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Judging, Atoning, Reconciling

How to coexist after war?

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Abstract

In 2012, the European Union received the Nobel peace prize for its contribution to reconciliation. Does the EU represent a space of experiment and reference for moving beyond war—be it global, regional, or civil—and peacefully coexisting after conflicts? The expression “transitional justice” has emerged since the 1990s to denote the time during which peace is built, opening up a new field of research and expertise. This notion takes into account not only the traditional instruments of justice, such as purges and reparations, but symbolic instruments as well, such as public requests to be excused and pardoned, along with gestures of repentance and multiple initiatives for restoring confidence. While “reconciliation” is the goal being sought, it is even more so the process of rapprochement, which is often asymmetrical and imperfect, and involves various actors on multiple scales. The relation to the past occupies a central and controversial role and has drawn responses ranging from amnesty to hypermnesia.

Article

The European Union received the Nobel peace prize on December 10, 2012. Homage was paid to French-German rapprochement as well as to the “driving force represented by the EU during the reconciliation process.” Peace and reconciliation have seemed inseparable since the turn of the twentieth century, which saw the appearance of associations advocating “international conciliation” and “reconciliation.” The increased attention paid to this new subject stems from the rise of “transitional justice.” This new concept does not call into question the “retributive” justice that has long prevailed in the aftermath of wars and takes the traditional instruments of the latter into account (trials of war criminals, purge proceedings, and reparations). It nevertheless stands out through its use of symbolic instruments, such as the public confession of crimes, requests for forgiveness, and gestures of repentance which allow victims to rebuild their lives and promote the restoration of confidence. This new concept of “reconstitutive” justice emerged in the late 1980s and early 1990s in the context of the end of the Cold War, notably in Europe, and with apartheid in South Africa and the fall of dictatorships in Latin America. The expression designates a series of measures designed to facilitate the period of political transition, and to consolidate democracy and the rule of law. It does not solely involve the immediate aftermath of the conflict, but rather a varying period of time, during which the whole series of problems resulting from the traumatic past is processed, including memory. Transitional justice is thus a new way of grasping post-conflict punishment, reparation and reconciliation together as a whole. The different means for managing postwar periods in Europe since the nineteenth century, including punishment, compensation, material and moral reparations, public pardons and even repentance, raise the question of the relation to the past as a foundation of “European awareness.” The European Parliament’s resolution from April 2, 2009 bears witness to this, declaring that European integration is a “model for peace and reconciliation,” and that “reconciliation entails engaging with memory.” Since the Treaty of Westphalia (1648) and its clause of “perpetual forgetting,” European conceptions have been completely reversed.

To judge and to punish: national justice in the face of war

On the national scale, judicial institutions play a specific role during the aftermath of war. Often preceded by “unofficial” purges and summary executions, administrative or penal proceedings have a political and sometimes social function (as shown by the exclusion of certain social categories in the USSR and the Soviet occupation zone in Germany after 1945) and bear a fundamental symbolic dimension in all places. A distinction is made between three major categories: 1. Purges conducted by national courts on their own nationals (the trials of Belgian collaborators with the German occupier organized after the armistice on November 11, 1918; the purges connected to the Second World War in the USSR and Europe; the “lustration” practiced in Central and Eastern Europe after the collapse of communism, in an effort to exclude compromised individuals from positions of responsibility). 2. Trials involving foreigners who committed crimes within national territory (trials of Nazi criminals conducted in formerly occupied Europe; trials of war criminals in countries from the ex-Yugoslavia). 3.A purge conducted by a foreign power in the defeated country, such as the “Bergen-Belsen trial” held in 1945 by the British within their occupation zone in Germany, at a time when there was no longer a German state. The German legal system was gradually re-established only from 1949, and initially judged Nazi crimes committed against Germans, before expanding its competence.

Purges most often eased with time. Amnesty laws were enacted, and measures pardoning or reducing the sentences for nationals and foreigners multiplied and served as a sign of normalization, the goal being to restore social cohesion and promote both national and international “reconciliation.”

The rise of international justice

Until the end of the Second World War, justice was meted out within a national framework. In October 1945, an International Military Tribunal (IMT) was established for the first time in Nuremberg, to judge the major Nazi criminals who were still alive. While the wars of the twentieth century were characterized by mass violence and the large-scale perpetration of crimes, henceforth referred to as genocide and crimes against humanity, the judgment and punishment of criminals was also seen as a “chance for peace” (Edgar Faure).

The idea of punishing those responsible is nevertheless an old one. The English, for instance, contemplated judging Napoleon before opting for his exile. The codification of the rules of war accelerated after the Battle of Solferino (1859). Under the leadership of Henri Dunant, the founder of the Red Cross, the First Geneva Convention in 1864 and The Hague Conferences in 1899 and 1907 marked the birth of international humanitarian law. It was in this context that the notion of war crimes gradually developed. The impact of the First World War bolstered the desire to criminalize extreme war violence. In 1922, the League of Nations created a Permanent Court of International Justice, and the Kellog-Briand Pact (1928) sought to “outlaw war.” It was also in the aftermath of “The Great War” that the Allies decided, in view of the emotions sparked by “German atrocities,” to judge those who were primarily responsible. However the *Kaiser*, whom the Dutch refused to hand over, avoided his trial. In the end only a small number of people were brought before the Imperial Court in Leipzig—a national jurisdiction—and the trials turned into a fiasco. It was partly due to this failure that the punishment of the guilty parties became an Allied war aim during the Second World War.

While Nuremberg was not followed by the other international trials that had initially planned due to the dawning conflict between East and West, a legal basis was nevertheless established at the initiative of various states, the United Nations (1945), and the Council of Europe (1949), leading to the creation of bodies with a universal or regional dimension. The Universal Declaration of Human Rights (1948), The Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the Geneva Conventions of 1949 established a framework that subsequently became even more precise.

Yet it was not until the very end of the twentieth century that international justice flourished, in the face of new conflicts in Europe (wars in the Balkans, 1991-2001) and on other continents (the genocide against the Tutsi in Rwanda in 1994). After the end of the Cold War, the first International Criminal Tribunals (ICT) were established and tasked with passing judgment on individuals whose crimes harmed values considered to be universal. They had primacy over national jurisdictions. This is how the first ICT for Yugoslavia (ICTY), which was created in 1993, was able to secure the delivery of Slobodan Milosevic from Serbia in 2001, who was judged for crimes against humanity and genocide. A new symbolic phase subsequently began in 2002, with the creation of the International Criminal Court.

However, international justice led to controversy, notably in its relations with national jurisdictions. Did it dispossess them of their right to judge? Its capacity to fulfil its mission was also challenged at times. Could criminals escape its reach? The imprescriptibility of crimes against humanity was supposed to prevent that. Did it meet the expectations of victims? Did it facilitate the capacity to peacefully coexist after a conflict? By preventing vengeance and ensuring the punishment and subsequent reintegration of guilty parties in society (with the exception of the most serious cases), as well as by enabling victims to be recognized and to bear witness for History, many considered justice to be a pillar of the pacification process. Its decisions were inevitably criticized all the same, and criticisms of “victor’s justice” or “great power justice” were not groundless. Justice could also be seen by states as an obstacle to reconciliation. For example in the late 1950s and early 1960s, Nazi criminals were pardoned and freed in France, most likely to avoid reviving debates on collaboration and hindering rapprochement with the FRG. How can justice and reconciliation coexist? Transitional justice attempts to respond to this question by seeking to establish responsibility beyond the tight circle of the “primary” guilty parties, by prompting the confession of crimes in order to “establish the truth,” and by involving victims in this process, a step that is required for their recognition and psychological reconstruction. However in the Balkans, the TPIY’s contribution to reconciliation led to controversial assessments between actors on the ground: justice deemed as being too slow and not in line with the expectations of victims, along with various obstacles to rapprochement. Justice alone was not enough to advance the reconciliation process.

War reparations—reparations for the trauma caused by war?

Reparations were also marshalled to restore and consolidate peaceful coexistence after a conflict. Is it possible to repair the material, financial, physical, or psychological damage committed during a war?

For a long time, the payment of a fixed “compensation” (Prussia in 1807, France in 1815 or 1871) was imposed on the vanquished, a kind of *price for peace*. The Allies renounced this tribute in the aftermath of the First World War but demanded the payment of “reparations” (*the price of war*) based on the damage caused (the “rape” of Belgium, devastated regions in France, etc.). These reparations heightened resentment within international relations. Due to the scope and uniqueness of the crimes committed, the question of reparations after 1945 was rethought, and included not just the classical reparations—territory, dismantling, and deliveries, but not monetary payments—that Germany and its allies owed to victim countries, but also individual compensation for the different categories of victims, both German and foreign. Those persecuted for political, racial, or religious reasons were the first victims recognized. Decades later came the inclusion of homosexuals, those sterilized by force, Gypsy groups such as the Roma and Sinti and those incorporated by force within the German army, in addition to forced laborers. Reparations led to a hierarchization of victims, and were also connected to thorny questions of procedure: victims could claim their rights individually, but for foreign victims recourse was made to bilateral agreements, such as those signed between the FRG and Israel (1952) or its other Western European neighbours during the early 1960s. From that point onward, reparations were increasingly made through civil law proceedings, and were centred on the victim in

an effort to defend the rights and interests of particular groups independently from the framework of the state (as with the compensation sought by deportees and their descendants from the SNCF (French National Railway Company) since the mid-2000s).

A debate began during the post-war period regarding the qualification of “reparations.” The wrongs caused could rarely be righted, even less so suffering and death. In German the term *Wiedergutmachung*—“the act of making good again”—was and remains contested. *Reparation* is also problematic, as it espouses the perspective of the guilty parties. Reparations include different categories of action. It firstly involves the restitution of goods despoiled during a conflict, and then compensation for lost material goods or immaterial harm whose value is difficult to assess, such as loss of liberty, damage to health, career, etc. It can also include the rehabilitation of individuals within their rights and honour. The question of reparations once again came to the forefront with the end of the Cold War beginning in the 1990s. A reunified Germany revisited a question that it had previously resolved only with countries in the West, while there arose the question of repatriations for those who had been expelled (a highly debated question upon the Czech Republic’s entry into the EU), or who had been the victims of communism. Procedures of rehabilitation and compensation were initiated in Central and Eastern Europe.

The question of reparations being inseparably linked to that of the recognition of victims and the qualification of crimes, numerous roadblocks affected the process. European countries supported their former colonies in the context of cooperation and development aid, without explicitly recognizing that it was partly a process of reparation, as this aid was not connected to any recognition of a moral debt. The payment of reparations also led to the emergence of new demands from other categories of victims, or from victims of other conflicts. For example, associations such as CRAN (Conseil représentatif des associations noires: The representative Council of France’s Black Associations), which brought a suit against the Caisse des dépôts et consignations in 2013 for profiting from slavery, are requesting compensation today. The Turkish state’s non-recognition of the Armenian Genocide in 1915 presents both political and financial considerations. For that matter, the older the violence or the harm that is to be compensated, the harder it is to assess the compensation, or to identify the range of descendants to be compensated.

From the viewpoint of victims, there is the question of whether to accept the reparations or not. Compensation can be indispensable for ensuring existence. While such compensation is generally accepted because it is a right, victims fear that it can be seen as closing the book on the past. The unease of Holocaust victims is reflected in the difficulty of broaching the question of reparations in testimonies. The nature of the trauma is decisive. When it is a question of compensating the irreparable, acceptance of the reparation can under no circumstances be equated with a pardon.

Do reparations help advance the question of peaceful coexistence after a conflict? It is certain that material or financial reparations alone are not sufficient. Reparations that involve the total and complete recognition of the victim and the moral debt are indispensable. However, the absence of reparations, or reparations that are ill-adapted, can prolong tensions beyond the conflict. For example, at the beginning of the Greek crisis during the 2010s, the government and a part of public opinion criticized the FRG for its firm stance, whereas the compensation the latter paid to Greece had been wholly insufficient. Crimes of occupation were evoked to remind Germany of its past.

Peaceful coexistence after conflict: the actors and times of the rapprochement process

The recognition of victims has revealed itself as the most important condition for peaceful coexistence, leading to the question of how to achieve it. The distinction between perpetrators and

victims is not always simple, as shown by the conflicts in Northern Ireland or the former Yugoslavia. The recognition of the "debt" entails an awareness of individual and collective responsibility that is forged over time, with the latter being transmitted from generation to generation. A minimum amount of dialogue must be re-established in order for it to be expressed.

Learning to live *with* others mobilizes all actors, including states, civil society organizations, and individuals. The young are the primary consideration, as they embody the future and hopes for peace, and are not compromised, or at least are less compromised than their elders. In the aftermath of all conflicts since 1918, European and international bilateral youth meetings were organized for—and also by—the young, in an effort to advance "understanding" in international relations. It should be noted that these meetings were more of an opportunity to speak about the present and future rather than the past. The young also led the first initiatives offering moral reparations. There is nevertheless the risk that they can be used by their elders for a reconciliation process "by proxy." For example during the 1970s, the young Germans working in kibbutzim were derisively referred to as "expiators!"

It has generally proven counterproductive to initiate official dialogue on the most emotional subjects. It was often societal actors, such as politically engaged and organized citizens, who were the first to initiate dialogue on the local, cross border and international level. For example, since 2003 a collective of historians from the Balkan region, with support from the NGO Democracy and Reconciliation in Southeast Europe (CDRSSE), has published "common educational materials" for teaching about Southeast Europe, presenting a multitude of viewpoints. The diversity and complementarity of actors is productive, up to and including the tensions between them. While states are the only ones that can resolve questions of borders and reparations, due to reasons of national consensus it is difficult for them to immediately address questions of guilt and responsibility. It is generally other bearers of memory, such as associations for victims or former members of the resistance, who impose the debate on past crimes in the public sphere. The "second guilt," after that of the crimes committed, is that of silence, which excludes the victim from memory.

Reconciliation: a specific form of rapprochement

In most European languages, the term reconciliation evokes rapprochement through harmony, union, unity, friendship, or peace. It therefore suggests a reciprocal process. However in German, *Versöhnung* is based on the root *Sühne*, or expiation: between he who expiates and he who pardons, the relation is profoundly asymmetrical. These conceptions reflected in the etymology are therefore highly different, even if the trace of the religious is present everywhere. This is also true of international reconciliation, for instance when Chancellor Willy Brandt knelt before the Monument to the Ghetto Heroes in Warsaw in December 1970.

Use of the term reconciliation is instructive as well. In the late nineteenth century and then after 1918, initiatives for rapprochement led by pacifist, feminist, and religious movements, along with the League of Nations and certain governments, were referred to as "reconciliation," "moral disarmament," or "international conciliation." However, the term temporarily disappeared after 1945, notably due to the failed Franco-German and Greek-Turkish attempts from the interwar period. Another factor that contributed to this temporary eclipse was its disqualification after being seized upon by fascist circles during the 1930s, and later by supporters of collaboration. The collapse of the concept was such that in 1945 the Allies warned against the "danger of reconciliation." After the war, there was talk of rapprochement and understanding in particular, and in Eastern Europe of fraternity, peace, and friendship. It was in the late 1950s that "reconciliation" reappeared in diplomatic language. The term was consecrated in July 1962 by General de Gaulle and Chancellor Adenauer in Reims Cathedral, where they sought to "set the seal on Franco-German reconciliation." Its use was later made common, up until its spectacular rise during the 1990s with the establishment of "Truth

and Reconciliation" commissions.

Rapprochement and reconciliation are often seen as being synonymous. The second term, with its powerful emotional charge, has been subject to inflationist use, so much so that today there is denunciation of the "kitsch of reconciliation." Through their "catalogs of good practices," NGOs and international organizations have in fact helped make reconciliation both a categorical imperative and a normed process, something that has weakened it as a result. The necessity of reconciliation formulated by third parties is intolerable for victims. For example in Bosnia-Herzegovina, local victims' associations and the TPIY refused the "Truth and Reconciliation Commissions" that international organizations tried to put in place. In the end, an independent regional commission dedicated to victims, known as "RECOM," was created in 2011 by nearly a thousand local Balkan NGOs. In setting out to list the "deeds" and crimes committed, it has demonstrated its suspicion of the excesses of "truth," as well as its distrust of so-called "reconciliation." Has reconciliation consequently become incompatible with "truth," which is itself accused of no longer being based on factual reality?

Rapprochement and reconciliation are both open-ended, asymmetrical, and imperfect processes, involving various actors on numerous levels. The difference lies in their relation to the past. Rapprochement is primarily turned towards the future, while reconciliation calls on the past and memory. As it is conceived today, it is radically opposed to the *damnatio memoriae* of Antiquity, the forgetting imposed on belligerents by the Peace of Westphalia, or the "pact of forgetting" weighing on Spanish society since the end of Francoism. It never signifies forgetting. Is pardon all it demands? Unlike the Christian concept political reconciliation and repentance are distinct from the question of pardon, to the extent that the latter can be experienced as a form of pressure unduly exerted on victims or their descendants. As Frédéric Rognon has written, "reconciliation entails a new relation: words are not enough, nor is a commitment to never starting again. What is needed is a gesture, a behaviour, a material or symbolic reparation, along with the restoration of a genuine bond."

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