

## Coming to Terms with the Past as a Problem of Justice: Philosophical Reflections\*

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### (I)

#### Conceptual distinctions and general rules

In view of the highly charged political climate in which it is situated, the discourse on a nation's "coming to terms with the past" requires a conceptual clarification. The German term "*Vergangenheitsbewältigung*" from which the English phrase appears having been derived in contemporary debates, is misleading in one basic sense. In its literal meaning, it suggests that something like the "mastering of the past" would be possible for a nation or an individual. The English rendering of the term - "coming to terms with the past" - is more "realistic" insofar as it does not create false expectations as to the possible undoing of history.

It has to be made clear from the outset that, in strict terms of a philosophical - or rational - ethics, no *individual* responsibility exists on the

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part of contemporaries, or may be construed, for acts committed by people of previous generations. If this would be the case, one would follow an irrational, almost metaphysical doctrine of guilt. Furthermore, “coming to terms with the past” is essentially a moral – not primarily a legal – problem.

At first glance, one may distinguish three basic dimensions – or normative implications – of the process described by the notion. “Coming to terms with the past” means – and subsequently requires:

- (1) *Establishing a correct and comprehensive historical record* concerning facts that amount to the commission of “international crimes” (crimes against humanity, war crimes, etc., as defined in international law) allegedly committed by individuals (in particular officers, state functionaries, civil servants, etc.) of a previous generation or régime. This is an essentially *scholarly* (scientific) task, not a political one, and it is, obviously, to be undertaken by scholarly means, not as part of a propaganda campaign of any kind.
- (2) *Measures of redress*, i.e. compensation for injustices inflicted upon certain people or groups of people belonging to different ethnic, social, cultural or religious communities. Insofar as the individuals whose actions necessitate measures of redress are not alive anymore, the respective obligation is exclusively based on the notion of *state responsibility*. In distinction from the measures under point (1), this is primarily a *political* and to a lesser extent a *legal* task; eventually, albeit only in

certain well-described cases, it may be dealt with in civil law suits.

- (3) *Measures of criminal justice* – but obviously only in cases where alleged perpetrators of crimes are still alive. This *judicial instrument*, however, must by no means be used for the purpose of revenge. Such measures may only be undertaken if there exists an elaborate, properly functioning division of powers. This indispensable condition is definitely not met when the state prosecutor, an organ of judicial power, is acting upon instructions from the executive power, i.e. the Minister of Justice, the Prime Minister, the President, or the government collectively.

When one is dealing with a nation's past, no preconceived admissions of guilt are admissible. "Guilt" must never become a "historical dogma" – in whatever constellation and in regard to whatever nation.

As a general rule, a nation's (i.e. state's) "coming to terms with the past" must be detached from *vested interests* – whether those are related to party politics at the domestic or power politics at the international level – and is to be carried out *sine ira et studio*, i.e. "in good faith" and without any second thoughts in the sense of political maneuvering. The scholarly project of establishing a truthful record of the past must in no way and under no circumstances be obfuscated by a political agenda – and particularly so because of the *political* implications of its findings.

*There are no "good" or "bad" nations (peoples) per se.* The responsibility for what happened in the past always relates to certain

individuals or groups of people who may eventually have acted in a coordinated manner (as groups in a *functional*, not an ethnic or cultural, sense). This implies the principled rejection of a Manichaeian division of the world – a temptation that, in the course of history, the “rulers of the day” all too often could not resist.

When dealing with a nation’s past, “justice” is to be defined as a *balance of perception and remedial action*. In this context, the term is not primarily to be understood in the sense of criminal justice (as practiced by war crimes tribunals, etc.), but in the sense of

- (a) “doing justice” to the victims of international crimes by establishing a correct historical record, and
- (b) trying to give redress to those injustices by form of compensation when and where still appropriate. (One simply cannot go back hundreds of years.)

## (II)

### **Thirteen principles guiding a nation’s dealing with its past as a question of justice**

Within the general framework described above, we can now formulate the basic principles which, in our assessment, should guide a nation’s (people’s) “coming to terms with the past.” Without clarifying those questions of principle, the issue will easily be absorbed by political polemics and the discourse will create more confusion than clarity, making it virtually impossible for a country to define a clear political strategy.

- (1) **Principle of consistency:** In dealing with the past, *double standards* have to be avoided at the normative as well as the factual level. This implies that (a) the same ethical norms are applied to the judgment about historical events and (b) the same scientific standards and rules of scientific rigor are observed in the research of the facts. At the same time, the factual and normative levels are to be clearly separated; the description of the facts must not be confused with their evaluation.
- (2) **Principle of avoiding historical bias:** This relates to the obligation to avoid *historical* double standards. Frequently, only those defeated in conflict were expected – or felt “obliged” – to deal with the past, a “historical arbitrariness” that is based on the unspoken maxim of “might makes right.” The examples are numerous, especially in the twentieth century. Although well entrenched in the present global power structure, this practice is nonetheless totally unacceptable in ethical terms. There must be no selectivity in regard to the historical period or events a nation is expected to come to terms with. One is simply not credible in presenting “coming to terms with the past” as a requirement of justice if one accepts that the powerful are exempt from such an obligation.
- (3) **Principle of irreversibility:** It is a law of nature that the passage of time cannot be reversed. Although this insight appears trivial, it has to be stated in the present context. The past cannot be changed, only the future can be influenced by human beings – in spite of people often behaving “as if” they could reverse the course of history.
- (4) **Principle of feasibility:** When a nation is dealing with its history,

a basic question of common sense is coming up, namely, *how far should one really look into the past?* If one goes back far enough, almost every nation would have to account for abominable atrocities. The “founding myths” of a great many states – including the main global power of the day – would have to be carefully scrutinized and reevaluated – and the legitimacy of many a polity as a *state* would have to be put in question. Such an approach would do more harm than good and would not be compatible with the overriding norm of international peace and stability that governs international relations in the framework of the United Nations Organization.

- (5) **Principle of personal (as distinct from collective) responsibility:** Under general ethical principles, there is no such thing as “collective guilt” – or “guilt by historical association” for that matter. This maxim applies to two conceptually distinct levels: (a) Responsibility (in the moral sense as well as in that of criminal law) can only be attributed to *individuals*, including cases when those persons have acted on behalf of a polity or a group of people. (b) Furthermore, responsibility (again in the moral sense and that of criminal law) for acts committed in the past cannot be put on the shoulders of *future generations*; such an approach would be tantamount to endorsing the (Christian) theological concept of “original sin” (or hereditary sin). However, this principle does not touch upon what we have said on the notion of “state responsibility.”
- (6) **Principle of common sense** (in dealing with history in a political context): Generally, historical truth cannot be regulated – or “administered” – by law. Such an approach would in actual fact

require the establishment of a “truth ministry” – something which not only would be an absurdity, but would imply the creation of a totalitarian system of “mind control.” As stated in our initial remarks, historical truth is a goal of *scientific research* (which requires the constitutionally guaranteed freedom of the researcher). Scientific methodology obviously necessitates the critical evaluation of each and every historical record as well as the questioning of historical beliefs or stereotypes. The search for historical truth must not be “criminalized” under any circumstances whatsoever lest it be sacrificed on the altar of political interests.

- (7) **Principle of independence** (as requirement of impartiality): As in matters of strictly judicial nature, the search for historical truth – as a goal of science – also requires the total absence of political interference (whether in the sense of party politics at the domestic or power politics at the international level). A “separation of powers” in that basic sense (as generally required under the rule of law) is indispensable for such kind of research that, by its very nature, may touch upon the most sensitive issues not only of a nation’s identity and self-esteem, but the very legitimacy of its political order.
- (8) **Principle of interdependence** (between justice and truth): Justice (in the sense of fairness and impartiality) requires truth (in the sense of a correct factual record on which to base an evaluation), whereas truth necessitates justice in regard to the specific conditions under which historical research is to be carried out.
- (9) **Principle of mutual exclusiveness**: Conventional wisdom teaches

us that the unflinching search for historical *truth* and *politics* (in the sense of *realpolitik*, articulating the “national interest” of the moment) are mutually exclusive. Questions of historical accountability (that can only be decided on the basis of the full knowledge of the respective historical facts) must not be abused for the sake of settling scores in a political game – or for the sake of revenge. The controversies over laws (as in France) or resolutions of legislative bodies (as in the United States) aimed at “regulating” opinions about Turkey’s past (and dictated by vested political interests in those countries) are a case in point – particularly in connection with the debates on that country’s possible accession to the European Union.<sup>1</sup>

(10) **Principle of honesty and credibility** (requiring integrity in relating the events of the past to those of the present): Confronting the historical truth requires, on the part of those who propagate a nation’s dealing with its past as a kind of cathartic soul searching, not to deliberately overlook the “*truth of today.*” Ongoing – and systematically neglected – human rights violations by the very same states that urge others to look into their past are just one example of this kind of hypocritical attitude (which often characterizes the behavior of the most powerful countries). One might illustrate this basic credibility problem by referring, *inter alia*, to the invasion and occupation of Iraq – in blatant violation of the United Nations Charter – by the United States and the United Kingdom, accompanied by grave violations of international humanitarian law (such as those in the Abu Ghreib prison). Simply

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<sup>1</sup> On the case of France see the article “Erinnerungskultur wird nicht durch das Strafrecht erreicht,” in: *Istanbul Post. Das wöchentliche deutschsprachige Internetmagazin der Türkei*, Year



put: systematic human rights violators are not credible when trying to act as “global arbiters,” i.e. judges over other nations’ past.

(11) **Principle of distinguishing between historical and criminal record:** A clear distinction has to be made between the rationale underlying (a) the establishment of so-called “truth commissions” (or truth and reconciliation commissions) – the aim of which is *forgiveness*, but not *forgetfulness*, based on the establishment of a mutually agreed upon historical record and a public confession of guilt –, and (b) “proceedings of criminal accountability” with the implication of an obligation to actually redress the situation in terms of individual punishment, payment of reparations, etc. In that regard, a question that is still unresolved in contemporary international affairs is why and according to what criteria different models have been applied in different countries (such as South Africa, Former Yugoslavia, Sierra Leone, Cambodia, etc.).<sup>2</sup>

(12) **Principle of comprehensiveness (or inclusiveness)** (as requirement of global justice): In light of the principles enumerated above it is evident that questions of historical accountability can not be dealt with in an exclusively domestic (national) – or even regional – framework. By their very nature, those questions touch upon the transnational realm. “Global justice” can only be achieved through honesty and truthfulness about every nation’s past (without exception). Singling out particular countries – making them “international scapegoats” in a game of power politics – will seriously obstruct that goal. In view of these facts, the agenda for

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<sup>2</sup> For details see the author’s *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Springer: Vienna, New York, 2003, esp. Chapter I/5, pp. 75ff.

the nations' dealing with the past should ideally be set by a *universal* organization – one that, according to its structure, is able to follow a *comprehensive* approach. The United Nations Organization would meet that criterion – with a big caveat, however: provided that no member state enjoys a veto right over this process. (The Security Council's record as creator of international criminal tribunals and "referrer" of one single case, so far, to the International Criminal Court in The Hague<sup>3</sup> is not very encouraging in that regard.) If the principle of comprehensiveness is followed, France's historical record in Algeria and other European colonial powers' records in Africa and elsewhere would definitely have to be brought to the fore.

(13) **Principle – or imperative – of avoiding power politics:** According to historical experience, a nation's dealing with the past has always been affected by considerations of *realpolitik*. The antagonistic relationship between this essentially moral, and in certain respects judicial, exercise on the one hand and international power politics on the other cannot be ignored. More often than not, "severe human rights violations" (or international crimes) in a nation's history are only remembered after a régime change has been effectuated, whether from inside or from outside. When the latter is the case (as in Iraq), that nation's "coming to terms with the past" is shaped by the conqueror's interests – and measures of criminal justice are used as a *tool of revenge* and in an extremely *selective*

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<sup>3</sup> On the latter case the author's declaration: *Double Standards in International Criminal Justice: The Case of Sudan. Statement by Dr. Hans Köchler, President of the International Progress Organization*. Vienna: International Progress Organization, 2 April 2005, at [www.i-p-o.org/Koehler-Sudan-ICC.pdf](http://www.i-p-o.org/Koehler-Sudan-ICC.pdf).

*manner*:<sup>4</sup> In the case of Iraq, this is evidenced in (a) the Saddam Hussein trial as such (which was handled like a political show trial) and (b) the facts that proceedings were only allowed on the relatively minor case of Dujail and that he was put to death before other more serious charges could be brought. Such a practice discredits – almost beyond repair – ongoing efforts at encouraging nations to “come to terms with their past” since such trials – in fact quasi-legal proceedings – will unavoidably be perceived as mere tools of international power politics, designed at imposing a foreign will upon an entire nation.

### (III)

#### **Coming to terms with the past: The credibility issue**

Since historical “memory is a fact surpassing national borders,”<sup>5</sup> it must be dealt with in a genuine *multilateral* framework (and not merely on a bilateral basis or in a hegemonial context). “Memory policy” will only then be a viable concept of international affairs in the 21<sup>st</sup> century if it is not perceived as part and parcel of power politics in an essentially unipolar framework and if it is conceived of as a truly *universal* project – one that does not limit the scope of historical research to (a) certain geographical

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<sup>4</sup> On the case of Iraq see the documentation edited by the author: *The Iraq Crisis and the United Nations. Power Politics vs. the International Rule of Law. Memoranda and declarations of the International Progress Organization (1990-2003)*. Studies in International Relations, XXVIII. Vienna: International Progress Organization, 2004, esp. pp. 59ff.

<sup>5</sup> See the position paper of the *Heinrich Böll Foundation*, prepared for this conference: “From the Burden of the Past to Societal Peace and Democracy – International Conference – Coming to Terms with the Past. 24-25 February 2007, Istanbul,” p. 1.

areas, (b) certain periods of history, and (c) certain cultural, ethnic and/or political groupings.

This very ambitious project – in terms of global justice – will only be credible if the agenda is not set by self-righteous representatives of the most influential global player(s). As soon as the agenda is becoming part of a political game, the entire undertaking is being discredited. Under such circumstances, “coming to terms with the past” – as a process, or cathartic exercise, imposed from outside – will be a corollary of what has been characterized as “victor’s justice” in the domain of criminal law – and it will produce the opposite result to what it is being aimed at. A climate of *mistrust* and *denial* would result from such an approach.

To illustrate the relevance of this nexus in terms of international realpolitik, one might say – paraphrasing Vladimir Putin in his Munich speech of February 10, 2007 – that those who teach others (about how to deal with their past) should be prepared to learn themselves first. (In his speech, the Russian President referred to the dispute about democracy.<sup>6</sup>)

On the basis of the rules and principles outlined above, one can formulate the following *maxim of ethical credibility*: What is to be avoided by all means, is a kind of “moralizing approach” in dealing with the history of nations, according to which certain nations are labeled as “good” (in the sense of “innocent” and, thus, being beyond reproach) while others are categorized as “evil.” The actual reason for the first categorization is almost always that the countries thus categorized were *powerful* at the respective moment in time, whereas those subsumed to the second category were weak or not aligned with a powerful country at a given moment. In an

essentially imbalanced power constellation (such as the present one), the country that succeeds in placing itself in the position of arbiter is easily tempted to immunize its position by declaring itself the “indispensable nation.”<sup>7</sup>

In all honesty, however, one has to admit that there is no “historical axis of evil” and no nation can forever be held hostage of its past. All judgments that operate on the basis of an assumption of collective guilt (in the form of “historical guilt by association”), even if this is never explicitly admitted, have to be rejected on strictly ethical grounds. This should, however, not be misunderstood as ignoring – or trivializing – each and every nation’s (people’s) obligation to address its historical record in full honesty. The rejection of collective guilt must not be seen as an invitation to cover up international crimes that may have been committed by its leaders or other individuals or groups of people who were associated with a country’s leadership.

“Coming to terms with the past” is then and only then a contribution to *justice* – in the sense of (a) “doing justice” to the victims and (b) establishing a balanced historical record in the context of universal history (where no country is singled out against the others, and which allows structural comparison to what happened elsewhere and in other historical epochs) –, if such an effort is not used for the purposes of mere retribution or settling political scores. A “policy of double standards” – in

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<sup>6</sup> “Incidentally, Russia – we – are constantly being taught about democracy. But for some reason those who teach us do not want to learn themselves.” Vladimir V. Putin, President, Russian Federation, *Speech at the 43<sup>rd</sup> Munich Conference on Security Policy, 02/10/2007*, published by Munich Conference on Security Policy, [www.securityconference.de](http://www.securityconference.de).

<sup>7</sup> We allude here to Madeleine Albright’s famous statement about the United States which she made – in connection with the escalating Iraq crisis – at a Town Hall Meeting at Ohio State University on February 18, 1998. (According to the text released by the Office of the Spokesman, February 20, 1998. U.S. Department of State.)

whichever form – is incompatible with the imperatives of justice.

Apart from the question of double standards in terms of establishing the historical record and, thus, defining a nation's position in history, such a process must be more than a mere *accompaniment of criminal proceedings*. In the most spectacular instances – after major wars –, the latter have usually been shaped according to a *discriminatory* agenda; to a large extent, they were exercises in victor's justice through which the prevailing power(s) did seek to impose their own version of history, thus making themselves, i.e. their political actors, virtually exempt from any obligation to deal with their own transgressions of international humanitarian law, not to speak of the individual criminal responsibility of some of their own personnel and officials. One might also refer here to the negative examples (as far as a comprehensive and unbiased approach is concerned) of the so-called “war crimes commissions” set up after major conflicts since World War I, which, without exception, only dealt with the crimes and the historical truth in relation to the defeated countries. Their essentially political mandate did not allow them to adopt a comprehensive approach.<sup>8</sup>

Summing up: In ethical terms, but also in those of political philosophy, “coming to terms with the past” is neither a worthy nor a credible goal for nations if the respective notion of historical responsibility is exclusively linked to the past of countries that have either been defeated in war or have been proven to be “on the receiving end” (i.e. being the weaker ones) in a given international power balance.

Any effort at defining the parameters within which to undertake a

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<sup>8</sup> In a farsighted legal analysis published towards the end of World War II, Hans Kelsen, undoubtedly the most influential legal philosopher of the 20<sup>th</sup> century, has drawn international attention to this problem of victor's justice: *Peace through Law*. Union, N.J.: The Lawbook Exchange, second printing 2002 (first published in 1944), see esp. p. 113. For details see also the author's *Global Justice or Global Revenge?*, pp. 51ff.

comprehensive project of “memory policy” must avoid being turned into “memory politics.” Such an effort can only fulfill its aim (namely to contribute to a “conceptual and methodological enrichment of the discussions”<sup>9</sup> about a given country’s history and historical responsibility) if it manages to conduct the discourse *outside* a merely political framework. As we have tried to demonstrate, “coming to terms with the past” is essentially a moral obligation (with legal implications under specific conditions), oriented towards establishing the truth. However, in no period in history have politics and truth been easy neighbors.

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<sup>9</sup> Formulation quoted from the position paper prepared for the conference by the *Heinrich Böll Foundation*, p. 2.