TREATMENT OF WAR CRIMES IN PEACE SETTLEMENTS – PROSECUTION OR AMNESTY?

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I. INTRODUCTION

Amnesty is described in the Shorter Oxford English Dictionary (1983) as an act of oblivion, a general pardon of past offences by the ruling authority. Consequently, in order to be effective, an amnesty should be based on the following principles:

a) prohibition of the institution of any criminal proceedings against any person, on the ground of suspicion of having performed the acts to which the amnesty applies;

b) prohibition of any administrative, disciplinary or other proceeding for the commission of the acts to which the amnesty applies;

c) inadmissibility of any civil suits based on claims arising from the acts to which the amnesty applies;

d) quashing of all prosecutions and convictions for the acts to which the amnesty applies, and release of persons detained on the basis of such convictions.

II. INTERNATIONAL PRACTICE

It has been asserted by Röling that “the laws of war derive their authority, during a war, from the threat of reprisals, prosecution and punishment after the war”.

Indeed, prosecution and punishment of war criminals is essential to the legal validity, observance and development of the laws of war.

The American prosecutor at the Nuremberg Trials, Robert Jackson, was of the opinion that letting the major criminals live undisturbed to write their “memoires” in peace, “would mock the dead and make cynics of the living”.

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2 Cited ibid., 24.
However, when a civil or international war comes to an end, and peace is made, other important considerations come into play, usually conflicting with those requiring prosecution and punishment of war crimes that were committed during the course of the war. Commenting about the desirable content of a peace treaty, Grewe expressed his view that “amnesty and oblivion are essential elements of such a [peace] settlement, whereas humiliation, punishment and discrimination are inimical to stable conditions of peace”.

The purpose of this article is to examine the standpoint of contemporary international law on these two conflicting policies: the prosecution of war crimes after the conclusion of peace, on the one hand, and amnesty, on the other.

A. Amnesties

From a historical perspective, the practice of creating a general amnesty for war crimes after the conclusion of peace preceded the prosecution of war criminals, meaning that in the past amnesty was regarded as an essential element of the establishment of peace.

Included in international peace treaties concluded during past centuries – and up to the First World War – was the so-called “amnesty clause”, whereby former belligerent States declared a reciprocal general amnesty exonerating themselves, the members of their armed forces and their subjects of all the wrongful acts they had committed during, and in connection with the war.

An amnesty clause was already introduced in the 1648 Peace Treaties of Westphalia, signed at Münster and Osnabrück, which ended the Thirty Years War. They are generally regarded as the first international agreements within the meaning of modern international law, so that their conclusion marks the “birth-date” of the international law itself, in this respect. The amnesty clause included in Article 2 of these Peace Treaties provided “that there should be on the one side and the other a perpetual oblivion, amnesty, or pardon of all that has been committed since the beginning of these troubles … in words, writings, and outrageous actions, in violence, hostilities, damages and expenses”.

4 Ibid., 106.
7 A.M. De Zayas, “Westphalia, Peace of (1648)”, 7 Encyclopedia 536.