

Memorandum on the Second Optional Protocol to the International Covenant on Civil and Political Rights and the 1987 Philippine Constitution

1. The International Commission of Jurists (ICJ) opposes the death penalty in all cases without exception. We believe that the death penalty constitutes a violation of the right to life and the right to be free from cruel, inhuman, or degrading punishment.
2. The ICJ believes that if the Philippines adopts a law that re-imposes the death penalty, it will be in direct violation of its international obligations. The Philippines is a State Party to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which aims at the abolition of the death penalty. It is obliged under this international instrument not to execute anyone within its jurisdiction.
3. This memorandum responds to the question whether or not the Second Optional Protocol is inconsistent with a provision in the 1987 Philippine Constitution that refers to a residual possibility for Congress to impose the death penalty on an exceptional basis for compelling reasons and only for heinous crimes.
4. The ICJ is of the opinion that the Second Optional Protocol is not inconsistent with the abovementioned Constitutional provision in any way that would affect the application or validity of the Second Optional Protocol as a matter of internal Philippines law.¹
5. Under Article III, Section 19, paragraph 1 of the 1987 Philippine Constitution, the general rule is that no death penalty may be imposed. An exception refers to a residual possibility that Congress may bring back death penalty "for compelling reasons involving heinous crimes." The language used in Article III, Section 19, paragraph 1 of the Constitution merely gives Congress the choice to impose the death penalty. This provision does not compel Congress to impose the death penalty, but only specifies that, as a matter of internal Philippine law, the Congress may have an option to pass such enactments under very specific circumstances.
6. Article I, paragraph 1 of the Second Optional Protocol provides that, "No one within the jurisdiction of a State Party to the present Protocol shall be executed." The language of this provision clearly prohibits the Philippines from carrying out the death penalty.
7. No inconsistency exists that could affect the internal application of the Second Optional Protocol because while the Constitution itself does not prohibit the Congress from enacting laws providing for the death penalty in certain narrowly-defined conditions and for certain offences, the Constitution does not

¹ Internal laws of any character do not, under article 27 of the Vienna Convention on the Law of Treaties, affect the international application or validity of treaties, so the question here is limited to internal Philippines law.

in any way or in any circumstances **compel** that Congress actually adopt such laws. As such, the Philippines can simultaneously comply with its Constitution and with the Second Optional Protocol without any conflict or inconsistency, simply by maintaining the current situation where no laws provide for the death penalty.

8. Upon ratifying the Second Optional Protocol in 2007, as with virtually any other treaty, the Philippines entered into an international obligation not to do something it might otherwise have had the option under its domestic laws to do. This is the very essence of treaty-making.
9. If, on the other hand, an approach were to be adopted whereby any treaty the Philippines enters into under which it promises not to do something the Constitution might otherwise permit it to do, were to be viewed as inconsistent with the Constitution in a way that negatively affects the obligation of the Government and institutions of Philippines to respect the treaty, the result would be fundamentally incompatible with the entire concept of treaty-making.
10. Treaty-making by its very essence involves States freely agreeing not to do what they otherwise might be permitted to do, in order to find compromises and agreements on which to achieve mutually binding obligations under international law.
11. To suddenly say that any treaty, in which the Philippines has agreed not to do something the Constitution might otherwise permit it to do, is now to be seen as inconsistent with the Constitution and so not to be treated as binding, would call into question virtually every treaty to which Philippines is party, across a wide range of subject-matters including commerce and trade, military arrangements, finances, and many other areas, which would have pernicious effects in many areas. It would directly contradict the most basic foundations of the international legal system, and would lead other countries to view the Philippines as virtually incapable of making a reliable international legal agreement.
12. The Philippines cannot withdraw from Second Optional Protocol. There is no denunciation or withdrawal clause in the Second Optional Protocol. In its General Comment No. 26, the UN Human Rights Committee explains that a denunciation clause was deliberately omitted because once the people are accorded the protection of the rights under this treaty, such protection continues to belong to them, notwithstanding changes in government, or any subsequent action of the State designed to divest the people of these rights.²
13. The ICJ notes further that the Philippines ratified in 1972 the Vienna Convention on the law of treaties, which states that "a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal." The only exceptions to this general rule are: (a) "it is established that the parties intended to admit the possibility of denunciation or withdrawal"; and (b) "a right of denunciation or withdrawal may be implied by the nature of the treaty."³ Neither of those arises here. Article 27 also provides that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

² CCPR General Comment No. 26: Continuity of Obligations, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4

³ Article 56 of the Vienna Convention on the Law of Treaties.