Delicti Jus Gentium: *A Limitation on the State's Power to Grant Amnesty*

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The exercise of the power to grant amnesty has often been prompted by political considerations. It has been used to quell rebellions, to suppress insurrections and, most of the time, to encourage reconciliation. The crimes covered by those amnesty grants were mostly political offenses or offenses committed in furtherance of political beliefs.

On May, 1994, Proclamation Nos. 347 and 348 were issued by the President and passed by Congress. These proclamations granted amnesty to members of the New People's Army and other subversive groups and to rebelious elements of the Armed Forces of the Philippines. The avowed purpose was to promote peace as the crimes covered by the grant were political in nature. There is no controversy as to the validity of these amnesty grants, since they fulfilled the procedural and substantial requirements set forth by the 1987 Constitution.

The provisions of Article II, § 2 of the 1987 Philippine Constitution, however, impliedly create substantial limitations on the power to grant amnesty. Under said provision, the Philippines "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

One such generally accepted principle is the protection of certain human rights, which may take various forms. One such form of protection is the enforcement of laws which seek to prosecute "international crimes", which are generally recognized as violative of universal human rights. Such crimes are called DELICTI JUS GENTIUM.

As such, Delicti Jus Gentium constitutes a limitation on the power to grant amnesty on two basic considerations: 1) customary international law requires states to prosecute violators of human rights; and 2) there are treaties, to which the Philippines is a signatory, which impose the duty and obligation on the signatories to prosecute international criminals.

This paper will show that the duty to prosecute Delicti Jus Gentium necessarily excludes the power to grant amnesty for such crimes. Moreover, by virtue of the Constitution's adoption of the generally accepted principles of international law, the Government is bound to accept this proposition: the duty to prosecute Delicti Jus Gentium is a limitation on the power to grant amnesty.

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Introduction

For his rule was not only absolute; it was also universal.

"And the stars obey you?"

"Certainly they do," the king said. "They obey instantly. I do not permit insubordination."

"I should like to see a sunset...Do me that kindness...Order the sun to set..."

"If I ordered a general to fly from one flower to another like a butterfly, or to write a tragic drama, or to change himself into a sea bird, and if the general did not carry out the order that he had received, which one of us would be in the wrong?" the king demanded. "The general or myself?"

"You," said the prince firmly.

"Exactly. One must require from each one the duty which each one can perform," the king went on. "Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable."

Excerpt from "The Little Prince"[1]

A State manifests its authority through the powers it possesses. Some powers of the State are inherent, such as the power of taxation, of eminent domain and of police power. On the other hand, nearly all the other powers of the State are granted to it by the sovereign people as enshrined in the Constitution. Among these powers is the power to grant executive clemency, particularly amnesty. The power to grant amnesty is a tacit admission that human institutions are imperfect and that there are infirmities in the administration of justice. The power, therefore, exists as an instrument for correcting these infirmities and for mitigating whatever harshness might be generated by a too strict interpretation of the law.[2]

Under the 1987 Constitution of the Philippines, it is expressly stated that:

> Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations and pardons, and remit fines and forfeitures, after conviction by final judgement.
>
> He shall also have the power to grant amnesty with the concurrence of a majority of all the members of Congress.[3]

From this Constitutional provision, it is clear that the power to grant amnesty involves both the Executive and the Legislative Branches of the Government. Thus, the abovecited Constitutional provision lays down certain limitations on the power to grant amnesty, to wit: (1) [a]mnesty cannot be exercised over cases of impeachment, or

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1 Antoine de Saint-Exupery, The Little Prince.

2 Joaquin Bernas, S.J., The Constitution of the Republic of the Philippines, A Commentary 238 (1988).

3 Philippine Const., art. VII, § 19.

over such other cases as may be provided in the Constitution; and (2) [a] grant of amnesty must be with the concurrence of a "majority of all the members of Congress."[4]

Another limitation on the grant of amnesty is found in the same Constitution, which states that: "[n]o pardon, amnesty, parole, or suspension of sentence for violation of election laws, rules, and regulations shall be granted by the President without the favorable recommendation of the Commission [on Elections]."[5]

The Bill of Rights is a guarantee that there are certain areas of a person's life, liberty, and property which governmental power may not touch.[6] The Philippine Government is powerful and when its powers are unlimited, it becomes tyrannical.[7] One such governmental power which may become unlimited is the power to grant amnesty. Any grant of amnesty must not violate the declaration of the Bill of Rights under Article III of the Philippine Constitution.[8]

Under the 1987 Constitution, it is generally the President who initiates the grant of amnesty and for the grant to be considered law, the concurrence of a majority of all the members of Congress is required. In cases of violations of election laws, the favorable recommendation of the Commission of Elections is required.[9]

In practice, the process of granting amnesty begins with the President issuing an amnesty proclamation. He then sends a copy thereof to each of the houses of Congress with a request for their concurrence. Thereupon, both houses hold deliberations on the proclamation. If they concur in the amnesty proclamation, the appropriate concurrent resolution is issued.

The phrase "majority of all the members of Congress" means, by congressional practice, the vote of both houses of Congress, voting separately on the resolution of concurrence, the majority determined from and among the membership of each house.[10]

Of course, both the President and Congress must be in agreement concerning the granting of amnesty, whether the proposal comes from Congress, in the form of a statute, or from the President, in the form of a presidential proclamation. Thus, any change or amendment coming from either the President or Congress must necessarily require the approval of the other.

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4 BERNAS, *supra* note 2, at 239.

5 PHILIPPINE CONST., art. IX, C, § 5 (1987).

6 JOAQUIN BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER 30 (1987).

7 *Id.*

8 There are 21 sections in art. 3 containing the different rights protected by the Constitution.

9 PHILIPPINE CONST., art. VII, § 19 and art. IX, C, § 5 (1987).

10 SAMUEL MATUNOG, THEORY AND PRACTICE OF AMNESTY IN THE PHILIPPINES 8 (1992).

Hence, to say that to amend a presidential proclamation declaring amnesty is to infringe on a purely executive prerogative is to ignore the character of shared authority in the power to grant amnesty.[11]

However, the shared authority in the power to grant amnesty refers specifically to the approval process of the amnesty proclamation and not to its enforcement. The duty of enforcement is vested solely in the Executive Department, which the Chief Executive normally delegates to an amnesty commission. An amnesty commission is created to receive, review and recommend the approval of applications for amnesty.[12] In *People v. Macadaeg*,[13] the Supreme Court described amnesty commissions as forming part of the Executive Department and stated that such commissions perform merely administrative functions.

The manner and procedure for granting amnesty is basically outlined in the Constitution. The procedure outlined must be complied with in order that an amnesty proclamation may be given effect. It is, therefore, safe to conclude that an amnesty proclamation is valid and binding as long as it is approved by both the Executive and the Legislative Branches of the Government, irrespective of the reason or wisdom behind the issuance thereof. Hence, the view has arisen that the power to grant amnesty is subject to no limitation other than those specified in the Constitution.

Examine, however, this hypothetical situation. Suppose that the Igorots,[14] out of sympathy to the members of the Armed Forces of the Philippines (AFP), reported to the AFP, every movement made by the New People's Army (NPA) in their area. In retaliation, the members of the NPA commit genocide against the Igorot cultural community. In order to promote peace and reconciliation between the government and the rebels, President Ramos, with the concurrence of Congress, desists from prosecuting the perpetrators and instead granted them amnesty.

The grant of amnesty was constitutionally and procedurally correct, but was it proper? Are there reasonable guidelines governing the grant of amnesty? What limitations on the power to grant amnesty are there, other than the Constitutional ones heretofore enumerated?

Take another case, this time on the international level. Assume that German Law had been followed strictly, the present Government of the Republic of Germany having granted amnesty to those Nazi officers who committed genocide against the Jews in Auschwitz during World War II. Would it be proper for the said government to do so? Should there be an international outcry against this governmental act of Germany, and if so, would the international community be justified?

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11 *Id.* at 9.

12 MATUNOG, *supra* note 10, at 9.

13 91 Phil. 410 (1952).

14 One of the indigenous tribes of the Cordillera mountain ranges in Northern Luzon.

These were the same questions asked in an actual case decided by the National Amnesty Commission on December of 1994. The case was that of Domingo Echaluce Baskinas, who, in 1971, hijacked a plane bound from Davao to Manila and diverted it to the People's Republic of China. Baskinas was subsequently granted amnesty without having been prosecuted or convicted for the crime of hijacking. Was there any legal basis for granting Baskinas amnesty? Or was a limitation overlooked in the granting of such?

An examination of these cases and the questions they elicit points to one problem: [p]rescinding from the fact that the power to grant amnesty is a power vested in both the Executive and Legislative branches of the government, is such a grant necessarily valid of legal? Or are there other limitations which must be observed in making such grant?

A. Purpose and Significance of the Study

There have been many grants of amnesty in the past and the reasons for their proclamation have been varied. Some have been issued to absolve the commission of common crimes, some have been used as means to quell rebellions, and others have been founded on various political reasons, such as reconciliation, national security, and peace and order. An example of such politically motivated amnesty grants are Proclamation Nos. 347 and 348.

Since the Spanish occupation, a total of not less than sixteen amnesty proclamations have been issued. Under the present Constitution, there are two procedural, as well as two substantive limitations on the power to grant amnesty. On the one hand, the procedural limitations refer to the need for congressional concurrence in general and the need for the Commission on Elections' favorable recommendation in cases of violation of election laws, rules, and regulations. On the other hand, the substantive limitations consist of the prohibition against granting amnesty in cases of impeachment, or as otherwise provided by the Constitution, and neither can the Commission on Elections derogate rights protected under the Bill of Rights. Aside from these, no other constitutional limitations exist, thereby leaving the grant of amnesty to the sound discretion and reason of the Executive and the Legislative Departments. The grant of amnesty, therefore, necessarily depends on their political wisdom.

This paper seeks to analyze the power to grant amnesty and to determine whether or not other substantive limitations upon that power exist. In this study's analysis, the writer will demonstrate that the power to grant amnesty is limited by principles of international law. This paper will show that amnesty can not be granted to perpetrators of international crimes, since the President is bound by his international duties to prosecute such offenders.

There are two reasons to support the foregoing conclusion. First, the international community is an aggrieved party whenever an international crime is committed; hence, it is such community which has the right to punish or to grant amnesty to the offenders and not merely the individual State. Although the individual state is also an aggrieved party in the commission of an international crime, international law should govern since, as will be shown in this paper, international law is superior to the national law of a state with respect to the treatment of international crimes. Secondly, the Philippine Government, as a signatory to a number of multilateral treaties which seek to prosecute and eventually punish perpetrators of international crimes, is bound to prosecute such offenders instead of granting them amnesty. Prosecution and amnesty are diametrically opposed to each other.

The significance of this study lies in the proponent's intention that this dissertation should serve as a guiding standard to the National Amnesty Commission in the granting of amnesty to rebels and soldiers and, in the process, hopefully contribute to the enrichment of jurisprudence concerning the granting of amnesty.

The crux of this study is embodied in its thesis statement: [a]mnesty cannot be granted in cases of *Delicti Jus Gentium*, otherwise known as crimes against the international community. This limitation on the power to grant amnesty will be shown by debunking the notion that such power is solely dependent on the political will and wisdom of the Legislative and Executive branches of government and by emphasizing the fact that the voice of the international community should also be taken into consideration before granting amnesty.

B. Scope and Limitations of the Study

The first part of this study will discuss amnesty as a constant means used by the State, for various political reasons, to obliterate the fact of commission of a crime and to avoid the punishment of the political offender. A survey of previous amnesty grants will illustrate this point.

The second part will show that this power to grant amnesty is limited by the fact that amnesty cannot be granted for the commission of international crimes. However, not all of the specific international crimes will be discussed at length in this paper as it would simply be impractical to set forth the twenty-two known international crimes. Instead, a general discussion on the nature and characteristics of international crimes and its effects on the power to grant amnesty will be made. The law on international crimes, as a limitation on the power to grant amnesty, will be shown to have legal and binding effect on States based on customary international law and treaty obligations.

Finally, the third part of this paper will apply the principles enunciated in the first two parts, to an actual case decided by the National Amnesty Commission in December of 1994. The case is that involving Domingo Echaluce Baskinas who committed the crime of hijacking in 1971 and who, in 1994, was granted amnesty by the National Amnesty Commission without having been prosecuted or punished for the crime.

I. THE PRESENT AMNESTY SYSTEM

A. The Basis for the Grant

The insurgency problem has plagued the Philippines for the last twenty years. Scores have died senselessly and hundreds in the forefront and in the sidelines have been wounded.

Implied in the provisions of the Philippine Constitution is the aspiration of the people for a just and lasting peace. The leadership of the mission for the attainment of such peace lies with the government, with the powers and functions necessary for the fulfillment of the task provided accordingly. Upon the Government is imposed the prime duty to serve and protect the people with the view that "[t]he maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy."

In the pursuit of these ideals, the Philippine government employs various means within the framework of its Constitution. One of such means often used, especially in the pursuit of a just and lasting peace, is the power to grant amnesty.

In his first State of the Nation address on 27 July 1992, President Fidel V. Ramos emphasized that the advancement of peace and reconciliation shall be among the priorities of his administration.

In the pursuit of such an agenda, the President created the National Unification Commission (NUC) through Proclamation No. 10-A on 28 July 1992. § 2 of said Proclamation reads as follows:

> Section 2. Establishment of the National Unification Commission. An advisory body, to be known as the National Unification Commission, hereinafter referred to as the Commission, is hereby created which will, through consultations with concerned sectors of society, including all rebel groups, as well as the Armed Forces of the Philippines and the Philippine National Police, recommend to the President of the Philippines within ninety (90) days from the effectivity of this Proclamation a viable general amnesty program and peace process that will lead to a just, comprehensive, and lasting peace. The Commission shall be composed of a Chairman and four (4) members to be designated by the President, and two (2) members each of both Houses of Congress as may be designated by the Senate President and the Speaker of the House of Representatives. The amount necessary for the operational and administrative expense of the Commission shall be provided by the Office of the President.

Since the grant of amnesty needs the concurrence of Congress, Concurrent Resolution No. 5 was passed by the Senate on 15 March 1993 and the House of

Representatives on 16 March 1993, approving Proclamation No. 10, which was later on amended by Proclamation No. 10-A.

The President subsequently issued Executive Order No. 19 (E.O. 19) on 1 September 1992 constituting the NUC and prescribing its authority and functions.

Under E.O. 19, the NUC is an *ad hoc* advisory body to the President, and tasked:

> a. To formulate and recommend, after consulting with the concerned sectors of society, to the President...a viable general amnesty program and peace process that will lead to a just, comprehensive, and lasting peace in the country.
> b. To review and evaluate the existing National Reconciliation and Development Program...with the view to integrating the program into the general amnesty program and peace process.

After nationwide consultations with various sectors, it was evident that there was a shared vision for peace — a peace that is not just the absence of armed conflict, but "an environment where individuals, communities, or peoples are able to fully develop their potentials and progress, freely exercising their rights with due regard for the rights of others, and equally mindful of their responsibilities" and "a state where there is no Government graft and corruption; where people are given their due; where there is growth, progress, and sustainable development; where there is alleviation of the poor living conditions of the people; and where justice, freedom, and truth reign."

Consequently, on 1 July 1993, the NUC presented to the President a report containing, among others, its proposed Comprehensive Peace Process which includes six "paths" to peace.

The first of such paths is the pursuit of social, economic, and political reforms that addresses the root causes of the armed conflicts. The most commonly expressed root causes in the NUC consultations were: (1) poverty and economic inequity, (2) poor governance, (3) acts of injustice or abuse, (4) structural inequity in our political system, and (5) exploitation and marginalization of the Indigenous Cultural Communities. Other issues of serious concern included protection of the environment and the counter-insurgency campaign.[15]

The second path is the process of building consensus and empowerment for peace. This means continued consultations for constructive exchange between Government and local communities, especially on issues with direct impact on the life of the community.[16]

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[15] Report of the NUC.

[16] *Id.*

The third path is the pursuit of a peaceful, negotiated settlement with the different rebel groups. Efforts must continue to be made to bring all groups to the negotiating table.[17]

The fourth is the establishment of programs for the honorable reconciliation and reintegration into mainstream society of former rebels. *This includes amnesty to respond to concerns for legal status and security, and a program of community-based economic assistance reconstituting the National Reconciliation and Development Program (NRDP), simplifying procedures and incorporating strict control measures. The proposed amnesty program presents twin measures, one to address rebels from all armed groups; the other, applicable to agents of the State charged with specific crimes in the course of counter-insurgency.*[18] (emphasis supplied)

The fifth path addresses concerns that arise out of continued armed hostilities despite attempts to seek a negotiated settlement. To ensure maximum protection and welfare of non-combatants in the midst of the fighting, four activities are proposed along this path: (1) suspension of local offensive military operations for fixed periods; (2) increasing the effectiveness of legal protection of non-combatants, primarily through a multi-track dissemination and information campaign; (3) intensified delivery of basic services, and (4) respect and recognition of "Peace Zones" as agreed upon by the concerned sectors of the community.[19]

The final path is that of nurturing a positive climate for peace, including confidence-building measures between Government and the rebel groups, and peace advocacy and education within the rest of society.[20]

The Report to the President also recommends that four structures necessary to pursue the comprehensive peace process be created. These are: a National Amnesty Commission, a Council to oversee the economic assistance component of national unification, three Government Peace Negotiating Panels, and the Office of the Presidential Adviser on the Peace Process. This last office shall be fully dedicated to the peace process. It shall function as a staff to the President in managing the day-to-day needs of peace processes. It shall assist the President in coordinating the functions of the first three bodies.[21]

It is quite clear from President Ramos's declarations that the attainment of a just, comprehensive, and lasting peace will form the core of his administration. And from the reports submitted by the NUC, the entity tasked to map out this noble objective, the primary goal is to hasten the peace process by reintegrating, as soon as possible, all

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

rebels and insurgents into the mainstream of society under the rule of law. The tool that will be used to attain this goal is the grant of amnesty.

B. The Present Proclamations

As a result of the Government's effort to create a just, comprehensive, and lasting peace, the House of Representatives approved President Ramos' Amnesty Proclamation Nos. 347[22] and 348[23] on 1 May 1994, after four days of debate, with a 127-7 vote and one abstention.[24]

Proclamation No. 347 grants amnesty to insurgents and others who may have committed crimes to promote their political beliefs. The premises for which this proclamation was enacted are found in its "WHEREAS" clauses, as follows:

> WHEREAS, the peace process as an anchor of political, economic, and social stability and development has steadily moved forward with overwhelming acceptance and support of the Filipino people;
>
> WHEREAS, to enhance and hasten the peace process, there is a need to integrate, as soon as possible, all rebels and insurgents into the mainstream of society under the rule of law, including those who may have committed unlawful acts in furtherance of their respective political beliefs;
>
> WHEREAS, the grant of amnesty to those who may have committed unlawful acts in pursuit of their political beliefs is one of the six paths to the attainment of a just and lasting peace as recommended by the National Unification Commission;
>
> WHEREAS, after the lapse of the period for application for the grant of amnesty under Proclamation Nos. 10 and 10-A, many more rebels and insurgents, who have committed unlawful acts in pursuit of their political beliefs, have returned or expressed their desire and readiness to return to the fold of the law and join the mainstream of Philippine society; and
>
> WHEREAS, there is a need for government to act on rebel and insurgent returnees' request for the grant of amnesty so that they may live in peace in the pursuit of productive endeavors without prejudice to any legal arrangement

[22] Granting Amnesty To Rebels, Insurgents, And All Other Persons Who May Have Committed Crimes Against Public Order, Other Crimes Committed In Furtherance Of Political Ends, And Violations Of The Articles Of War, And Creating A National Amnesty Commission (1994). [hereinafter Proclamation No. 347]

[23] Granting Amnesty To Certain Personnel Of The Armed Forces Of The Philippines And Philippine National Police Who Have Or May Have Committed Certain Acts Or Omissions Punishable Under The Revised Penal Code, The Articles Of War, Or Other Special Laws, Committed In Furtherance Of, Incident To, Or In Connection With Counter-Insurgency Operations (1994). [hereinafter Proclamation No. 348]

[24] Philippines Today, 1 June 1994, at 12.

that may result from a negotiated settlement which the government is pursuing with the various rebel and insurgent groups.

Under Proclamation No. 347, "amnesty is granted to all persons who shall apply therefor and who may have committed crimes...in pursuit of political beliefs, whether punishable under the Revised Penal Code or special laws, including but not limited to the following: rebellion or insurrection; *coup d'etat*; conspiracy and proposal to commit rebellion, insurrection, disloyalty of public officers or employees; inciting to rebellion or insurrection; sedition; conspiracy to commit sedition; inciting to sedition; illegal assembly; illegal association; direct assault; indirect assault; resistance and disobedience to a person in authority or to the agents of such person; tumults and other disturbances of public order; unlawful use of means of publication and unlawful utterances; alarms and scandals; illegal possession of firearms, ammunition or explosives, committed in furtherance of, incident to, or in connection with the crimes of rebellion or insurrection; and violations of Articles 59 (desertion), 62 (absence without leave), 67 (mutiny or sedition), 68 (failure to suppress mutiny or sedition), 94 (various crimes), 96 (conduct unbecoming an officer and a gentleman), and 97 (general article) of the Articles of War; *Provided*, that the amnesty shall not cover crimes against chastity and other crimes committed for personal ends."[25]

Amnesty under Proclamation No. 347 "shall extinguish any criminal liability for acts committed in pursuit of a political belief, without prejudice to the grantee's civil liability for injuries or damages caused to private persons. The grant of amnesty shall also effect the restoration of civil or political rights suspended or lost by virtue of criminal conviction."[26]

The private persons who may have suffered injuries or damages by virtue of the grantee's acts may file an independent civil action against the grantee in the regular courts.[27]

Furthermore, "the amnesty herein proclaimed shall not *ipso facto* result in the reintegration or reinstatement into the service of former Armed Forces of the Philippines and Philippine National Police personnel. Reintegration or reinstatement into the service shall continue to be governed by existing laws and regulations; *provided*, however, that the amnesty shall reinstate the right of Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) personnel to retirement and separation benefits, if so qualified under existing laws, rules, and regulations at the time of the commission of the acts for which amnesty is extended, unless they have forfeited such

[25] Proclamation No. 347, § 1.

[26] Proclamation No. 347, § 2.

[27] Rules And Regulations Implementing Proclamation No. 347, 25 Mar. 1994, and Proclamation No. 348, 25 Mar. 1994, As Amended By Proclamation No. 377, 10 May 1994, Administrative Order No. 1 (1994). [hereinafter Adm. Order No. 1]

retirement and separation benefits for reasons other than the acts covered by [Proclamation No. 347]."[28]

It is likewise stated in Proclamation No. 347 that the surrender of firearms, ammunitions, and explosives shall not be a condition for amnesty. Applicants for amnesty may surrender their firearms within sixty days from the effectivity of said Proclamation (31 May 1994) without incurring liability for illegal possession thereof. The Government shall continue to encourage rebels and insurgents to turn in firearms, ammunition, and explosives which may be in their possession.[29]

Under the same Proclamation, the National Amnesty Commission was created, "which shall be primarily tasked with receiving and processing applications for amnesty, and determining whether the applicants are entitled to amnesty under Proclamation 347. Final decisions or determinations of the Commission shall be appealable to the Court of Appeals."[30]

On the other hand, Proclamation No. 348 grants amnesty to military and police personnel who have committed certain acts punishable under the Revised Penal Code, the Articles of War, or other special laws, committed in furtherance of, incidental to, or in connection with counter-insurgency operations. Under the said Proclamation, it is recognized and acknowledged that certain personnel of the AFP and PNP have or may have committed acts or omissions punishable under the Revised Penal Code, the Articles of War, or other special laws, in furtherance of, incident to, or in connection with counter-insurgency operations.[31] Furthermore, it is likewise stated that "in order to promote an atmosphere conducive to the attainment of a comprehensive, just, and enduring peace in line with the government's peace and reconciliation program, there is a need to declare amnesty in favor of said personnel of the AFP and the PNP."[32]

Under Proclamation No. 348, as amended by Proclamation No. 377, "amnesty is granted to all personnel of the AFP and the PNP who shall apply therefor and who have or who may have committed as of 25 Mar. 1994, acts or omissions punishable under the Revised Penal Code, the Articles of War or other special laws, in furtherance of, incident to, or in connection with counter-insurgency operations; *provided*, that such acts or omissions do not constitute *serious human rights violations*, such as acts of torture, extra-legal execution, arson, massacre, rape, other crimes against chastity or robbery of any form; [p]rovided, that the acts were not committed for personal ends."[33] (emphasis supplied)

[28] Proclamation No. 347, § 2(b).

[29] Proclamation No. 347, § 3.

[30] Proclamation No. 347, § 4.

[31] Proclamation No. 348, "Whereas" clause.

[32] Proclamation No. 348, "Whereas" clause.

[33] Proclamation No. 348, § 1.

Amnesty under Proclamation No. 348 shall extinguish any criminal liability for acts committed by the grantee, without prejudice to the grantee's civil liability for injuries or damages caused to private persons. The grant of amnesty shall also effect the restoration of civil or political rights suspended or lost by virtue of criminal action.[34]

The amnesty under this proclamation shall not *ipso facto* result in the reintegration or reinstatement into the service of former AFP and PNP personnel. Reintegration or reinstatement into the service shall continue to be governed by existing laws and regulations; provided, however, that the amnesty shall reinstate the right of AFP and PNP personnel to retirement and separation benefits, if so qualified under existing laws, rules and regulations at the time of the commission of the acts for which amnesty is extended, unless they have forfeited such retirement and separation benefits for reasons other than the acts covered by Proclamation No. 348.[35]

C. *State as Victim*

The past amnesty proclamations covers political offenses[36] or offenses with a political motivation. Crimes covered by the grants were punishable under either the Revised Penal Code or special penal laws.

Crimes punishable under the Revised Penal Code or by special penal laws covered by the amnesty grants could be categorized under Crimes Against National Security and the Law of Nations,[37] Crimes against the Fundamental Laws of the State[38]

[34] Proclamation No. 348, § 4 (a).

[35] Proclamation No. 348, § 4 (b).

[36] "A political offense might be described in a basic way as an ideologically motivated act, expressing political opposition, directed against the security of the State; or another act similarly motivated and so inextricably linked to it that the political element predominates over the element of common criminality, including any act committed to avoid persecution arising from the participation in the struggle for national independence or political freedom." MIRIAM DEFENSOR-SANTIAGO, *Political Offenses in International Law* at 321 (1977).

[37] Treason (art. 114, Revised Penal Code)
Conspiracy and Proposal to Commit Treason (art. 115, RPC)
Misprision of Treason (art. 116, RPC)
Espionage (art. 117, RPC)
Inciting to War or Giving Motives for Reprisals (art. 118, RPC)
Violation of Neutrality (art. 119, RPC)
Correspondence with Hostile Country (art. 120, RPC)
Flight to Enemy's Country (art. 121, RPC)
Piracy in General and Mutiny on the High Seas or Philippine Waters (art. 121, RPC)
Qualified Piracy (art. 123, RPC)

[38] Arbitrary Detention or Expulsion, Violation of Dwelling, Prohibition, Interruption and Dissolution of Peaceful Meetings, and Crimes Against Religious Worship (arts. 124-133, Revised Penal Code).

and Crimes Against Public Order,[39] as well as other common crimes which are committed for political purposes or are tainted with political color.

Crimes under the Revised Penal Code, in particular, and criminal laws, in general, are crimes against the sovereignty of the State.[40] The violation of the criminal laws is an affront to the People of the Philippines as a whole and not merely the person directly prejudiced, who is merely the complaining witness.[41] Since it is the sovereignty of the State which is injured in cases of political crimes or crimes with a political motivation, it is that State, by virtue of its police power,[42] which has the power to prosecute and punish the offenders[43] for such crimes. Corollarily, it is also within the power of that same State, for reasons it may deem proper, to forgive the offender by granting him amnesty, instead of prosecuting and punishing him.

The State's right to abolish or forget the crimes of those who have infracted its sovereignty, by rebellion or otherwise, flows from the fact that the State is the VICTIM of such crimes.

It is, therefore, within the sole discretion of the State to punish, or to grant amnesty to these evildoers if it feels that its interests, in particular, and the interests of the nation, in general, would be better served by either punishment or amnesty. Thus, the State may find that its interests, such as its thrust for national reconciliation would be best served by granting them amnesty.[44]

2. VALIDITY OF THE PRESENT AMNESTY PROCLAMATIONS

As discussed earlier, there are four constitutional limitations on the power to grant amnesty. First of all, amnesty cannot be exercised over cases of impeachment, or in such other cases as provided in the Constitution.[45] Secondly, a grant of amnesty must be with the concurrence of a "majority of all the members of Congress."[46] Thirdly, no amnesty for violation of election laws, rules, and regulations shall be granted by

[39] Rebellion, Sedition and Disloyalty, Crimes Against Popular Representation, Illegal Assemblies and Associations, Assault upon, and Resistance and Disobedience to Persons in Authority or Their Agents, Public Disorders, Evasion of Service of Sentence, Commission of Another Crime During Service of Penalty Imposed for Another Previous Offense (arts. 133-160, Revised Penal Code).

[40] 21 Am Jur 2d, § 1, at 84.

[41] People v. Ramos, 207 SCRA 152.

[42] People v. Santiago, 43 Phil. 124.

[43] CESAR S. SANGCO, CRIMINAL LAW 2-3 (1977); RUPERTO KAPUNAN, JR. and DONATO FAYLONA, CRIMINAL LAW 5 (1990).

[44] R.K. Goldman, *Amnesty Laws, International Law, and the American Convention on Human Rights*, THE LAW GROUP DOCKET 1989, 1-3.

[45] PHILIPPINE CONST. art. VII, § 19.

[46] *Id.*

the President without the favorable recommendation of the Commission on Elections.[47] And finally, an amnesty grant should not infringe the Bill of Rights[48] as enshrined in Article III of the Philippine Constitution.

All of these limitations were respected in the issuance and approval of Proclamation Nos. 347 and 348. Hence, there is no question that the present proclamations are valid and do not suffer from any constitutional infirmity.

Furthermore, the government may have ample justification in using amnesty as a political tool, as in the past when the Philippine Government had used it many times over for various political reasons, such as the suppression of rebellion and the promotion of order and security in Philippine society. The granting of amnesty to rebels to attain lasting peace in this country is no doubt a governmental strategy motivated by political reasons, since such amnesty grant is intended to defuse the armed struggle and to strengthen the existing status quo.

Another justification for granting amnesty to political offenders is the fact that a political offense is a crime against the sovereignty of the State, and therefore, the State, as a victim, may choose to prosecute or to forgive and grant amnesty to those who cause her injury.

At this point, there is no dispute that the present amnesty proclamations are, indeed, valid and binding.

II. IDENTIFYING THE ISSUES

The mere fact that the present amnesty proclamations observe constitutional limitations does not necessarily mean that no other limitations upon the grant of amnesty exist.

Article II, § 2, of the 1987 Constitution states that:

> "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." (emphasis supplied)

The inclusion of the phrase "adopts the generally accepted principles of international law as part of the law of the land" in the foregoing provision is nothing more than a formal acceptance of a principle to which all civilized nations conform. The problem that the provision poses, however, is that of determining which of these

[47] PHILIPPINE CONST., art. IX, C, § 5.

[48] PHILIPPINE CONST., art. III.

generally accepted principles of international law are accepted by the Philippines.[49] At any rate, it is believed by the proponent that the presence of this provision in the Constitution in effect requires the Philippine Government to take into consideration existing generally accepted principles of international law in all its governmental actions and to accept such principles that may constitute a limitation on governmental power. And one of the governmental actions wherein the principles of international law should be taken into consideration is the granting of amnesty.

The question that may now be asked is: what are the generally accepted principles of international law which may constitute limitations on the power to grant amnesty?

A. Sources Doctrine[50]

There are different sources from which a generally accepted principle of international law may arise. Under Article 38 of the Statute of the International Court of Justice, the manner by which a principle of international law may evolve are expressed as follows:

> Article 38. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations and
> (d) subject to the provisions of Article 59,[51] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

The Sources Doctrine includes both treaty and custom and States can only really be legally bound through their consent given either expressly through treaty or impliedly through custom.[52]

At present, there are a number of generally accepted principles of international law arising out of custom and treaties, which, in the opinion of the author, constitute a limitation on the power to grant amnesty. One of the generally accepted principles of international law is the protection of certain human rights.

[49] BERNAS, *supra* note 2, at 25.

[50] The Sources Doctrine is the heart of contemporary international law, for it is the primary means by which the legal basis for the regulation of the behavior of sovereigns is determined. [Anna Leah Castañeda, *From Prerogative to Prohibition: Article 2(4) As Customary International Law in Nicaragua v. U.S.*, 38 ATENEO L. J. 1 at 10 (Dec. 1993)].

[51] Article 59 of the Statute of the International Court of Justice: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

[52] Castañeda, *supra* note 56, at 93.

The protection of human rights can take various forms. It could take the form of a judicial proceeding or it may be in the form of a law embodying the human rights which are sought to be protected. At present, there are a number of international laws which codify the protection of certain human rights. These laws are termed International Crimes, otherwise known as *Delicti Jus Gentium*.

Delicti Jus Gentium, as a limitation on the power to grant amnesty, will be best understood by a discussion of its nature and characteristics.

III. DELICTI JUS GENTIUM

A. The Doctrine

Delicti Jus Gentium may be conveniently termed offenses against the law of nations, crimes against the laws of mankind, or in short, international crimes.[53] They are considered crimes against the international community. As manifested in Article 19 of the International Law Commission's Draft Articles on State Responsibility, *delicti jus gentium* assume an international character since the commission thereof breaches an international obligation. According to the said article:

a. An act of State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

b. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

There are twenty-two crimes which are considered international crimes[54] and these are: aggression; war crimes; unlawful use of weapons/unlawful emplacement of weapons; crimes against humanity; genocide; racial discrimination and apartheid; slavery and related crimes; torture; unlawful medical experimentation; piracy; aircraft hijacking; threat and use of force against internationally protected persons; taking of civilian hostages; drug offenses; international traffic in obscene publications; destruction and/or theft of national treasures; environmental protection; theft of nuclear

[53] Defensor-Santiago, *supra* note 36, at 180.

[54] Bassiouni identified only 20 crimes in the Draft Code, but in International Criminal Law: Digest/Index of International Conventions, 1815-1985, two crimes were added, namely "Theft of Nuclear Materials" and "Environmental Protection." The first had been subsumed in "Unlawful Use of Weapons" and the second had been excluded on the basis of a judgment since then reversed. The 22 categories of crimes have evolved over the years essentially through customary and conventional international law.

materials; unlawful use of the mails; interference with submarine cables; falsification and counterfeiting and bribery of foreign public officials.[55]

The concept of *Delicti Jus Gentium* has three distinctive features.

First of all, the ultimate objective of prohibiting the commission of *delicti jus gentium* is the protection of human rights. In the words of Bassiouni, "international criminal proscriptions are the *ultima ratio* modality of enforcing internationally protected human rights."[56]

The characteristics of such proscriptions may be separated into two general categories: first are the provisions prohibiting actions by the State, through its officials, which deprive individuals of their human rights and second, the provisions requiring states to ensure that human rights are not infringed upon by private individuals.[57]

There is now general agreement that the protection of human rights is a matter of international concern and is appropriately a part of the international legal system.[58] The crux of international human rights law is to afford legal protection to human rights.[59] And the rationale for the international protection of human rights is that certain forms of depradations become matters of international concern when committed under the aegis of state policy because of the presumed international impact of such behavior.[60] Thus, it is suggested that collective effort is required to protect against policies that may ultimately affect the entire world community.[61] And the development of international criminal law is a step in that direction since it seeks to punish the crimes which violate these fundamental human rights.[62]

The proscription of these crimes seeks to protect certain human rights that are enshrined in the Universal Declaration of Human Rights[63] and in the International

[55] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980).

[56] *Id.* at 17.

[57] BASSIOUNI, *supra* note 55, at 18.

[58] MARTIN DIXON AND ROBERT MCCORQUODALE, CASES AND MATERIALS IN INTERNATIONAL LAW (International Student's Edition) 170 (1991).

[59] *Id.* at 166.

[60] Cherif Bassiouni and A. Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Protection and Suppression of Torture*, 48 REVUE INTERNATIONALE DE DROIT PENAL 17 (1977).

[61] Ved Nanda, *Self-Determination in International Law: The tragic Tale of Two Cities-Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 A.J.I.L. 321 (1972).

[62] BASSIOUNI, *supra* note 55, at 16.

[63] G.A. Res. 217, U.N. Doc. A/810 at 71(1948). The Universal Declaration of Human Rights was adopted on 10 Nov. 1948 by a vote of 48 in favor, none against and eight abstentions, being Byelorussian USSR, Czechoslovakia, Poland, Saudi Arabia, Ukrananian SSR, USSR, and Yugoslavia [hereinafter referred to as Universal Declaration].

Covenant on Civil and Political Rights.[64] Although the human rights protected may vary depending on the specific international crime proscribed, Bassiouni, in his work entitled International Criminal Law and Human Rights,[65] lists down the human rights that are most commonly protected when the abovementioned international crimes are proscribed. These protected rights are:

a. Right to Equal Treatment;[66]
b. Right to Life, Liberty, Property, and Personal Security;[67]
c. Freedom From Slavery and Forced Labor;[68]
d. Right to be Free from Torture and from Cruel, Inhuman, or Degrading Treatment or Punishment;[69]
e. Recognition as a Person Before the Law;[70]
f. Freedom from Arbitrary Arrest or Detention;[71]
g. Freedom of Opinion, Expression, and Association;[72]
h. Right to a Fair Criminal Trial;[73]
i. Freedom of Movement;[74]
j. Right to Family;[75]
k. Right to Property;[76] and
l. Freedom of Religion.[77]

[64] UKTS 6, Cmnd 6702 (1977). In the vote of the General Assembly, 105 states voted for this Covenant, with no states voting against and no state abstaining. It entered into force on 23 Mar. 1976, and as of 1991, 89 states have ratified this Covenant. Most of the rights included in this Covenant elaborate the civil and political rights contained in the Universal Declaration [hereinafter referred to us ICCPR].

[65] BASSIOUNI, *supra* note 66, at 19-24.

[66] UNIVERSAL DECLARATION, *supra* note 63, arts. 2, 7; ICCPR, UKTS 6, Cmnd 6702, arts. 2, 26.

[67] UNIVERSAL DECLARATION, art. 3; ICCPR, art. 6.

[68] UNIVERSAL DECLARATION, art. 4; ICCPR, arts. 8, 11.

[69] UNIVERSAL DECLARATION, art. 5; ICCPR, art. 7

[70] UNIVERSAL DECLARATION, art. 6; ICCPR, art. 16.

[71] UNIVERSAL DECLARATION, art. 9; ICCPR, art. 9.

[72] UNIVERSAL DECLARATION, art. 10; ICCPR, art. 19.

[73] UNIVERSAL DECLARATION, art. 11; ICCPR, arts. 9, 15.

[74] UNIVERSAL DECLARATION, art. 13; ICCPR, art. 12.

[75] UNIVERSAL DECLARATION, art. 16; ICCPR, art. 23.

[76] UNIVERSAL DECLARATION, art. 17.

[77] UNIVERSAL DECLARATION, art. 18; ICCPR, art. 18.

The problem with human rights protection is enforcement. The treaties[78] embodying human rights are mostly statements of principles which are hard to implement. The proscription of international crimes, which protects human rights, helps eradicate the problem of enforcement.[79]

The second feature of *delicti jus gentium* is the presence of an International or Transnational Element. This element can be found in the very nature of the violative conduct, the target-victim, or in the impact. The international element can be defined by virtue of the impact of the conduct, which affects the collective security interests of the world community, or if by reason of the seriousness and magnitude of the violative conduct, it constitutes a threat to the peace and security of humankind. The transnational element, on the other hand, merely affects the interests of more than one State, and therefore, is more limited in its impact on world order than the international element.[80] But whether the element is international or transnational, it is clear that the effects of *delicti jus gentium* are not confined to the State where it was committed, but also extend extraterritorially to the international community.

In another work entitled "Methodological Options For International Legal Control of Terrorism," Bassiouni[81] was more specific in describing an international or transnational element when he said that an international crime is an act which, in addition to the elements of a common crime, contains the following five elements: 1) it takes place in more than one state; 2) it takes place where no state has exclusive national jurisdiction; 3) it affects internationally protected persons, i.e., diplomats and personnel of international organizations; and 4) it affects internationally protected objects, e.g., international civil aviation and international means of communications. Lastly, it is suggested that this theory must be codified or incorporated in a multilateral treaty.[82]

Finally, the aggrieved party in the commission of *delicti jus gentium* is the international community. The very definition of *delicti jus gentium* itself expresses this feature. It is defined as an "offenses against the law of nations", "crimes against the

[76] UNIVERSAL DECLARATION, art. 17.

[77] UNIVERSAL DECLARATION, art. 18; ICCPR, art. 18.

[78] UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948 and the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OF 1966, to name a few.

[79] BASSIOUNI, *supra* note 55, at 31.

[80] *Id.* at 24.

[81] However, Bassiouni in his work, CHARACTERISTICS OF INTERNATIONAL CRIMINAL LAW CONVENTIONS, 4, admitted that "presently neither international instruments nor contemporary doctrine has provided a satisfactory framework for defining these elements and identifying their content and parameters. This remains a task to be accomplished."

[82] BASSIOUNI, *supra* note 55, at 487.

laws of mankind", and "international crimes."[83] As opposed to a common crime which is an offense against the sovereignty of the State where it is committed,[84] the effects of the commission of an international crime are global since it injures the international community as a whole. Violators of international crimes should be punished because the violating conduct offends humanity itself. A person who commits an international crime is, like the pirate, *hostis humane generis* (an enemy of all mankind) over whom any state could assert criminal jurisdiction.[85] There are several reasons for this principle.

First of all, as discussed in the first part of this chapter, the proscription of *delicti jus gentium* seeks to protect human rights. Bassiouni[86] lists the different human rights which the proscription of international crimes protects, all of which are embodied in the Universal Declaration of Human Rights.[87] In its declaration of policy, the said Declaration states that:

> As a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

And under Article 30 of the same Declaration, the following is expressed: "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at destruction of any rights and freedoms set forth herein."[88]

It is, therefore, clear that when the nations of the world sought to codify certain human rights into one Declaration, they considered the protection of these rights a common international interest, and any violation or derogation of the said rights is concurrently an attack against that common international interest. Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community."[89] [s]ince the proscription of

[83] Defensor-Santiago, *supra* note 36, at 180.

[84] 21 AM. JUR. 2d, § 1, 84; Goldman, *supra* note 44, 1-3.

[85] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2556-57 (1991).

[86] *See* note 65.

[87] UNIVERSAL DECLARATION, G.A. Resolution 217 (III), UN Doc A/810 (1948).

[88] UNIVERSAL DECLARATION, *supra* note 98, art. 30.

[89] E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964).

international crimes seeks to protect these cherished human rights, any commission of an international crime is a crime committed against the international community and against the whole of humankind which has a common international interest in such protection.

Secondly, the existence of an international or transnational element[90] in *delicti jus gentium* makes its characterization, as a crime against the international community, more obvious. In common crimes, the injured party is the State where the crime is committed, since it only injures the sovereignty of that nation.[91] The presence of an international or transnational element, however, may involve two or more states indicates that injury is not only committed against the sovereignty of a certain state, but also against all the nation-states who may have been affected by the commission of the international crime.

B. Implications on the Power to Grant Amnesty

> The defendants are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation. Humanity is the sovereignty which has been offended and a tribunal has been convoked to determine why.

The US Military Tribunal spoke thus in the *Einsatzgruppen Case*.[92]

The *ultima ratio* of *delicti jus gentium* is the protection of human rights which are embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The principles stated in the said Declaration has an international binding effect on a State since it is argued that the Universal Declaration of Human Rights embodies customary international law. While it does not bind States in the manner that a treaty obligation does, it certainly may reflect ideals held by the international community.[93] Thus, the same Declaration creates an expectation of adherence, and insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States. Indeed, several commentators

[90] Bassiouni gives 5 elements:
1) it takes place in more than one state;
2) it takes place where no state has exclusive national jurisdiction;
3) it affects internationally protected persons;
4) it affects internationally protected objects; and
5) the international crime must be codified or incorporated in a multilateral treaty.

[91] 21 AM. JUR. 2d, § 1, at 84.

[92] IV TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 789.

[93] DIXON AND MCCORQUODALE, *supra* note 58, at 181.

have concluded that the Universal Declaration of Human Rights has become, *in toto*, a part of binding, customary international law.[94]

In the *Namibia Case*[95], Judge Ammoun, in his separate opinion, had the opportunity to say that while "the provisions of the Universal Declaration of Human Rights are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a) of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law, as was said in respect of Article 6[96] of the Vienna Convention of the Law of Treaties,[97] or because they have acquired the force of custom through a general practice of law, in the words of Article 38, paragraph 1(b), of the Statute."

Judge Ammoun justifies his statement by saying that the right to equality which the Namibians so hardly fought for,[98] has been deemed, by common consent, inherent in human nature ever since the remotest times and stands as the foundation of other human rights. This primordial principle or axiom is embodied in Article 1 of the Universal Declaration of Human Rights which states: "[a]ll human beings are born free and equal in dignity and rights." According to Judge Ammoun, from this principle flow most rights and freedoms.[99]

The same arguments discussed above can also be made applicable to the International Covenant on Civil and Political Rights,[100] since this Covenant elaborates the civil and political rights contained in the Universal Declaration of Human Rights.[101] Even though the said covenant does not require State parties to prosecute or punish violations of rights under this Covenant, a reading of its provisions will show that they are required to investigate serious violations of physical integrity,[102] and to bring

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[94] Filartiga v. Pea-Irala, 630 F. 2nd 876 (1980), United States Court of Appeals, Second Circuit.

[95] 1971 ICJ Rep 16.

[96] Art. 6 states that "[e]very State possesses capacity to conclude treaties."

[97] VIENNA CONVENTION ON THE LAW OF TREATIES (1969), UKTS No. 58 (1980) Vol. II.

[98] Judge Ammoun said, "[t]he equality demanded by the Namibians and by other peoples of every color, the right to which is the outcome of prolonged struggles to make it a reality, is something of vital interest to us here, on the one hand, because it is the foundation of other human rights which are no more than its corollaries and, on the other, because it naturally rules out racial discrimination and apartheid, which are the gravest of the facts with which South Africa, as also other States, stands charged. The attention I am devoting to it in these observations can therefore by no means be regarded as exaggerated or out of proportion."

[99] *Id.*

[100] Other treaties of equal character are the European Convention for the Protection of Human Rights and Fundamental Freedoms [ETS 5, UKTS 70 (1970)] and the American Convention on Human Rights.

[101] DIXON AND MCCORQUODALE, *supra* note 58, at 174.

[102] Orentlicher gives torture, extra-legal executions, and forced disappearances as examples.

to justice those who are responsible therefor.[103] Adherents to the treaty, like the Philippines,[104] pledge not only respect to the enumerated rights, but also to ensure that persons subject to their jurisdiction shall enjoy the full exercise of those rights.[105]

Since the protection of human rights is customary international law, and the proscription of *delicti jus gentium* is the means through which those rights are to be protected, the Philippine Government has an international obligation and duty to enforce the protection of such rights, and to respect the principles mentioned in Article II, § 2, of the Philippine Constitution, insofar as they affect international crimes. As a result of this legal obligation, the author believes that *delicti jus gentium* is a limitation on the power to grant amnesty because of the following reasons:

a. As opposed to a common crime, an international crime injures the entire international community as a whole, and, therefore, it is this international community which has the right to punish or to forgive (by granting amnesty) those who injure its interests and not merely the individual State.
b. The protection of certain human rights, the *ultima ratio* of proscribing international crimes, is deemed customary international law. [s]ince the Philippines is constitutionally bound to observe the protection of human rights as a generally accepted principle of international law, the protection of these rights becomes a legal obligation as it forms part of the "law of the land."

Due to a State's obligation to protect human rights, it bears a concomitant duty to prosecute violations thereof since the protection of human rights can only be served by prosecuting and punishing violators of the same. For example, in the crime of genocide, the human right sought to be protected is the right to life. Hence, if someone commits genocide, the only way to vindicate the violation of a person's right to life is to prosecute and punish said offender. This duty to prosecute on the part of the Philippine Government, is made more apparent by the declaration in Article II, § 2, of the Constitution that the Philippine government "values the dignity of every human person and guarantees full respect for human rights."[106]

On the other hand, the protection of human rights is not achieved by granting the offender amnesty since amnesty entails forgiveness. If there is a duty to protect human rights, the operative act of this duty is prosecution, and the ultimate objective, punishment of the guilty. Amnesty and protection of human rights are diametrically opposed to each other — the former implying forgiveness and the latter involving prosecution and eventual punishment of the guilty.

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[103] Orentlicher, *supra* note 85, at 2568.

[104] The Philippines became a signatory to the Convention on 19 Dec. 1986 and it took effect on 23 Jan. 1987.

[105] INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 2 (1).

[106] PHILIPPINE CONST., art. II, § 2.

Hence, from a discussion of the nature and characteristics of *delicti jus gentium*, this author arrives at the conclusion that *delicti jus gentium* constitutes a limitation on the power to grant amnesty.

The proposition that *delicti jus gentium*, is a limitation on the power to grant amnesty is not only justified on the basis of customary international law, but likewise on the Philippine Government's international treaty obligations. The next two chapters will show that existing international treaty obligations create an obligation on the part of the Philippine Government to prosecute violators of international crimes and a concomitant duty to refrain from granting them amnesty. It is, therefore, necessary to discuss the nature and characteristics of international crimes and the treaties which have codified these crimes.

IV. INTERNATIONAL CRIMINAL LAW CONVENTIONS

A. The Conventions

Delicti Jus Gentium, or international crimes, are embodied in treaties called International Criminal Law Conventions. And as stated in the preceding chapter, there are, at present, twenty-two recognized international crimes, most of which are codified in International Criminal Law Conventions.

The legal bases for considering these twenty-two crimes as international crimes, according to the sources of international law, are as follows: (1) existing international conventions which consider a particular act as an international crime; (2) recognition under customary international law that such act constitutes an international crime; (3) recognition under general principles of international law that such conduct is or should be deemed violative of international law and about which there is a pending draft convention before the United Nations; and (4) prohibition of the said act by an international convention which, though not specifically stating that the act constitutes an international crime, is nevertheless recognized as such in the writings of scholars.[107]

Upon examining these twenty-two recognized international crimes separately, there appear three distinct requirements for the international proscription of such criminal conduct. It must contain either an international or transnational element or a partial international or transnational element coupled with an element of "necessity" in order for it to be included in the category of international crimes. In other words, the act or conduct in question must either rise to the level where it constitutes an offense against the world community (*delicti jus gentium*) or at least the commission of the act must affect the interests of more than one state. Moreover, the undefined "transnational" element could encompass a multitude of activities which may affect

[107] BASSIOUNI, *supra* note 55, at 2.

the interests of more than one state, involve transborder activities or involve nationals of more than one state.[108]

Under the present system, conventional international law which defines and proscribes international crimes must be enforced through and under the national criminal laws of States and calls on all State parties to the convention to cooperate in the prosecution and punishment of criminal offenders. The aims of international criminal justice are no different from those of any national criminal justice system: to prevent harmful conduct through deterrence; to prosecute those who are accused of criminal violations; and to punish those who are found guilty.[109]

Accordingly, an international criminal law convention, which implicitly or explicitly recognizes a certain conduct as an international crime, imposes the duty upon signatory states to criminalize the prohibited conduct, to extradite violators to other states desirous of prosecuting them, and to cooperate with such states in the prevention and suppression of such conduct.[110]

An international crime is any conduct which is designated as a crime in a multilateral convention with a significant number of state parties to it, provided the corresponding instrument contains any of the ten (10) penal characteristics described below.[111]

These international criminal conventions contain any of the following ten penal characteristics: (1) explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or as a crime; (2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; (3) criminalization of the proscribed conduct; (4) duty or right to prosecute; (5) duty or right to punish the proscribed conduct; (6) duty or right to extradite; (7) duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings); (8) establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal jurisdiction); (9) reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives); and (10) elimination of the defense of superior orders.[112]

The duty to prosecute or to extradite the violator raises the question of whether or not it becomes a *jus cogens* principle with respect to international crimes. In this instance, the duty becomes a binding international obligation, irrespective of whether

[108] BASSIOUNI, *supra* note 55, at 3.

[109] *Id.*

[110] *Id.* at 3.

[111] *Id.* at 4.

[112] BASSIOUNI, *supra* note 55, at 3.

or not it is explicitly stated in any particular convention or a customary norm. This is true so long as the convention clearly defines the crime to be an international crime.[113]

B. *Implications on the Power to Grant Amnesty*

> When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.
>
> A. Solzhenitsyn[114]

Based on the foregoing discussion regarding the nature and characteristics of International Criminal Law Conventions, there is a recurring provision contained in such conventions - one that provides for the duty to prosecute the offenders of the crime committed. The duty to prosecute and the power to grant amnesty are mutually exclusive principles, since the aim of the former is punishment of the guilty while that of the latter is forgiveness. And it is obvious that punishment and forgiveness are contradictory, both in terms of their substance and of their spirit.

Therefore, there is an international legal obligation to prosecute these perpetrators of international crimes and a State which grants amnesty to such offenders is in direct violation of their legal obligations to the international community. For as long as an International Criminal Law Convention contains a specific provision imposing upon signatory States the duty to prosecute such criminal perpetrators, then the power to grant amnesty is thereby limited. The duty would be to prosecute the offenders and not "to enforce a total amnesia regarding (international) crimes."[115]

In November of 1989, during a speech before the First Committee of the XIX Regular Meeting of the General Assembly to Present the Annual Report of the Inter-American Commission on Human Rights, the said Commission's Chairman, Ambassador Oliver H. Jackman voiced strong opposition to amnesty laws that foreclose prosecution of international crimes:

> A compact by which the whole nation is called upon to suspend its memories of torture, forcible disappearances of loved ones, a compact which would have citizens pretend that the tragic losses and suffering which they have undergone never occurred, this...is no bargain. This is not amnesty; it is forcible amnesia. The "peace" that is bought at this price is supported by a thread slenderer even than the thread by which the sword of Damocles was suspended.[116]

[113] *Id.* at 7.

[114] THE GULAG ARCHIPELAGO 178 (1974).

[115] Orentlicher, *supra* note 85, at 2539.

[116] *Id.* at 2579 *citing* the speech by ambassador Oliver H. Jackman before the First Committee of the XIX Regular Meeting of the General Assembly to Present the Annual Report of the IACHR, Nov. 1989.

But even if a convention or treaty does not contain a definite stipulation obligating states to prosecute perpetrators of international crimes, an international obligation to prosecute such crimes may still exist based on customary international law. For example, the International Covenant on Civil and Political Rights,[117] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[118] and the American Convention on Human Rights do not explicitly require the State parties thereto to prosecute or punish violations of the rights set forth therein. Nonetheless, these treaties impose a general duty to investigate allegations of torture, extra-legal killings, and forced disappearances, and, subject to evidentiary and other legitimate constraints, to prosecute those who are responsible therefor. A State's complete failure to punish repeated or notorious instances of international crimes violates its obligations under customary international law.[119]

A treaty imposing an obligation to prosecute perpetrators of international crimes is binding only upon the Philippine Government if it is a signatory to such treaty. If the Philippine Government is not a signatory to that treaty, then it must be proved that the crime committed is proscribed by customary international law, which principle the Philippines adopts as a generally accepted principle of international law, in order for the Philippine Government to be obligated to prosecute such perpetrators. Otherwise, the power to grant amnesty for the commission of international crimes would not be limited by international law.

V. THE PROBLEM OF CLASSIFICATION AND INTEREST

A. *Classification*

The crimes covered by the grant of amnesty are those crimes designated by the Executive and the Legislative branches of the government. As discussed earlier, amnesty has generally been granted for the commission of common crimes with political color or crimes classified as political offenses. The present Proclamation Nos. 347 and 348 are testaments to this fact.

However, § 1 of Proclamation No. 347[120] states the following provision:

> *Section 1. Grant of Amnesty.* - Amnesty is hereby granted to all persons who shall apply therefor and *who have or may have committed crimes*, on or before thirty (30) days following the publication of this Proclamation in two (2) newspapers of general circulation, *in pursuit of political beliefs*, whether punishable

[117] UKTS 6, Cmnd 6702 (1977).

[118] ETS 5, UKTS 70 (1950).

[119] Orentlicher, *supra* note 85, at 2540.

[120] Approved by the Philippine Senate and the House of Representatives last 1 May 1994.

under the Revised Penal Code or special laws, including but not limited to the following: rebellion or insurrection....(emphasis supplied)

Under the foregoing, all-encompassing provision of Proclamation No. 347, any applicant for amnesty can allege that he committed a common crime "in pursuit of his political beliefs," even though the crime is not actually covered by the amnesty grant. The author does not foresee any problem where, for instance, the applicant murders a public official "in pursuit of his political beliefs" or commits robbery of military weapons "in pursuit of his political beliefs." Amnesty may be granted to him.

A problem under the aforequoted § 1 of Proclamation No. 347, however, arises where an international crime is itself designated or claimed as one committed "in pursuit of political beliefs." What would happen if an applicant alleges that he committed genocide "in pursuit of his political beliefs," or that he was "impelled by his political beliefs" to commit piracy? Will the crime be considered a political crime so as to make amnesty applicable to it? Or will the international character of the crime be upheld so as to place it out of the reach of the amnesty grant?

The proponent sets forth that, despite the designation or averment of an international crime as having been committed "in pursuit of political beliefs," the international character of the crime should prevail and be upheld, and, therefore, amnesty shall not apply to it.

The following reason is given to support this stand.

The objects which the proscription of international crimes are sought to be protected are superior to those which the proscription of common crimes protect. In the proscription of international crimes, what is sought to be protected are the higher and loftier considerations of human rights and the interests of the whole international community. On the other hand, the prosecution of common crimes seeks to protect only the interests of the State where the crime was committed since, in this instance, the commission of the crime does not affect the interests of the international community.

In relation to this author's proposition stated above, Professor Lauterpacht posits the following view:

> For fundamental human rights are rights superior to the law of the sovereign State. The hope, expressed by Emerson, that 'man shall treat with man as a sovereign state with a sovereign state' may be brought nearer to fruition by sovereign States recognizing the duty to treat man with the respect which traditional law exacted from them in relation to other States. To that vital extent the recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organized international community itself. That fundamental law, as expressed in the acknowledgment of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the international legal order.[121]

The protection of human rights, through the prosecution and punishment of perpetrators of international crimes, is superior to the law of a sovereign State seeking to punish political offenders. The national law treating international crimes committed "in pursuit of political beliefs" as political crimes should yield to international law designating these crimes as international crimes. Hence, an international crime committed "in pursuit of political beliefs" should still be considered essentially as an international crime, regardless of its commission avowedly "in pursuit of political beliefs," since to consider it as having been transformed into a political crime would put it within the ambit of the amnesty grant, to the detriment of the international community's concern and interest in the protection of human rights. Otherwise, the very purpose for which international crimes were codified would directly destroy a legitimate enforcement mechanism for the protection of human rights.

In sum, an international crime, albeit colored by its commission "in pursuit of political beliefs," should still stand as an international crime, and is thus beyond the pale of an amnesty grant. To embrace a contrary view would go against a profound international interest and concern - the protection of human rights. The international community regards the protection of such rights as sacred. The Philippines should do no less.

B. International Interest vs. the National Interest

There should be no conflict between the interest of the international community and that of the State. It does not necessarily follow that wherever international law is upheld, national interests are prejudiced. The two interests are not irreconcilable.

International law requiring prosecution does not prevent governments from instituting policies of national reconciliation. The argument that amnesty laws may be necessary to mend social divisions falsely assumes that such laws are the only means of achieving reconciliation. There are other means. At any rate, amnesty grants

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[121] DIXON AND MCCORQUODALE, *supra* note 58, at 170.

are not barred from being used to promote national reconciliation, provided they do not cover atrocious crimes which international law requires to be punished.[122]

Hence, the mere fact that an international crime per se or an international crime committed "in pursuit of political beliefs" is excepted from the amnesty grant does not denigrate the noble purposes for which amnesty was proclaimed. Considering these premises *vis-a-vis* the present Amnesty Proclamations, it can be seen that the aim of achieving peace is not foreclosed if amnesty is not granted to a perpetrator of an international crime, since there are other ways of achieving such objective without violating the Government's international obligation to prosecute perpetrators of international crimes.

VI. PRESENT DAY CASES: HOW *DELICTI JUS GENTIUM* OPERATES AS A LIMITATION ON THE POWER TO GRANT AMNESTY

As of 5 December 1994, there have been 2,414 actual applications for amnesty, with 1,441 applications coming from the CPP-NPA-NDF,[123] 220 from the RAM/ALTAS,[124] 12 from MNLF/MILF,[125] 140 from the AFP, 151 from the PNP, and 450 from groups whose affiliations are unclear. From this group, a total of 330 applicants have been granted amnesty.[126]

One of those who applied for amnesty is Domingo Echaluce Baskinas.

A. The Case of Domingo Echaluce Baskinas

Domingo Echaluce Baskinas, alias "Ka Alex," is 43 years old and hails from Calayucay, Sto. Domingo, Albay. At present, he is residing at No. 1 Amungao St., Brgy.

[122] Orentlicher, *supra* note 85, at 2537, further gives the Colombian Amnesty Law (No. 35) of 19 Nov. 1982 as an example, which did not apply to persons who killed non-combatants and those who otherwise behaved brutally. A distinction was made between crimes that can be subject to amnesty and those that cannot:

> The King may pardon any Offense whatever...so far as the public is concerned in it, after it is over, and consequently may prevent a popular Action or Statute, by pardoning the Offense before the suit is commenced...
>
> But it seems agreed, that the King can by no previous License, Pardon, or Dispensation, make an offense punishable which is *malum in Se*, as being against the Law of Nature, or so far as the Public Good as to be indictable at Common Law, and that a Grant of this kind tending to encourage the doing of Evil, which is the chief End of Government to prevent, is plainly against Reason and the Common Good, and therefore void.

[123] The existing subversive Communist faction in the Philippines.

[124] Right-wing extremists composed of disgruntled military personnel.

[125] Composed of Muslim fundamentalists and extremists.

[126] Report of the National Amnesty Commission, 5 Dec. 1994.

Apanay, Alicia, Isabela. He was a member of the Education Group of the Quezon Bicol Guerrilla Zone.[127]

On March 28, 1971, a Philippine Air Lines plane, with Registry No. PIC-1121, piloted by Capt. Antonio Misa, left the Manila International Airport at 5:55 a.m., subsequently establishing radio contact with the control tower at 6:35 a.m. when it was over Romblon. That was the last word heard from the aircraft, until it landed at Hongkong's Kaitak airport at 9:05 a.m..

At 6:45 a.m., when the plane was over Romblon, about seven minutes to Roxas City, two young men entered the cockpit. One held a .22 caliber *paltik*[128] while the other brandished a fire ax taken from the plane. The gun-totter guarded pilot Misa while the ax-wielder watched co-pilot Trinidad. The two young hijackers were silent for a while until co-pilot Trinidad broke the ice by saying that the pilots would take them to any place they wanted to go. The hijackers told the pilots that they would like to go to Peking, China.

The pilots tried to reason out that the fuel was not enough to reach China. Capt. Misa then suggested that refueling should take place in Hongkong. He wanted to bide for time and to avoid panic among the passengers. The hijackers consented to the suggestion.

There were six hijackers, all of whom were student activists from the Mindanao State University in Marawi City. One of the hijackers was Domingo Echaluce Baskinas.

While refueling at Kaitak airport, 20 of the 45 passengers were released. Thereafter, the hijacked plane took off from Hongkong at 12:31 p.m.. Upon landing at the White Cloud airport in China, the remaining passengers were allowed to alight from the plane and they were treated well at the airport.

The following morning, the passengers were allowed to board the same plane, which then left for Hongkong for another refueling, and finally proceeded to Manila.[129]

The six hijackers remained in China and all of them were neither extradited nor prosecuted by the Chinese authorities for the crime they committed.

In 1994, or 23 years later, one of the hijackers, Domingo Echaluce Baskinas applied for amnesty under Proclamation No. 347. His application letter stated as follows:

[127] Application form of Domingo Baskinas.

[128] Colloquial term for a home-made gun.

[129] *Activists Hijack Airliner*, Daily Mirror, 19 Apr. 1971.

June 27, 1994

National Amnesty Commission

Dear Sir:

My name is Domingo Echaluce Baskinas from Sto. Domingo, Albay. I want to apply for political amnesty under Proclamation 347 declaring a general conditional amnesty for rebels.

Relevant facts of my case:

1. On March 28, 1971, I together with 5 other students from Mindanao State University, Marawi City diverted a Philippine Airlines Flight to the People's Republic of China.

2. Objectives of the hijacking:

We wanted the hijacking to serve as a strong political statement against our effete social system, thus galvanizing public attention to our national predicament.

China could serve as a future role-model of a better society. We hoped to learn from their revolutionary experience.

3. I stayed in China for 10 years. Then, in May 1981 I returned to the Philippines and worked in the Education Bureau of the CPP-NPA's Quezon-Bicol Guerrilla Zone.

4. In April, 1982, I surrendered to the Ministry of National Defense, Camp Aguinaldo. From April 1982 - December 1984 I was detained and interrogated periodically inside the National Defense Intelligence Office (N.D.I.O.) Compound. Later, they transferred me to Alicia, Isabela where I was placed under the custody of NDIO Safehouse People. I began to live outside the safehouse in 1988 when I married.

5. I applied for amnesty in 1983 & 1985. Since I have not been provided with formal release papers, I still consider my case pending for resolution.

6. In 1984, one of my co-defendants, Daniel Lobitana, was taken home from Peking by Mr. Ferdinand "Bongbong" Marcos, Jr. [a]fter his official visit and was not even incarcerated.

We hijacked the plane in pursuance of our political objectives. My surrender and subsequent detention for 12 years demonstrated my desire to live within the bounds prescribed by law... and my belief that political objectives can still be realized through peaceful means.

I hope my application will be favorably considered.

Truly Yours,
Domingo E. Baskinas[130]

[130] Application letter of Domingo Echaluce Baskinas to the National Amnesty Commission dated 27 June 1994.

The case of Baskinas was defended and argued by Atty. Bienvenido Hermogenes, Head of the National Amnesty Commission's Legal Department, who recommended the granting of amnesty to Baskinas in his letter dated 28 November 1994 to the National Amnesty Commission, stating expressly:

> The letter in my opinion clearly provides the answer to the queries of the NAC. It recites with candor and forthrightness the political motivations and objectives of the applicant-offender, which was "to serve as a strong political statement against our effete social system, thus galvanizing public attention to our national predicament. China could serve as a future role-model of a better society. x x" Although he is now living a life unmolested in Alicia, Isabela he still applies for amnesty. "Since I have not been provided with formal release papers, I still consider my case pending for resolution ...."
>
> This incident of the PAL plane hijacking was a major event in Philippine setting, which was very much agitated by student activism on the eve of Martial Law.
>
> AMNESTY IS HEREBY RECOMMENDED.
> (sgd.) Atty. Bienvenido Hermogenes

The issue thus presented was, should he be granted amnesty?

The National Amnesty Commission, in a Notice of Resolution dated 5 January 1995, granted Baskinas's application for amnesty. Quoted hereunder is a resolution of the National Amnesty Commission *en banc* dated 16 December 1994:

> RESOLUTION NO. D-94-039. (App. No. 008), with reference to the application of DOMINGO E. BASKINAS of No. 1 Amungao St., Brgy. Apanay, Alicia, Isabela, who committed acts constituting the crime of rebellion by means of participation in activities of the CPP/NPA/NDF such as the hijacking of Philippine Airlines Flight from Manila to Davao and diverted it to China on March 28, 1971. It appearing from the record and upon verification that the applicant has committed such acts in pursuit of his political belief, for which he now seeks amnesty, and upon recommendation of the Local Amnesty Board of Metro Manila, the Commission resolved to GRANT the application for amnesty, pursuant to the provisions of Proclamation No. 347.[131]

Basically, amnesty was granted in this case on the premise that the hijacking committed was a political offense - one which was committed in furtherance of political beliefs. Whether or not this decision is correct will be the subject of an exhaustive discussion in the succeeding sections.

B. The Peculiar Circumstances of the Case

For the past 23 years, Baskinas has lurked behind the glory of his crime. It has been 23 years now and he has never been convicted, much less prosecuted, for the

[131] Resolution No. D-94-039 (App. No. 008), National Amnesty Commission (1994).

crime he committed. Together with six other students, he committed hijacking, although in his formal application for amnesty, he indicated that he committed it for "political purposes." Because of this qualifying phrase, the crime of hijacking was considered a political offense, and, hence, within the coverage of the amnesty grant. After 23 years, without having been convicted or even prosecuted for the crime, he has been forgiven in the name of peace.

The proponent does not agree with the decision of the National Amnesty Commission granting Baskinas' application for amnesty. The following reasons are given to support the claim of the author.

Firstly, the crime of hijacking committed "in pursuit of political beliefs" remains essentially an international crime in whatever way it may be qualified or modified, and, hence the benefits of amnesty should not be bestowed upon it.

As discussed in the earlier section, The Problem of Classification, an international crime designated as one committed "in pursuit of political beliefs" should still be considered as an international crime for one basic reason. The proscription of international crimes, *vis-a-vis* that of political crimes committed against a sovereign state, commands a higher priority, since the former is directly concerned with the protection of human rights, which is superior to the interests of individual states.

Hence, hijacking committed "in pursuit of political beliefs" should be considered as an international crime since its proscription seeks to protect the interests of the international community in human rights, as compared to the prosecution of a political offense wherein the insular interests of the individual state is the object sought to be protected.

Another reason why the author disagrees with the National Amnesty Commission when it approved the amnesty application of Baskinas is that the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), to which the Philippines is legally bound, prohibits the grant of amnesty to hijackers.

C. *International Obligations Under the Hijacking Treaty*

On 16 December 1970, at the Hague, the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) was passed.[132] Under the said treaty, the offense of hijacking is committed by:

> Any person who on board an aircraft in flight commits any of the following acts: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft,

[132] 49 states out of the 77 in attendance at the conference voted for the treaty.

> or attempts to perform any such act or (b) is an accomplice of a person who performs or attempts to perform any such act.[133]

Based on the foregoing definition of hijacking under the said Convention, Baskinas' actions on 28 March 1971 constituted the crime of hijacking. Baskinas, on that fateful day, "unlawfully, by force or threat" seized or exercised control of a Philippine Airlines aircraft on a flight from Manila to Davao and diverted it to the People's Republic Of China.[134]

Under Article 2 of the said Convention, "[e]ach contracting State undertakes to make the offense punishable by severe penalties."[135] Based on this provision alone, there is a direct legal obligation on the part of Contracting States to prosecute these offenders of the international crime of hijacking. The case of Baskinas is unique since he has never been tried or prosecuted by any government authority for the crime of hijacking. After almost ten years in hiding, he comes out into the open and asks that he be granted amnesty. If indeed there is a binding legal obligation on the part of the Philippine government to abide by the hijacking treaty, then the international obligation to prosecute Baskinas would be breached by granting him amnesty. To forgive Baskinas of his crime without any such prosecution would preempt any legal proceedings which may be instituted against him pursuant to the Philippine government's international obligation to prosecute him.

Under the present circumstances, if one were to insist that the government is bound by its treaty obligations under the hijacking convention, then it is clear that Baskinas should be prosecuted of his crime. But the situation has been muddled up by the following circumstances.

The Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) was signed at the Hague on December 16, 1970. On 28 March 1971, Domingo Echaluce Baskinas committed the crime of hijacking. However, the Convention was ratified by the Philippines on 28 February 1973, the Instrument of Ratification of which was deposited with the International Civil Aviation Organization (ICAO) on 26 March 1973. The convention entered into force in the Philippines on 26 April 1973.[136] Some eleven years thereafter, or on 27 June 1994, Baskinas applied for amnesty.

It results, therefore, that at the time Baskinas committed the crime, the Philippines was not yet a signatory to the aforesaid convention, and hence, insofar as that convention is concerned, no international legal duty on the part of the Philippines to prosecute Baskinas was then existing. Therefore, at the time of Baskinas' offense, there had been no international obligation under such treaty.

[133] CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT, art. 1, 16 Dec. 1970.

[134] Daily Mirror, *supra* note 129.

[135] CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT, art. 2, 16 Dec. 1970.

[136] AMBASSADOR BENJAMIN B. DOMINGO, PHILIPPINE TREATIES INDEX 1946-1982, 127 (1983).

The only way to establish the legal capacity to prosecute Baskinas, despite the disqualifying time element involved, is to show that the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), or simply, the Hijacking Treaty of 1970, was a codification treaty.

D. International Legal Obligation Based on a Codification Treaty

A codification treaty is one which "photographs" the state of the law at the time of the treaty's adoption and whose provisions attempt to provide a clear formulation of the current and prevailing rules and principles of customary international law. That such a treaty itself, or its provisions, are declaratory of international law may be demonstrated by studying the following: first, intrinsic evidence to the treaty, like the preamble, the provisions, and the *travaux preparatories*, and second, extrinsic evidence to the treaty, that is, the state of customary international law *vis-a-vis* the treaty.[137]

Once it has been established that a treaty codifies custom and provided that it has been signed and ratified by a significant number of States, the codification treaty "is powerful evidence of the state of customary international law [which]...deploys its effects upon non-parties to the treaty." Indeed, even States which have neither signed nor ratified a codification treaty may not escape being bound by its rules which are only declaratory of international custom, for then the source of the obligation of the non-signatory State is not the treaty itself but the custom confirmed by the treaty.

And even if such a treaty is still unsigned or has not yet entered into force, it still has some evidentiary value, because of the careful consideration given to its drafting and a considerable degree of acceptance by participating States.[138] [b]ut this force diminishes when the treaty remains ineffective with the passage of time.

As stated earlier, to prove that a treaty is a codification of existing customary international law, it may be necessary to study: first, evidence intrinsic to the treaty, like the preamble, the provisions, and the *travaux preparatories*, and second, evidence extrinsic to the treaty, that is, the state of customary international law *vis-a-vis* the treaty.[139] In this paper, however, the codification of such law by the treaty shall be proven by looking simultaneously and without distinction at intrinsic as well as extrinsic evidence, as for example, the preamble (intrinsic evidence) being a manifestation of the state (extrinsic evidence) of customary international law on hijacking.

The preamble of the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) states:[140]

[137] Castañeda, *supra* note 50, at 18.

[138] *Id.*

[139] *Id.*

[140] CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT, Preamble (1970).

THE STATE PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED as follows...

The reason why the convention came to an agreement that the commission of the crime of hijacking "is a matter of grave concern" and that it has "seriously [affected] the operation of air services and [undermined] the confidence of the peoples of the world in the safety of civil aviation" may be traced back to the status of air transportation in the late 1950's to early 1980's.

The advent of the Castro regime in Cuba created a flurry of aircraft hijackings to the point that between 1958 and 1962, fifty percent (50%) of unlawful aircraft seizures occurred in the Western Hemisphere. From January 1968 through June 1982, there were 684 attempted aerial hijackings resulting in at least 500 deaths and 400 injuries. Of that overall number of such hijackings, 108 were deemed to have been politically motivated, resulting in 212 dead and 186 injured. These latter incidents originated in 43 different countries and finished in 47 national states. Terrorist skyjackings seemed to produce an imitative effect, and sometimes occurred in clusters. From January 1958 through June 1963, a total of 48 terrorist groups, comprising 416 individual politically-motivated offenders, participated in the political-ideological skyjackings just cited. Palestinians accounted for twenty percent (20%) and Latin Americans for twenty-one percent (21%) of the total political skyjackings. The most consistent targets of the Palestinian and Arab hijackers were Israel's national airline and foreign scheduled air carriers with service to Israel.[141]

Even the Philippines was not spared from the growing experience of hijacking when on the 30th day of December 1952, the first case of aircraft hijacking in this country occurred. In the case of *People v. Ang Chio Kio*,[142] the accused Ang Chio Kio, then a passenger of Philippine Airlines Plane PI-C-38, en route from Laoag to Aparri, tried to force the pilot of the plane, Pedro Perlas, to proceed to Amoy, China. Upon the refusal of Perlas to do so, he was shot to death by the accused. Ang Chio Kio was convicted of the crime of frustrated coercion, even though the elements of a hijacking were present in the case. The accused was sentenced to *reclusion perpetua*.

[141] BASSIOUNI, *supra* note 55, at 456.

[142] People v. Ang Chio Kio 95 Phil. 475 (1954).

During that period, a growing worldwide concern over the crime of hijacking naturally emerged and States were looking for possible international legal measures for the suppression of the growing menace of aircraft hijacking.

E. Attempts to Codify the Custom

Aircraft hijacking, as far back as 1958, was considered as an internationally proscribed act. Hijacking was then described at times as "piracy on the high skies."[143] The 1958 Geneva Convention on the Law of the Sea included both ship and aircraft in defining piracy in Article 15[144] thereof as follows:

> (1) Any illegal act of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private *aircraft*, and directed:
>
> a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> b. Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (3) Any act of inciting or of intentionally facilitating an act described in paragraph 1 or 2 of this article. (emphasis supplied)

While piracy is restricted to attacks by private ships or aircraft for private ends, an attack in violation of the customary international law of piracy, even for political ends, is still punishable as piracy *jure gentium*.[145]

The first global effort to deal with the problem of interference with air transport was the Convention on Offenses and Certain Other Acts Committed on Board Aircraft held in Tokyo on 14 September 1963.[146]

The said Tokyo Convention dealt strictly with non-military airplanes in flight, and centered on establishing concurrent jurisdiction over offenders against the safety of aircraft, passengers, or crew. No specific definition of hijacking was provided beyond the proscription of acts "which jeopardize good order and discipline on board" the aircraft, and no duty of extradition was provided. The Tokyo Convention provides no effective means of bringing the hijacker to justice,[147] for, as provided in

[143] Defensor-Santiago, *supra* note 36, at 256.

[144] 1958 GENEVA CONVENTION ON THE LAW OF THE SEA, art. 15.

[145] Defensor-Santiago, *supra* note 36, at 256.

[146] IV PTS 801; 704 UNTS 219.

[147] BASSIOUNI, *supra* note 55, at 456.

Article 16, subparagraph 2 thereof, "nothing in this Convention shall be deemed to create an obligation to grant extradition."[148]

F. Customary Law as Determined Through Acts and Statements of States

The International Law Commission described the following as manifesting state practice:

> "Treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations."[149]

As a manifestation of the Philippines's adherence to the generally accepted principle of international law that hijacking is an internationally proscribed act, the Philippine Government became a signatory to the 1958 Geneva Convention on the Law of the Sea.[150] [e]ven though that Convention primarily focused on the crime of piracy, hijacking was necessarily included as an internationally proscribed act by defining piracy in part as one "committed for private ends by the crew or the passengers of a private ship or a private aircraft."[151]

With respect to the Tokyo Convention, the President of the Philippines ratified this convention on 11 October 1965, which was concurred in by the Senate by virtue of Senate Resolution No. 76. The corresponding Instrument of Ratification was deposited with the International Civil Aviation Organization (ICAO) on 26 November 1965 and the said Convention was finally entered into force for the Philippines on 4 December 1969.

The treaty lacks enforcement mechanisms in terms of extradition, but the signing of the treaty is a declaration that the Philippine Government adheres to the principle that hijacking is an internationally proscribed act.

There are several reasons why hijacking is considered as an international crime. Firstly, it violates international and domestic public order. The hijacker forces a violation of the law (an alteration of the airplane flight plan) by those persons precisely entrusted with maintaining the public order - the flight crew. Secondly, it endangers the lives of passengers and crew, thus transgressing not only natural law but also the Universal Declaration of Human Rights, and thereby rendering the nature of hijacking as a crime against humanity. Hijacking endangers the right to life (physical safety and mental health); the right to freedom; freedom of transport and trade, including the freedom to contract in relation to transport; the right to property and a host of private

[148] CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT, art. 16 (2).

[149] Castañeda, *supra* note 50, at 10.

[150] *See* PHILIPPINES TREATIES INDEX 1946-1982.

[151] 1958 GENEVA CONVENTION ON THE LAW OF THE SEAS, art. 15.

interests among which are the interest in safety regulation, regular air traffic services, international tourism, and common air transport services such as airmail.[152]

It would appear then that there is no basis for extending amnesty or asylum to aerial hijackers under generally accepted principles of international law as it now exists.[153] Indeed, aerial hijacking, for the menace it poses to innocent lives and property, might be considered as on par with genocide, war crimes, and any other crime against humanity, which are all extraditable.[154]

G. *The Hague Convention as the Codified Treaty*

The drafters of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft believed that the Tokyo Convention of 1963 was not adequate to meet the needs occasioned by the increased growth of air hijacking in the ensuing years. The Hague Convention sought to remedy the omissions of the Tokyo Convention in two principal areas. First and foremost, the Hague document binds its signatories to the maxim *aut dedere aut punire* - extradite or prosecute.[155] Second, the Hague Convention in effect grants a universal or comprehensive jurisdiction to its parties.[156] It does this by allowing jurisdiction to an apprehending State which does not choose to extradite, and in addition, by not excluding "any criminal jurisdiction exercised in accordance with national law."[157]

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[152] OMAR LIMA QUINTANA, THE CRIME OF AERIAL HIJACKING OR INTERFERENCE WITH CIVIL AIR TRAVEL 30 INT'L REV. CRIM. POL. 32 (1972).

[153] S.K. AGRAWALA, AIRCRAFT HIJACKING AND INTERNATIONAL LAW 49 (1973).

[154] Defensor Santiago, *supra* note 36, at 262.

[155] Art. VII, HAGUE CONVENTION:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.

[156] Art. IV, HAGUE CONVENTION:

1. Each contracting State shall take such measure as may be necessary to establish its jurisdiction over the offense and any other act of violence against passengers or crew committed by the alleged offender in connection with the offense, in the following cases:
   a) when the offense is committed on board an aircraft registered in that State;
   b) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;
   c) when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offense in case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in Paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

[157] BASSIOUNI, *supra* note 55, at 458.

The Hague Convention embodies the principles enunciated in the two previous treaties, i.e., the 1958 Geneva Convention on the Law of the Sea and the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft. The fact that hijacking is considered an international crime is embodied in the Hague treaty, as in the Geneva and Tokyo treaties. Furthermore, the Hague treaty was in response to two problems at that time: first, there was the increasing number of hijackings being committed during the period; and second, the previous treaties "failed to provide the necessary measures to bring a hijacker to justice." These problems the Hague Convention answered. It is also worthy to note that quite a number of states assented to the treaty, for there were 49 states out of a total of 77 in attendance in the conference which voted for the treaty.

If a treaty codifies a custom and has been ratified by a great number of states, as in the case of this Convention, then the codification treaty "is powerful evidence of the state of customary international law [which]... deploys its effects upon non-parties to the treaty."[158]

Hence, the fact that the Philippines was not a signatory to the treaty at the time Baskinas committed the hijacking will not excuse the former from compliance with the treaty by exacting responsibility from the latter, for it has been said that "even States which have neither signed nor ratified a codification treaty may not escape liability from breaching treaty rules which are declaratory of a custom, because the source of the obligation is no longer the treaty but the custom as enunciated by the treaty."[159] Even if such treaty is unsigned or has not yet entered into force, it still has some evidentiary value because of the careful consideration given to its drafting and a considerable degree of acceptance by participating states.[160]

H. *Pacta Sunt Servanda and State Responsibility*

The rule that treaties are binding on the parties thereto and must be performed in good faith is a fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations. Moreover, paragraph 2 of Article 2 of the Charter itself expressly provides that Members are to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."[161] Under the Vienna Convention on the Law of Treaties of 1969, Article 26 thereof embodies the rule of *pacta sunt servanda* by saying that "[e]very treaty in force is binding on the parties to it and must be performed by them in good faith."

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[158] Castañeda, *supra* note 50, at 18.

[159] *Id.*

[160] *Id.*

[161] Report of the International Law Commission, Vol. II, at 172 (1966).

The principle of good faith is a legal principle which forms an integral part of the rule of *pacta sunt servanda*.[162] In the *North Atlantic Coast Fisheries* arbitration, the tribunal dealing with Great Britain's right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said: "...from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty."

The principle of *pacta sunt servanda* is considered the primary reason why there is compliance with treaty obligations at all. It derives from the consent of states and is a principle of customary international law. For there to be any significant legal regulation of the international community, the principle of *pacta sunt servanda* is required. If each state can rely on the other parties to a treaty to comply with the terms of that treaty, then that state will also constantly seek to comply with its treaty obligations.[163]

State responsibility is an adjunct of *pacta sunt servanda*. Every treaty in force is binding on the parties to it and must be performed by them in good faith.[164] If a State breaches a treaty or a customary international law, then it is committing an internationally wrongful act.[165] The internationally wrongful act of a State involves conduct "attributable to the State under international law" that "constitutes a breach of an international obligation of the State." The act of the state is to be characterized as internationally wrongful only "by international law." Putting these ideas together, "every internationally wrongful act of a State entails the international responsibility of that State."[166]

In the case at bar, there is a clear international obligation on the part of the Philippine Government to adhere to the principles and provisions of the Hague Convention on Hijacking. Even though the Philippines was not a signatory to the treaty at the point in time when Baskinas committed the crime of hijacking, the Hague Convention was, at the time of its signing in 1970, a codification of international customary law which considered hijacking as an international crime.

The Philippines' international obligation consisted in prosecuting Baskinas for the crime of hijacking or granting extradition to any other State seeking to prosecute him. For the Philippines to grant amnesty or forgiveness to Baskinas is clearly violative of that international duty under international law, for it is contradictory in both spirit and principle to the provisions of the Hague Convention.

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[162] *Id.*

[163] DIXON AND MCCORQUODALE, *supra* note 58, at 57

[164] VIENNA CONVENTION ON THE LAW OF TREATIES, art. XXVI.

[165] DIXON AND MCCORQUODALE, *supra* note 58, at 400.

[166] *Id.* at 403 *citing* P. ALLOT, STATE RESPONSIBILITY AND THE UNMAKING OF INTERNATIONAL LAW.

Hence, the approval of Baskinas's application for amnesty was plain error on the part of the National Amnesty Commission for it failed to consider the Philippine Government's international obligations under the 1970 Hague Convention on Hijacking.

CONCLUSION

A. Summary

1. Since the American period, the Philippine government has been using amnesty as a political tool. It has been used to suppress rebellions or insurrections, to forgive rebels in the name of reconciliation and most recently, to promote peace. There has been no limitation on the power to grant amnesty. As long as the procedural and substantive requirements laid down in the Constitution are followed, then the President can grant amnesty. [w]ith the present structure in place, there is the possibility that the power to grant amnesty can be made solely dependent on the political will and reason of the President and Congress.

2. By practice, and as history has shown, amnesty has been commonly used to forgive or absolve crimes of a political nature. A political offense is an ideologically motivated act, expressing political opposition and directed against the security of the State. The object of injury, whenever a political crime is perpetrated is the State - she is the VICTIM in these cases. As a victim, it is the State's prerogative to forgive those who injure her by granting them amnesty or by prosecuting them. The State, by enacting Proclamation Nos. 347 and 348, has chosen to forgive those who commit political crimes against her.

3. There is no question that the aforesaid Proclamations are valid in the sense that they fulfill the procedural and substantive requirements laid down in the Constitution. However, by virtue of Article II, § 2 of the Constitution, the Philippine Government is bound to observe that limitation dictated by international law on the power to grant amnesty. On the basis of customary international law and existing treaty obligations, the power to grant amnesty cannot be exercised over *delicti jus gentium*.

4. The legal impediment to the grant of amnesty in cases of *delicti jus gentium* rests, first of all, on customary international law. The *ultima ratio* of proscribing *delicti jus gentium* is the protection of human rights. This can be gleaned from the fact that the human rights sought to be protected by such proscription are rights based on customary international law and embodied in documents deemed to have binding legal effect, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. According to authors on international law, the protection of human rights has attained the status of customary international law, most especially the protection of those rights which are embodied in the Universal

Declaration of Human Rights and the International Covenant on Civil and Political Rights. Being customary international law, states are obliged to protect human rights by prosecuting violators of human rights and perpetrators of international crimes. Accordingly, amnesty may not be granted to perpetrators of international crimes, since human rights would be deprived of protection by forgiving these violators of human rights in granting them amnesty. The only way to protect human rights is to prosecute the violators thereof.

5. Another basis for the State's legal obligation to refrain from granting amnesty in cases of international crimes are those treaty obligations impliedly limiting the power to grant amnesty. International crimes are generally embodied in treaties called International Criminal Law Conventions. An important feature of such conventions is the express stipulation that state parties thereto should prosecute violators of the international crimes defined therein. The duty to prosecute and the power to grant amnesty are contradictory to each other. Since the objective of prosecution is eventual punishment, this duty to prosecute cannot co-exist with the power to grant amnesty, the aim of the latter being to forgive the criminal. Forgiveness and prosecution are simply diametrically opposed to each other, both in nature and spirit.

6. An important feature of *delicti jus gentium* is the object affected by the crime. In cases of political offenses, the object affected is the State. Hence, the State has the prerogative to punish the offender or to grant him amnesty. With that State lies that prerogative, being the aggrieved party or the victim in cases of political offenses. The situation is different in cases of *delicti jus gentium.* In these cases, the aggrieved party is not merely the State, but the international community. By incorporating an internationally proscribed act in a treaty, the international community has made a tacit manifestation that it would be the injured party in the commission of such act, and necessarily the whole world as well, and not simply of the State. This should be taken into consideration in granting amnesty.

7. A problem arises when an applicant comes forward and asks for amnesty on the ground that he committed an international crime "in pursuit of political beliefs" (e.g. genocide "in pursuit of political beliefs," piracy "in pursuit of political beliefs," hijacking "in pursuit of political beliefs"). Will it be considered a political offense and hence, covered by the grant of amnesty, or will it be considered an international crime and therefore, beyond the reach of an amnesty grant?

8. In the foregoing, the international character of the crime should be upheld, since the protection of human rights, which the proscription of international crimes seeks to protect, is superior to the laws of the sovereign state. Hence, the national laws of an individual state seeking to grant amnesty to political offenders should give way to international law seeking to protect human rights.

9. The thesis statement expressed herein finds application in the case of Domingo Echaluce Baskinas, who was granted amnesty on the basis of his assertion that hijacking committed "in pursuit of political beliefs" should be considered a political offense,

and hence, within the coverage of the amnesty proclamation. This paper arrived at the conclusion that the crime he committed was an international crime, and hence, beyond the coverage of the said proclamation. The basis of this conclusion is the fact that the necessity for the protection of human rights is superior to the laws of an individual state seeking to grant amnesty to political offenders. In view thereof, the author believes that the crime committed was the international crime of hijacking, which is beyond the pale of an amnesty grant.

10. The basis of the Philippine Government's international obligation to prosecute Baskinas for the crime of hijacking is embodied in the 1970 Hague Convention on Hijacking. The obligation to prosecute Baskinas was shown in the interplay of customary international law and treaty obligations. Since it was established that an obligation to prosecute existed, it was error on the part of the National Amnesty Commission to have approved Baskinas.

11. Hijacking alone is not the only crime placing a limitation on the power to grant amnesty. There are twenty-two individually known international crimes and each one constitutes an impediment to the grant of amnesty. For the international crime, however, to constitute such a limitation, it is important to determine first whether there is a legal obligation on the part of the State to prosecute that particular international crime. The Sources Doctrine is the indispensable tool in such determination.

12. The thesis statement expressed in this paper is: *Delicti Jus Gentium* is a limitation on the power to grant amnesty. The case of Baskinas is just one of the many cases wherein an international crime may be granted amnesty without considering the State's international obligations vis-a-vis such grant. This may be due to the fact that the Philippine Constitution expressly limits the power to grant amnesty on certain procedural and substantive requirements, viz.: 1) amnesty may not be granted in cases of impeachment, or as otherwise provided in the Constitution; 2) an amnesty proclamation needs the concurrence of Congress; 3) an amnesty grant for violation of election laws, rules, and regulations must be with the favorable recommendation of the Commission on Elections and 4) an amnesty grant must not violate the Bill of Rights.

By virtue of Article II, § 2, of the Constitution, and on the strength of the arguments presented in this paper, it is submitted that another limitation on the power to grant amnesty exists - *Delicti Jus Gentium.* Hence, aside from constitutional requirements heretofore enumerated, this proposed limitation should also be required to be taken into consideration in every grant of amnesty.

13. This paper does not espouse the view, and should not convey the impression that the granting of amnesty is against nationalist policies. Whenever an offender of an international crime is prosecuted for the crime he committed, instead of being granted amnesty, it does not necessarily mean that the nationalist purposes for which amnesty is granted have been disregarded in favor of international law. There need

not be a conflict between national law and international law, since there are many ways to promote the objectives of the national law without disregarding the international obligations imposed by international law.

14. Assuming *arguendo* that Baskinas was prosecuted for his crime, instead of having been granted amnesty, this does not necessarily mean that the peace process would be hampered, since there are other ways to promote and attain peace without disregarding the Philippine Government's duty to prosecute Baskinas for the crime of hijacking.[167]

RECOMMENDATIONS

TO THE UNITED NATIONS. It is suggested that a multilateral treaty be passed prohibiting the grant of amnesty in favor of international crimes. This is not an impossibility, since moves have already been made toward this direction. In 1977, the Committee of Ministers of the Council of Europe adopted a resolution dealing specifically with the subject of "The Contribution of Criminal Law to the Protection of the Environment." In that resolution, the following measure was adopted: "exclusion from amnesty of serious environmental offenses...."[168]

At this point, the determination of whether or not a state may grant amnesty in favor of an international crime depends on whether or not it is a signatory to a treaty proscribing the international crime, or otherwise, whether or not the crime is considered punishable under customary international law. If a treaty is passed expressly prohibiting the grant of amnesty in cases of the commission of international crimes, then this problem will be solved.

TO THE EXECUTIVE DEPARTMENT. The Executive should re-examine its policies regarding the grant of amnesty, particularly the present Proclamation Nos. 347 and 348. Specific prohibitions against the grant of amnesty should be embodied in the amnesty proclamations, especially those concerning international crimes. If these prohibitions are not or cannot be included in the present proclamations, then the President should use his power discreetly by taking into consideration the international duty to prosecute offenders of international crimes. The President, as Head of State, should take into consideration and act in accordance with the treaty obligations which bind the Philippines.

[167] It has been suggested that pardon be granted to the international criminal offender after he has been convicted by final judgment. The author, however, disagrees with this view since a grant of pardon would be a way of circumventing the very purpose for which an international crime is proscribed - the protection of human rights. Pardoning an offender would have the effect of excusing him from the punishment attached to the crime. It does not, therefore, fulfill the duty to protect human rights, which consists of the duty to prosecute, and eventually punish the violators of human rights.

[168] BASSIOUNI, *supra* note 55, at 550-51, *citing* STEPHEN MCCAFFREY, CRIMES AGAINST THE ENVIRONMENT.

TO THE NATIONAL AMNESTY COMMISSION. The NAC should have been more judicious in granting amnesty to Baskinas. It should not have granted amnesty to Baskinas simply on the basis of his assertion that he committed the crime of hijacking "in pursuit of political beliefs." International law should have been made an important consideration in its deliberations.

TO THE LEGISLATIVE BRANCH. The legislature should examine the present power of the President to initiate and of the Congress to concur in a grant of amnesty under the present Constitution. An appropriate constitutional amendment should be made by placing a limitation on the President's power to grant amnesty in line with the thesis laid down in this paper.

TO THE JUDICIARY. If ever the case of Baskinas or, for that matter, other cases of similar nature are brought before the Supreme Court for adjudication, the High Court should not limit its consideration of the power of the Executive to grant amnesty only to the letter of the Constitution, but should also take into consideration the status of international law on the matter. The basis for this suggestion Article II, § 2 of the 1987 Constitution which states that: "The Philippines... adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[169]

In the past and up to the present, the grant of amnesty has been left to the political will of the President and Congress. The reason for this is because, after all, the relevant procedural and substantive requirements of the Constitution have been followed, and there is no other law which would prevent the State from granting amnesty to any offender and for whatever reason the President and Congress may deem proper.

With this paper, another limitation is proposed which would serve as a deterrent for the possible abuse of that prerogative of political will by the President and Congress. *Delicti Jus Gentium*, as a limitation on the power to grant amnesty, should not be viewed on its face value and accepted as just "another" limitation. The importance of recognizing this limitation lies in the fact that by accepting it, the Philippine Government is taking on a greater and loftier responsibility - the protection of human rights. By punishing perpetrators of international crimes, the government is indirectly protecting those rights which the proscription of international crimes always seeks to protect. The acceptance of the thesis statement of this work would speak highly of a Government which truly "values the dignity of every human person and guarantees full respect for human rights."[170]

To allow a government to grant amnesty to perpetrators of international crimes is tantamount to condoning and tolerating a government which violates a law of nature - the protection of human rights. A government of the people, by the people, and for the people, should not go against the very reason for the existence of a human

being - the protection of his rights. A government which does otherwise is a government which governs without reason, for it disregards the rights of those human beings who compose it and rely on it for protection.

> "Exactly. One must require from each one the duty which each one performs," the king went on. "Accepted authority rests first of all on REASON. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable."
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> Excerpt from "The Little Prince"
> by Antoine de Saint-Exupery