

A QUESTION OF OBLIGATION IN INTERNATIONAL  
LAW: A CASE STUDY ON THE PHILIPPINES’  
CYCLE OF INFATUATION AND AVERSION  
TO THE DEATH PENALTY

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I. INTRODUCTION

In his 1957 essay, *Reflections on the Guillotine*, Albert Camus asks the question: “what then is capital punishment but the most premeditated of murders?”<sup>1</sup> The abolition of the death penalty remains a contentious issue in international law. Put simply, it is sensible for a global community that universally upholds the right to life to be against a state’s ability to condemn its own citizen to death.<sup>2</sup> Merlin Magallona, formerly a professor at the University of the Philippines, went so far as to argue that the protection of the right to life against the death

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1. ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 131, 151 (Justin O’Brien trans., 1963).

2. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948).

penalty is considered an obligation *erga omnes*.<sup>3</sup> But this view is not universally shared.

As of 2022, the key international instrument on the abolition of the death penalty—the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR)—has only been ratified by ninety countries.<sup>4</sup> This is only about half of the 173 countries that ratified its “parent” instrument, the ICCPR.<sup>5</sup> Many reasons exist for this disparity. For the United States, the Fifth Amendment’s express reference to the concept of a capital crime arguably implies a constitutional recognition of the validity of capital punishment.<sup>6</sup> For China, its government has declared that abolition must proceed in pace with the respective stages of the development of a society.<sup>7</sup> For governments in the capital punishment hotspot of Southeast Asia, the narrative that the death penalty deters crime continues to resonate.<sup>8</sup> Amnesty International reports that 579 executions were carried out by eighteen different countries in 2021.<sup>9</sup>

There are also positive trends. The Malaysian government has recently expressed openness to introducing alternatives to the death penalty.<sup>10</sup> Over the past five years, the governments of Sao Tome and Principe (2017), Madagascar (2017), Gambia (2018), State of Palestine (2019), Angola (2019), and Ar-

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3. Merlin M. Magallona, *A Survey of Death Penalty in International Law*, 16 PHIL. Y.B. INT’L L. 46, 54-55 (2017).

4. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, at 207, Dec. 15, 1989, 44 UN GAOR Supp. (No. 49), UN Doc. A/44/49 [hereinafter U.N.T.C. CCPR-OP2].

5. International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

6. *Glossip v. Gross*, 576 U.S. 863, 894 (2015) (Scalia, J., concurring).

7. See Asma Jahangir (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Comm. Hum. Rts., On Its Sixtieth Session*, at 23, UN Doc. E/CN.4/2004/7/Add.1 (Mar. 24, 2004).

8. Kristen Han, *Southeast Asia’s death penalty needs regional consideration*, GLOBE (Aug. 2, 2022), <https://southeastasiaglobe.com/death-penalty-needs-regional-reconsideration/> (last visited Sept. 23, 2022).

9. Amnesty Int’l, *Death Penalty 2021: Facts and Figures*, (May 24, 2022).

10. *Malaysia government to introduce alternatives to death penalty*, CHANNEL NEWS ASIA (Sept. 14, 2022), <https://www.channelnewsasia.com/asia/malaysia-mandatory-death-penalty-government-replace-alternative-sentence-2936646>.

menia (2021) have ratified the Second Optional Protocol.<sup>11</sup> The promise of these ratifications lie in the fact that the Second Optional Protocol does not provide for a mechanism for withdrawal. Once a country ratifies the instrument, it is bound to comply with its international obligations (a) to not execute anyone within its jurisdiction and (b) to abolish the death penalty within its jurisdiction.<sup>12</sup> In the context of this greater international trend, the return of the Philippines' infatuation with the death penalty despite its ratification of the Second Optional Protocol in 2007 presents an interesting case study.

## II. THE PHILIPPINES & THE DEATH PENALTY: A TALE OF INFATUATION AND AVERSION

The Philippines is the only member of the ten-country Association of Southeast Asian Nations to have ratified the Second Optional Protocol.<sup>13</sup> Across Southeast Asia, Cambodia and Timor-Leste are the only other countries to have legislated against the death penalty.<sup>14</sup>

### A. *Death Penalty in the Philippines*

The context of the complex relationship between the Philippines and the death penalty can perhaps be traced to the Philippines' origins as a sovereign nation. In the closing years of the nineteenth century, the Philippines began a quest to break the colonial shackles set by Spain. Alarmed, the Spanish colonial government utilized "legal" mechanisms to execute a leading figure of the brewing Philippine revolution—the Philippine national hero, Jose Rizal.<sup>15</sup> Rizal was charged

11. U.N. Treaty Body Database, *Ratification Status for CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty*, OHCHR, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN) (last visited Sept. 23, 2022) [hereinafter OHCHR CCPR-OP2].

12. Second Optional Protocol to the International Covenant of Civil and Political Rights aiming at the abolition of the death penalty art. 1, Dec. 15, 1989, 1642 U.N.T.S. 414 [hereinafter Second Optional Protocol].

13. OHCHR CCPR-OP2, *supra* note 11.

14. Han, *supra* note 8, para 1.

15. See Miguel A. Bernad, *The Trial of Rizal*, 46 PHILIPPINE STUD. 46, 46-48 (1998) (describing the roles of the Spanish governors in the trial of Jose Rizal).

with the crimes of Rebellion and Illegal Association.<sup>16</sup> He was sentenced to death on December 28, 1896 and executed less than one month after the case against him was formally opened.<sup>17</sup>

However, the reliance on the death penalty was not exclusive to the Spanish colonial powers. Months after the execution of Rizal, the newly elected President of the revolutionary government, Emilio Aguinaldo, sentenced Andres Bonifacio—the founder of the *Katipunan* revolutionary movement and Aguinaldo's rival for the position—to death.<sup>18</sup> Bonifacio questioned the legality of the convention which elected Aguinaldo.<sup>19</sup> Based on Bonifacio's subsequent acts, he was charged with treason, brought to trial, convicted, sentenced to death, and executed on May 10, 1897.<sup>20</sup>

The signing of the Treaty of Paris on December 10, 1898 frustrated this quest for independence. Through this treaty, Spain agreed to cede the Philippine Islands to the United States in exchange for twenty million dollars.<sup>21</sup> Aligned with U.S. practices, capital punishment continued to be imposed in the Philippine Islands.

Since 1930, the Revised Penal Code of the Philippines (RPC), has recognized capital punishment for the following crimes: (a) treason;<sup>22</sup> (b) correspondence with a hostile country;<sup>23</sup> (c) qualified piracy;<sup>24</sup> (d) parricide;<sup>25</sup> (e) murder;<sup>26</sup> and (f) robbery with violence against or intimidation of persons.<sup>27</sup>

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16. *Id.* at 53-54.

17. *Id.* at 47-48.

18. ANDRES BONIFACIO, TRIAL OF ANDRES BONIFACIO: THE ORIGINAL DOCUMENTS IN TAGALOG TEXT AND ENGLISH TRANSLATION 18, 20-21 (Virginia Palma-Bonifacio trans., 1963) (describing the charge of treason and the conviction, sentencing and execution of Bonifacio); Glenn Anthony May, *Warfare by "Pulong" Bonifacio, Aguinaldo, and the Philippine Revolution Against Spain*, 55 PHILIPPINE STUD. 449, 450 (2007).

19. BONIFACIO, *supra* note 18, at 7; May, *supra* note 18, at 472.

20. BONIFACIO, *supra* note 18, at 20-21; May, *supra* note 18, at 450.

21. Treaty of Peace (Treaty of Paris), Spain-U.S., art. III, Dec. 10, 1898, 30 Stat. 1754.

22. REVISED PENAL CODE, Act No. 3815, art. 114, as amended (Phil.) [hereinafter RPC].

23. *Id.* art. 120.

24. *Id.* art. 123.

25. *Id.* art. 246.

26. *Id.* art. 248.

27. *Id.* art. 295.

Through amendments to the RPC, the following crimes were also made subject to capital punishment: (a) kidnapping and serious illegal detention;<sup>28</sup> (b) destructive arson;<sup>29</sup> (c) arson resulting in death;<sup>30</sup> and (d) rape, when committed (i) with the use of a deadly weapon, (ii) by two or more persons, (iii) when the victim has become insane, or (iv) when homicide is committed on the occasion of the rape.<sup>31</sup> Membership in the Communist Party of the Philippines was also once considered a capital crime under the Anti-Subversion Act,<sup>32</sup> which has since been repealed.<sup>33</sup>

Neither the 1935 nor the 1973 Constitutions of the Philippines imposed any restrictions to constrain the State's ability to impose the death penalty. During the regime of the dictator Ferdinand Marcos in the 1970s, his government introduced a series of law-and-order measures which expanded the scope of crimes punishable by death. This includes (a) hi-jacking an aircraft in flight;<sup>34</sup> (b) car-napping a motor vehicle, resulting in death;<sup>35</sup> (c) unlawful manufacture, sale, acquisition, disposition of explosives, or possession of firearms or ammunition, when resulting in death or when in connection with rebellion, insurrection or subversion;<sup>36</sup> (d) illegal fishing when resulting in the loss of human life;<sup>37</sup> and (e) drug related crimes which include (i) the sale, administration, delivery, distribution and transportation of drugs causing the death of a victim, (ii) maintenance of a den, dive, or resort for prohibited drug use,

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28. *Id.* art. 267.

29. *Id.* art. 320.

30. *Id.* art. 326-A.

31. *Id.* art. 335.

32. Anti-Subversion Act, Rep. Act No. 1700, § 4-5, 7, as amended (June 20, 1957) (Phil.).

33. An Act Repealing the Anti-Subversion Act, Rep. Act No. 7636, as amended (Sept. 22, 1992) (Phil.).

34. An Act Prohibiting Certain Acts Inimical to Civil Aviation, Rep. Act No. 6235, §§ 1-2, as amended (June 19, 1971) (Phil.).

35. Anti-Carnapping Act of 1972, Rep. Act No. 6539, § 14, as amended (Aug. 26, 1972) (Phil.).

36. Codifying the Laws of Firearms, Pres. Decree No. 1866, § 1 (June 29, 1983) (Phil.).

37. Amending Pres. Decree No. 704, Pres. Decree No. 1058 (Dec. 1, 1976) (Phil.).

causing the death of a person, and (iii) manufacture of prohibited drugs.<sup>38</sup>

Just four months after the dictator Marcos declared martial law, he ordered the increase of the penalty imposed on Lim Seng, a convicted drug lord.<sup>39</sup> Lim Seng would become the first execution by firing squad in the Philippines since its independence in 1946.<sup>40</sup>

After Marcos fled the country, the Philippines adopted a human-rights focused constitution in 1987. Section 11, Article II of the Constitution declares that “[t]he State values the dignity of every human person and guarantees full respect of human rights.”<sup>41</sup> Astoundingly, the Constitution then repealed the death penalty and commuted sentences, subject only to future action by Congress. Section 19(1) of the Bill of Rights states “Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. *Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.*”<sup>42</sup> With this provision, the Philippines made history as the first modern Asian nation to abolish the death penalty for all offenses.<sup>43</sup>

Yet just half a decade later, in 1993, the Philippines passed Republic Act No. 7659, which reinstated the death penalty for the following crimes: (a) treason; (b) qualified piracy; (c) qualified bribery; (d) parricide; (e) murder; (f) kidnapping and serious illegal detention; (g) robbery with violence or intimidation against persons; (h) destructive arson; (i) rape; (j) plunder; (k) various drug related offenses including mere possession of illegal drugs; and (l) car-napping.<sup>44</sup> However, while the death penalty was in effect from 1993 to 2006, only

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38. The Dangerous Drugs Act of 1972, Rep. Act No. 6425, §4-5, 7 (April 4, 1972) (Phil.).

39. *A Dealer in Heroin Executed by Manila*, N.Y. TIMES, Jan. 15, 1973, at 14.

40. *Id.*

41. CONST., (1987), art. II, § 11 (Phil.).

42. *Id.* art. III, § 19(1) (emphasis added).

43. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND DEATH PENALTY IN ASIA 112 (2009).

44. An Act to Impose the Death Penalty on Certain heinous Crimes, Rep. Act No. 7659, §§ 2-6, 8-17, 19 (Dec. 13, 1993) (Phil.).

seven executions were carried out by the government.<sup>45</sup> All of them occurred between 1998 and 2001.

With the overwhelming support of the Senate and the House of Representatives, President Gloria Arroyo passed Republic Act No. 9346 in June 2006, which once again abolished the death penalty.<sup>46</sup> Months later, the Philippine Secretary of Foreign Affairs signed the Second Optional Protocol on September 22, 2006 and the ratification instrument signed by the President was deposited with the United Nations on November 20, 2007.<sup>47</sup> Legally, the Philippines has abolished the death penalty as of 2006.

### B. *Motivations for Reintroduction*

In 2016, President Rodrigo Duterte swept into power on a populist wave promising an anti-criminality campaign that gave rise to a deadly war on drugs that has caught the attention of the international community.<sup>48</sup> From the beginning of his term, Duterte sought the reinstatement of the death penalty as a component of his war on drugs.<sup>49</sup> However, while Duterte succeeded in having his allies elected to Congress, he did not succeed in reinstating the death penalty during his term.<sup>50</sup> As the elections for Duterte's successor neared, Presi-

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45. JOHNSON & ZIMRING, *supra* note 43, at 107-8.

46. *Advisory on the Validity of the Philippines' Ratification of the Second Optional Protocol*, PHILIPPINE COMMISSION ON HUMAN RIGHTS (CHR) (V) A2020-017, at 2 (July 9, 2020), [http://chr.gov.ph/wp-content/uploads/2020/10/07082020\\_Advisory\\_on\\_Ratification-Death-Penalty.pdf](http://chr.gov.ph/wp-content/uploads/2020/10/07082020_Advisory_on_Ratification-Death-Penalty.pdf) (last visited Sep. 23, 2022) [hereinafter CHR Advisory].

47. *Id.*

48. Hannah Ellis-Petersen, *Philippines: mid-terms clear way for Duterte to reinstate death penalty*, GUARDIAN (May 22, 2019), <https://www.theguardian.com/world/2019/may/22/philippines-mid-terms-clear-way-for-duterte-to-reinstate-death-penalty>. For a timeline of the International Criminal Court's investigation into Duterte's war on drugs, see Jodesz Gavilan, *Timeline: The International Criminal Court and Duterte's bloody war on drugs*, RAPPLER (Jun. 26, 2022), <https://www.rappler.com/newsbreak/iq/timeline-international-criminal-court-philippines-rodrigo-duterte-drug-war/> (last visited Nov. 6, 2022).

49. Tiffany Ap, *Philippines' Duterte: I'll bring back the death penalty*, CNN (May 16, 2016), <https://www.cnn.com/2016/05/16/asia/philippines-duterte-death-penalty/index.html> (last visited Sep. 23, 2022).

50. See Ellis-Petersen, *supra* note 48 (describing the election of Duterte allies).

dential aspirants began withdrawing their support for the death penalty.<sup>51</sup>

Still, Duterte's anti-drug rhetoric remains influential on his allies in both houses of Congress. Of the five death penalty bills currently pending in Congress, the four bills with substantial provisions all seek to impose the death penalty on drug related offenses.<sup>52</sup>

### III. ATTEMPTS TO ESCAPE INTERNATIONAL OBLIGATIONS

How then does a country like the Philippines seek to reinstate the death penalty despite its ratification of the Second Optional Protocol?

#### A. *A Question of Ratification*

One strategy seeks to question the ratification of the Second Optional Protocol. In discussions during proposals to reintroduce the death penalty in 2017, one Senator raised the concern that the Second Optional Protocol was not ratified by the Senate, contrary to the constitution's rule that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the

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51. See, e.g., Bella Perez-Rubio, *Lacson, Sotto reverse long-standing support for death penalty*, PHILSTAR GLOBAL (Nov. 4, 2021), <https://www.philstar.com/headlines/2021/11/04/2139033/lacson-sotto-reverse-long-standing-support-death-penalty> (last visited Sep. 23, 2022); Aika Rey, *From being a staunch supporter of death penalty, Pacquiao says 'Not now'* RAPPLER (Jan. 27, 2022), <https://www.rappler.com/nation/elections/from-staunch-supporter-death-penalty-manny-pacquiao-says-not-now-january-2022/> (last visited Sep. 23, 2022).

52. Death Penalty for Large Scale Illegal Drug Trafficking, PHIL. S. 198, 19th Cong., 1st Sess. (2022); Death Penalty Law, PHIL. H. 501, 19th Cong., 1st Sess. (2022); An Act Re-Imposing the Death Penalty on Certain Crimes, Repealing for the Purpose Republic Act No. 9346 and for other purposes, PHIL. H. No. 1543, 19th Cong., 1st Session (2022); An Act Adopting The Higher Prescribed Penalty, Including Death, Of The National Law Of An Alien Found Guilty Of Trafficking Dangerous Drugs And Other Similar Substances, Amending For The Purpose Republic Act No. 9165, Otherwise Known As The "Comprehensive Dangerous Drugs Act, PHIL. H. 2459, 19th Cong., 1st Sess. (2022); Death Penalty Law, PHIL. H. 4121, 19TH CONG., 1ST SESS. (2022); See Raphael A. Pangalangan, *Reviving the death penalty*, INQUIRER.NET (Aug. 25, 2022), <https://opinion.inquirer.net/156364/reviving-the-death-penalty> (last visited Sep. 23, 2022) (explaining why House Bill No. 1543 does not contain any substantial provisions).

Senate.”<sup>53</sup> The argument is that since the Second Optional Protocol was not ratified, the Philippines would not be in breach of any international obligations should the death penalty be reinstated.

The Philippine Commission on Human Rights (CHR) has presented two views to address this argument. The first position, co-developed with Dr. Christopher Ward of the Australian National University, is that the Second Optional Protocol may be construed as an executive agreement which does not require senate concurrence.<sup>54</sup> The CHR argues that in the case of *Bayan Muna v. Romulo*, the Supreme Court recognized that “one type of executive agreement is a treaty-authorized or a treaty-implementing executive agreement, which necessarily would cover the same matters subject of the underlying treaty.”<sup>55</sup> Hence, it is argued that the Second Optional Protocol which further implements the ICCPR may be construed from the perspective of Philippine law as an executive agreement not requiring Senate concurrence.

The second argument raised by the CHR is that, even if the Second Optional Protocol is a treaty, the actions of the Philippine government point to its ratification. In *Pimentel v. Office of the Executive Secretary*, the Supreme Court found the ratification of a treaty is an executive act to be performed by the President:

under our Constitution, the power to ratify is vested in the President, subject to the concurrence of the Senate. The role of the Senate, however, is limited only to giving or withholding its consent, or concur-

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53. Jesse Diaz, *House eyes early vote on death penalty bill*, PHILIPPINE STAR (Feb. 18, 2017), [https://www.philstar.com/headlines/2017/02/18/1672686/house-eyes-early-vote-death-penalty-bill?fbclid=IWAR2C-V3j8FmmZF8xmPXsDFn90saPyls0CE28L2dy7QLoOLv0RyCgpD\\_kIoM](https://www.philstar.com/headlines/2017/02/18/1672686/house-eyes-early-vote-death-penalty-bill?fbclid=IWAR2C-V3j8FmmZF8xmPXsDFn90saPyls0CE28L2dy7QLoOLv0RyCgpD_kIoM) (last visited Sep. 23, 2022); CONST. *supra* note 41, art. VII, §21 (Phil.).

54. CHR & Christopher Ward, *In Defense of the Right to Life: International Law and Death Penalty in the Philippines*, at 7-9 (2017), 7-9, <https://regnet.anu.edu.au/sites/default/files/uploads/2017-03/In-Defense-of-the-Right-to-Life-IL-and-Death-Penalty-in-the-Philippines.pdf> (last visited Sep. 23, 2022). *See generally*, Intellectual Property Association v. Ochoa, G.R. No. 204605, 797 SCRA 134, 158-164, (Jul. 19, 2016) (Phil.) (finding that an executive agreement does not require senate concurrence to be valid and constitutional).

55. *Bayan Muna v. Romulo*, G.R. No. 159618, 641 SCRA 244, 262 (Feb. 1, 2011) (Phil.).

rence, to the ratification. Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it.<sup>56</sup>

It cannot be denied that the President ratified the Second Optional Protocol. As to the need for Senate consent or concurrence, it bears emphasizing that Congress had overwhelmingly supported the law abolishing the death penalty, with the support of sixteen votes in the Senate.<sup>57</sup> As former Senate President Franklin Drilon explains: “with the law which prohibited the imposition of death penalty, we are deemed to have ratified the second protocol.”<sup>58</sup> Hence, with the passage of Republic Act No. 9346, the Senate is deemed to have concurred in adopting the Second Optional Protocol, albeit in advance.

The question of ratification must also be examined from the perspective of international law. Under the Vienna Convention on the Law on Treaties (VCLT), “ratification” pertains to the international act “whereby a State establishes on the international plane its consent to be bound by a treaty[.]”<sup>59</sup> As noted by the CHR, there is no clear indication that the ratification of the Second Optional Protocol is void when tested against the standards of the VCLT.<sup>60</sup> None of the circumstances appear to have interfered with the Philippines’ act of ratifying the Second Optional Protocol. Taking a closer look at Article 46, it states:

*Provisions of internal law regarding competence to conclude treaties*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

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56. *Pimentel v. Office of the Executive Secretary*, G.R. No. 158088, 462 SCRA 622, 637-638 (Jul. 6, 2005) (Phil.).

57. CHR Advisory, *supra* note 46, at 4-5.

58. CHR Advisory, *supra* note 46, at 3.

59. Vienna Convention on the Law of Treaties arts. 2(1)(b), 11, 14, 16, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

60. CHR Advisory, *supra* note 46, at 5.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

To rely on an Article 46 exception, a state must demonstrate each of the necessary elements: (a) that a provision of its internal law was violated, (b) that the provision was fundamental, and (c) that it was “manifest.”<sup>61</sup> In light of the Philippine legislative history abolishing the death penalty both through the 1987 Constitution and Republic Act No. 9346, there may be no substantive basis to establish these elements. The Philippines also manifested its ratification of the Second Optional Protocol to the international community. In the National Report submitted to the U.N. General Assembly through the Human Rights Council on March 7, 2008, the Philippines declared:

104. International Covenant on Civil and Political Rights (ICCPR). [. . .] In testimony of its firm commitment to the value and sanctity of human life and in the belief that the defense of life is strengthened by eliminating the exercise of judicial authorization to take life, *the Philippines abolished the Death Penalty ratified the 2nd Optional Protocol of the International Covenant on Civil and Political rights (ICCPR)*.<sup>62</sup>

Thus, from the perspective of both domestic and international law, the Philippines has ratified the Second Optional Protocol.

### B. *A Question of Withdrawal*

Perhaps Duterte and his allies’ lack of regard for the Philippines’ international obligations under the Second Optional Protocol was emboldened by the Philippines’ withdrawal from the Rome Statute in 2019.<sup>63</sup> It must then also be explored if the Second Optional Protocol provides any way for the Philippines to withdraw.

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61. CHR & Ward, *supra* note 54, at 7.

62. U.N. Human Rights Council Res. 5/1, A/HRC/WG.6/1/PHL/1, ¶ 104 (Mar. 11, 2008) (Phil.) (Emphasis added).

63. Pangilinan v. Cayetano, G.R. No. 238875 (Mar. 16, 2021) (Phil.). The Rome Statute is the multilateral treaty which created an International Criminal Court and conferred upon it the jurisdiction to investigate, prosecute, and try individuals accused of international crimes identified in the treaty.

Unlike the Rome Statute,<sup>64</sup> the Second Optional Protocol has no mechanism for withdrawal. At most, a State Party can reintroduce the death penalty only within the limited confines of Article 2(1). Specifically, it is allowed only in cases where (a) a person is convicted for a most serious crime of a military nature committed during war time; and (b) the state imposing the death penalty made a reservation for this specific circumstance for imposing the death penalty at the time of ratification or accession.<sup>65</sup> Apart from this, the obligations imposed by the Second Optional Protocol are not subject to derogation.<sup>66</sup> Notably, the Philippines has made no reservation against the Protocol.<sup>67</sup>

The VCLT provides further guidance on how to approach a treaty in the absence of a provision for withdrawal. It states:

Article 56

*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*

1. 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* unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.<sup>68</sup> (Emphasis added)

There is no clear basis to establish any of the two exceptions under paragraph 1. In fact, the position of the U.N. Human Rights Committee has been categorical:

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64. Rome Statute of the International Criminal Court art. 127, July 17, 1998, 2187 U.N.T.S. 3.

65. Second Optional Protocol, *supra* note 12, art. 2(1). *See also* VCLT, *supra* note 59, art. 19.

66. Second Optional Protocol, *supra* note 12, art. 6(2).

67. U.N.T.C. CCPR-OP2, *supra* note 4; CHR Advisory, *supra* note 46, at 7.

68. VCLT, *supra* note 59, art. 56.

*States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it.* Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. *Abolition of the death penalty is therefore legally irrevocable.* Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before.<sup>69</sup>

Evidently, withdrawal is not a feasible option.

#### IV. CONCLUSION – A QUESTION OF INTERNATIONAL OBLIGATION

Resolving the questions of ratification and withdrawal lead to the conclusion that the Philippines is bound to retain the abolition of the death penalty pursuant to its international obligations under the Second Optional Protocol. Despite this, should lawmakers seek to proceed in legislating its reintroduction, they are urged to look at three perspectives.

First, from the perspective of international law, reintroduction cannot be done without breaching the Second Optional Protocol. It would violate the generally accepted principle of international law known as *pacta sunt servanda*, which preserves the sanctity of treaties by requiring that “[e]very treaty in force is binding upon the parties and it must be performed by them in good faith.”<sup>70</sup> As one commentator has pointed out, the return of the death penalty in breach of the Second Optional Protocol could erode the international com-

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69. U.N. Human Rights Committee General Comment No. 36, CCPR/C/GC/36, ¶ 34 (Sep. 3, 2019) (Emphasis added).

70. Pangilinan v. Cayetano, *supra* note 63, § XVII; VCLT, *supra* note 59, art. 26.

munity's confidence in the Philippines' ability to keep its word in relation to its other treaty obligations.<sup>71</sup>

This also leads into the second perspective of geopolitics and foreign relations. The Philippines has always taken pride in its role in adopting international human rights measures. At the High Level Segment of the United Nations Human Rights Council in 2008, Philippine Secretary of Foreign Affairs Alberto Romulo proudly declared that:

[t]he Philippines has made steady progress in upholding, protecting and promoting human rights[. . .] We abolished capital punishment and have joined a call for a moratorium on executions[. . .] The Philippines is one of the few countries to have ratified all seven core international human rights treaties[. . .] We also signed the Second Optional Protocol to the International Covenant on Civil and Political Rights.

We adhere to our international commitments on human rights.<sup>72</sup>

From a more practical point of view, the CHR has also warned of the risk that reinstating the death penalty may undermine the efforts of the Department of Foreign Affairs to negotiate with foreign governments on behalf of Filipino migrant workers who are facing death row abroad.<sup>73</sup>

Third, the perspective of Philippine domestic history should also give its lawmakers pause. The founding of the Philippine nation may be traced to a revolution set in motion by

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71. Xave Gregorio, *For lawmaker, no stopping death penalty revival even if Philippines is barred from doing so*, PHILSTAR GLOBAL (Aug. 23, 2022), <https://www.philstar.com/headlines/2022/08/23/2204575/lawmaker-no-stopping-death-penalty-revival-even-if-philippines-barred-doing-so> (last visited 23 Sep. 2022).

72. U.N. Human Rights Council, *Behind a Common Cause: Advancing with Resolve, Finding Strength*, in *Synergy*, Statement of Dr. Alberto G. Romulo, Secretary of Foreign Affairs, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session7/HLS/Philippines-E.pdf> (last visited 23 Sep. 2022). The Philippines has since signed 8 of the 9 core treaties, save for the International Convention for Protection of All Persons from Enforced Disappearances.

73. Gaea Katreena Cabico, *CHR: Restoring death penalty will likely hurt efforts to save OFWs on death row*, PHILSTAR GLOBAL (Aug. 5, 2020), <https://www.philstar.com/headlines/2020/08/05/2033101/chr-restoring-death-penalty-will-likely-hurt-efforts-save-ofws-death-row> (last visited Sep. 22, 2020).

the efforts of two patriots: Rizal and Bonifacio, both of whom were executed through capital punishment. Perhaps the first question that could be asked is: why does the country find value in a system that has allowed the government to condemn two of its best citizens to death?

Since then, the country has charted its own path. But what is clear from the domestic history is that the infatuation and aversion to the death penalty comes in cycles. Support for the measure waxes and wanes.

Is riding the current tide of infatuation worth breaching the country's international obligations when a wave of aversion may just be beyond the horizon? And finally, do lawmakers seek to be complicit with the State in the most premeditated of murders? These are all questions that the Philippines will have to address. Regardless, the Philippines shall remain bound to the Second Optional Protocol.