittal would place the accused in jeopardy for the same offence. It further explains that a verdict of acquittal, however, may be nullified through a proper petition for certiorari to show grave abuse of discretion. The remedy of certiorari is provided under section 1, rule 65, of the Rules of Court.

4.2 The State party challenges the author's assertion that the extraordinary remedy of certiorari "is available only to the People of the Philippines as party plaintiff, represented by the Office of the Solicitor General, but not to the victim herself" and that "she may not file a petition for certiorari on her own or through her private counsel". It argues that the Supreme Court has admitted petitions for certiorari filed by an offended party pursuant to section 1, rule 65, of the Rules of Court. Thus, the

Supreme Court, in *People v. Calo, Jr.*,² citing the earlier case of *Paredes v. Gopengco*,³ held that “the offended parties in criminal cases have sufficient interest and personality as ‘person(s) aggrieved’ to file the special civil action of prohibition and certiorari under sections 1 and 2 of rule 65 in line with the underlying spirit of the liberal construction of the Rules of Court in order to promote their object”. The Supreme Court having, in a number of cases, relaxed the application of the provisions of the Rules of Court to better serve the ends of substantial justice, the State party submits that the author cannot claim that she has no legal remedy under Philippine law, as she is not prohibited from availing herself of the special remedy of certiorari.

Author’s comments on the State party’s observations on admissibility

5.1 In her submission of 26 September 2008, the author challenges the State party’s assertion that she could have availed herself of the special remedy of certiorari. With regard to the role of the victim in criminal cases, she argues that criminal cases are prosecuted in the name of the “People of the Philippines”, the offended party, who appears in court as the party plaintiff and that the victim’s role is limited to that of a witness for the prosecution. The interest of the victim, also called the “private complainant”, “private offended party” or “complaining witness”, is limited to the civil liability that is instituted in the criminal action. Therefore, the author deems the State party’s submission to be misleading, given that she has to pursue further processes after the accused has been acquitted on the merits of the case.

5.2 With regard to the exhaustion of domestic remedies, the author submits that the remedy of certiorari under rule 65 of the Rules of Court was neither available to her, nor likely to bring effective relief, assuming she could have availed herself of it. This remedy is not a matter of rights and is granted by judicial discretion only in rare cases. She cites numerous cases by the Supreme Court and draws from them the following strict requirements it applies, in addition to those already stated in the Rules of Court, to grant such a remedy: firstly, the petitioner must show that the recourse of appeal is not available, or that he or she has no plain, speedy or adequate remedy in the ordinary course of laws against his or her perceived grievances; and secondly, the sole office of the writ of certiorari is the correction of errors of jurisdiction, including the commission of a grave abuse of discretion amounting to a lack of jurisdiction and does not include correction of a public respondent’s evaluation of the evidence and factual finding thereon. Therefore, the petition for certiorari must be based on jurisdictional grounds, because as long as the respondent acted within jurisdiction, any error committed by him, her or it in the exercise thereof will amount to nothing more than an error of judgement, which may be reviewed or corrected only by appeal. A special civil action for certiorari will prosper only if grave abuse of discretion is manifested and, for the abuse to be grave, the power must be exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The 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 the duty

² *People v. Calo, Jr.*, 186 Supreme Court Reports Annotated 620 (1990).

³ *Paredes v. Gopengco*, 29 Supreme Court Reports Annotated 688 (1969).

enjoined or to act in contemplation of law. In the present case, the author argues that, while it may be true that she, as victim, could have filed a petition for certiorari, she would have had to show that the acquittal was not about errors of judgement but about errors of jurisdiction and that the constitutional prohibition against double jeopardy therefore did not constitute a bar to the remedy. But in the author's case, the sex discrimination that she suffered can be easily dismissed as an error of judgement. Given the right of the accused against double jeopardy, the Court would have most likely considered any error ascribed by the victim to the judge as simply an error of judgement. Moreover, the author argues that she would have had to surmount the doctrinal rule that factual findings of trial courts must be respected. Finally, she submits that she would have had to pay prohibitive docket fees for a petition for certiorari, as well as expenses for the cost of printing and reproducing the pleadings and voluminous attachments in the required number of copies. The author therefore concludes that the remedy of certiorari was hardly the "available" and "effective" remedy contemplated by article 4, paragraph 1, of the Optional Protocol.

5.3 Furthermore, the author submits that the two cases referred to by the State party to show that she could have availed herself of the remedy of certiorari do not apply to her situation. Those cases involved interlocutory orders, specifically an order denying a motion for inhibition and an order granting bail, not a final judgement of acquittal after a trial on the merits duly promulgated by the trial court, as in the author's case. Therefore, none of those cases can be successfully invoked to support the legal standing of the victim before the Supreme Court in an action for certiorari involving a judgement of acquittal.

5.4 The author adds that the Supreme Court has not rendered a decision that specifically recognizes the legal standing of a rape victim or any other offended party in a criminal case to file the special civil action of certiorari to reverse or nullify the acquittal of an accused after a trial on the merits of the case based on the evidence presented. In fact, she explains that in the case *People v. Dela Torre*, the Supreme Court held that "the prosecution cannot appeal a decision in a criminal case whether to reverse an acquittal or to increase the penalty imposed in a conviction" because it would violate the right of the accused against double jeopardy. It further stated, in an obiter dictum, that "the only way to nullify an acquittal or to increase the penalty is through a proper petition for certiorari to show grave abuse of discretion", but clarified that "if the petition, regardless of its nomenclature, merely calls for an ordinary review of the findings of the court *a quo*, the constitutional right against double jeopardy would be violated. Such recourse is tantamount to converting the petition for certiorari into an appeal, contrary to the express injunction of the Constitution, the Rules of Court and prevailing jurisprudence on double jeopardy".⁴ She submits that if she had filed a petition for certiorari, she would have asked the Court to conduct a "review of the findings of the court *a quo*" using the standards of human rights and sex discrimination.

5.5 The author submits also that it is the State's obligation to properly and effectively prosecute crimes and that it is most unfair and improper to place the burden of the proper and effective prosecution of crimes on the victim, and to expect from her, when it had failed at the trial court level because of sex

⁴ *People v. Dela Torre*, 380 Supreme Court Reports Annotated 596 (2002), referring to *People v. CA and Maquilang*, G.R. No. 128986, 21 June 1999.

discrimination, to pursue it all the way to the appellate court despite her lack of resources and the obstacles placed in her way by substantive and procedural law.

Issues and proceedings before the Committee concerning admissibility

6.1 During its forty-fourth session (20 July-7 August 2009), the Committee considered the admissibility of the communication in accordance with rules 64 and 66 of its rules of procedure. It ascertained that the matter had not already been or was being examined under another procedure of international investigation or settlement.

6.2 With regard to article 4, paragraph 1, of the Optional Protocol requiring the exhaustion of domestic remedies, the Committee noted that authors must use the remedies in the domestic legal system that are available to them and that would enable them to obtain redress for the alleged violations. The Committee considered that the crux of the author's complaints related to the alleged gender-based myths and stereotypes about rape and rape victims, which had been relied upon in the judgement of the trial court and which had led, apart from the acquittal of the accused, to her revictimization. It noted both the author and the State party's explanations, according to which a verdict of acquittal was immediately final and a re-examination of the merits of such acquittal would have placed the accused in jeopardy for the same offence. It also noted the State party's argument that the communication ought to be declared inadmissible under article 4, paragraph 1, of the Optional Protocol on the grounds of non-exhaustion of domestic remedies because the author had not availed herself of the special remedy of certiorari provided under section 1, rule 65, of the Rules of Court. The Committee noted the author's reply, in which she stated that the remedy of certiorari was not available to her, criminal cases being prosecuted in the Filipino criminal legal system in the name of the "People of the Philippines" and the remedy of certiorari being available only to the "People of the Philippines" represented by the Office of the Solicitor General, but not to the victim herself. It also noted the author's assertion that, even if she could have availed herself of such a remedy, the sole office of the writ of certiorari was the correction of errors of jurisdiction, not errors of judgement, and that the sex-based discrimination she had suffered and on which the author could have based her petition for certiorari would have most likely been considered as an error of judgement. The Committee further noted that the State party had not contested this assertion. In addition, it noted that the writ of certiorari was a civil remedy. The Committee therefore found that the remedy of certiorari was not available to the author.

6.3 The Committee considered that the author's allegations relating to articles 2 (c), (d), (f) and 5 (a) of the Convention had been sufficiently substantiated, for purposes of admissibility, and declared the communication admissible on 28 July 2009.

Comments from the State party on the merits

7.1 On 3 September 2009, following the transmission of the 28 July 2009 admissibility decision to the State party, the latter was requested to submit its written explanations or statements on the substance of the matter by 31 October 2009. Since no reply was received, a reminder was sent to the State party on

15 January 2010, inviting it to submit additional comments no later than 28 February 2010. On 1 July 2010, the State party submitted comments, in which it reiterated its previous observation, that the author still had a recourse in certiorari available. While it is classified as a special civil action under the Rules of the Court, such recourse is also available in criminal cases. Therefore, a petition for certiorari, in which the author would have argued that there was a grave abuse of discretion, amounting to lack or excess of jurisdiction in the proceedings, may have annulled the acquittal verdict of the accused.

7.2 Regarding the author's contention that the Supreme Court's interpretation of the Philippines Rape Law is a "collection of contradictions", the State party observed that the fact that the Supreme Court decisions vary from one case to another only proves that the Court carefully examines situations on a case-by-case basis, by appreciating available evidence, and in the light of specific scenarios and individual behaviour. According to the State party, such individualized and subjective appraisal by the Courts is consistent with the principle of the presumption of innocence. The State party contends that embracing the contentions of the author would result in a conviction of even innocent persons accused of rape. Finally, the State party noted that it would consider developing trainings on gender responsiveness for the judiciary.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

8.2 The Committee will consider the author's allegations that gender-based myths and misconceptions about rape and rape victims were relied on by Judge Hofileña-Europa in the Regional Court of Davao City in its decision, under article 335 of the Revised Penal Code of 1930, leading to the acquittal of the alleged perpetrator, and will determine whether this amounted to a violation of the rights of the author and a breach of the corresponding State party's obligations to end discrimination in the legal process under articles 2 (c), 2 (f) and 5 (a) of the Convention. The issues before the Committee are limited to the foregoing. The Committee emphasizes that it does not replace the domestic authorities in the assessment of the facts, nor does it decide on the alleged perpetrator's criminal responsibility. The Committee will also not address the question of whether the State party has breached its obligations under article 2 (d), which the Committee deems of less relevance in the case at hand.

8.3 With regard to the author's claim in relation to article 2 (c), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". The Committee notes the undisputed fact that the case remained at the trial court level from 1997 to 2005. It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

8.4 The Committee further reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. The Committee further recalls its general recommendation No. 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "... discrimination under the Convention is not restricted to action by or on behalf of Governments ..." and that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case.

8.5 The Committee notes that, under the doctrine of *stare decisis*, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the revised penal code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgement, the Committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgement and classified by the author (see paras. 3.5.1-3.5.8 above), the Committee, after a careful examination of the main points that determined the judgement, notes the following issues. First of all, the judgement refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have reacted before, during and after the rape owing to the circumstances and her character and personality. The judgement reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgement that the assessment of the credibility of the author's version of events

was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and “ideal victim” or what the judge considered to be the rational and ideal response of a woman in a rape situation as become clear from the following quotation from the judgement:

“Why then did she not try to get out of the car when the accused must have applied the brakes to avoid hitting the wall when she grabbed the steering wheel? Why did she not get out or even shout for help when the car must have slowed down before getting into the motel room’s garage? Why did she not stay in the bathroom after she had entered and locked it upon getting into the room? Why did she not shout for help when she heard the accused talking with someone? Why did she not run out of the motel’s garage when she claims she was able to run out of the hotel room because the accused was still **NAKED AND MASTURBATING**⁵ on the bed? Why did she agree to ride in the accused’s car **AFTER**⁶ he had allegedly raped her when he did not make any threats or use any force to coerce her into doing so?”

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim’s physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

8.6 Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgement, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of “gender-based myths and misconceptions”.

8.7 With regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code.⁷ It recalls its general recommendation No. 19 of 29 January

⁵ Capitalized as per judgement.

⁶ Idem.

⁷ Article 266-A of the Revised Penal Code of the Philippines. Rape: When And How Committed. Rape is committed:

1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
 - (a) Through force, threat, or intimidation;
 - (b) When the offended party is deprived of reason or otherwise unconscious;
 - (c) By means of fraudulent machination or grave abuse of authority; and
 - (d) When the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
2. By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal

1992 on violence against women, where it made clear, in paragraph 24 (b), that “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”. Through its consideration of States parties’ reports, the Committee has clarified time and again that rape constitutes a violation of women’s right to personal security and bodily integrity, and that its essential element was lack of consent.

8.8 The Committee finally would like to recognize that the author of the communication has suffered moral and social damage and prejudices, in particular by the excessive duration of the trial proceedings and by the revictimization through the stereotypes and gender-based myths relied upon in the judgement. The author has also suffered pecuniary damages due to the loss of her job.

8.9 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a) read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee, and makes the following recommendations to the State party:

- (a) Concerning the author of the communication
 - Provide appropriate compensation commensurate with the gravity of the violations of her rights
- (b) General
 - Take effective measures to ensure that court proceedings involving rape allegations are pursued without undue delay
 - Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions.. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:
 - (i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;
 - (ii) Remove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:
 - requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

orifice, or any instrument or object, into the genital or anal orifice of another person.

- requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.”⁸

(iii) Appropriate and regular training on the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol and its general recommendations, in particular general recommendation No. 19, for judges, lawyers and law enforcement personnel;

(iv) Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.

8.10 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee’s views and recommendations and to have them translated into the Filipino language and other recognized regional languages, as appropriate, and widely distributed in order to reach all relevant sectors of society.

⁸ Handbook for legislation on violence against women, Department of Economic and Social Affairs, Division for the Advancement of Women, United Nations Publication, New York, 2009, p. 27

**Individual opinion by Committee member Yoko Hayashi
(concurring)**

I would like to make a few additional observations in order to emphasize that I do not consider it the function of the Committee to decide upon the criminal responsibility of the accused in any given case nor in the present case (Please refer to Paragraph 8.2).

I acknowledge that the judicial tradition in the State party is respectful of the principles of presumption of innocence, the right of the accused against double jeopardy, and other fundamental principles which permeate its criminal justice system. These principles for which women and men have fought for in the past centuries are essential for the human rights of women to flourish.

Therefore, I would like to make it clear that I do not agree with the author's allegation that without the gender myths and stereotypes, the accused would have been convicted (Please refer to Paragraph 3.5). I do not consider it the task of the Committee to make such a judgment. The Committee is not equipped to examine the testimony of parties concerned, nor to evaluate the credibility of the accused or the author. Nor do I agree to the author's request that the Committee should address "graft and corruption in law enforcement agencies, prosecutorial offices and the judiciary" (Please refer to Paragraph 3.17), since I do not believe that these elements arise in the present case.

However, having closely reviewed the court decision in the present case rendered on April 11th, 2005 by the Regional Court of Davao City, I agree with part of allegations of the author, in that the court proceedings were materially delayed, and that the reasoning which led to the conclusion may have been influenced by the so-called rape myths.

Therefore, I have joined the adoption of the Committee's view to recommend that the State party review its rape law, including both the definition under its Criminal Code and its trial procedures, as well as to conduct gender-sensitive trainings for the legal profession.

In relation to the recommendation for monetary compensation (Please refer to Paragraph 8.9 (a)), it is my understanding that such a recommendation can be justified since the author has undergone lengthy legal proceedings to pursue her claim as a victim. However, I would like to clarify that the recommended monetary compensation does not include damages arising from the author's economic loss, nor from the court sentence that acquitted the accused. The author is entitled to receive compensation because of the undue delays in the proceedings and the reasoning used by the court in its decision which could potentially victimize the

author. However, the State party cannot be held accountable because its judiciary acquitted the accused.

While admiring the courage of the author who has pursued her case all the way to the Committee, as well as recognizing the potential the present case may have in universalizing rape laws, I nevertheless felt duty bound to append the present individual opinion.

(Signed) Yoko **Hayashi**
