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Carlos Closa

**Dealing with the Past:
Memory and European Integration**

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**DEALING WITH THE PAST:
MEMORY AND EUROPEAN INTEGRATION**

By Carlos Closa*

Abstract

Memory has become an object of dispute in the EU. Different groups and states do not have a full convergence of views and this raises the question as to whether the EU should or should not be involved. A pluralist conception of justice would argue that the recognition of memory is not excluded as a form of justice. Adopting this view, this paper argues that the recognition of memory can be addressed at the EU level if the different components of justice are allocated to the proper spheres (recognition, retribution and recognition) and levels (national and European).

* Carlos.closa@csic.es, Institute for Public Goods and Policies (IPP) Spanish National Research Council CSIC (IPP-CSIC, Madrid, Spain); Senior Emile Noël Fellow. This paper was written thanks to a grant from the Spanish Ministry of Education (Grant PR2010-0077) under the *Programm for stances of senior professors and researchers in foreign research institutions*. I am grateful for the comments received, at various stages, from Professor J.H.H Weiler, Professor Michael Walzer and Arie Rosen.

Preface

What does the EU have to do with memory? A few years ago, my response to this question would have been the same as that of any skeptical reader approaching the topic for the first time: ‘nothing at all’. Doubtless, I would have considered that research on this topic belongs to the kind of speculative-contemplative universe which academics use to indulge in a narcissistic display of self-referential brilliance (and one that makes the rest of society wonder whether or not research in the social sciences is justified).

From 2007, I became involved in the discussions prompted by the approval of the EU Framework Decision on the denial of crimes of Nazism. The theme of these was not the Holocaust or, rather, not the Holocaust as it is usually understood. Instead, the theme was totalitarian crimes or crimes of communism and the persistent demands that crimes of Nazism and Communism receive equal treatment. Between 2009 and 2010, I directed a study for the EU Commission (*Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States* JLS/2008/C4/006 http://ec.europa.eu/justice_home/doc_centre/rights/studies/docs/memory_of_crimes_en.pdf).

This study provided the background for a Commission Report (*Report from the Commission to the European Parliament and to the Council* COM (2010) 783 final Brussels, 22.12.2010), followed by the Council *Conclusions on the memory of the crimes committed by totalitarian regimes in Europe* Brussels, 11268/11, 8 June 2011. The whole process of preparation and the body of factual evidence revealed a universe of “facts of memory” and it was the disputes over their meaning that drew my attention towards the normative foundations of the treatment of memory.

Surprisingly, this new topic connects with my former research on citizenship. Both of them respond to the challenged raised by Carl Schmitt: how potential foes can become friends. Similarly to the granting of rights (citizenship), recognition (of memory) serves to reduce the possibility of constructing the other as the enemy. Hopefully, some progress has been made in this direction.

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Introduction

Memory differs from history in that the latter is presented as an objective epistemological enterprise oriented towards fact-finding and establishing historical truth whilst the former is closely related to the subjective significance (whether individual or collective) of eventual historical facts. Unlike memory, which confirms and reinforces itself, history contributes to the disenchantment of the world (Judt, 2005: 830). Collective memory can thus be seen as a-historical or even anti-historical to the extent that it may not only tend to simplify and reduce the ambiguities of the past but also that it may also tend to insist on its own presence. As such, collective memory carries moral messages in a way unacceptable to most historians (Müller; 2000: 23).¹ Naturally, the borders between both memory and history blur and it is difficult to ascertain where one finishes and the other commences.

Memory and its politics and policies are common areas of discussion within nation states where they have clearly identified functions. When related to the EU, however, this discussion may appear far-fetched and even intellectually illegitimate in intent. To dispel these concerns, the normative question that underlies and inspires this research (i.e. *should the EU be at all concerned with memory of the past?*) needs to undergo two tests.

The first of these tests is posed by the question: why does research on this normative question matter? The response is a straightforward one: memory has become *the object of a political conflict* in the enlarged EU. Before the 2004 enlargement, the EU had constructed an implicit memory, one of whose two intertwined pillars was the narrative on the original *telos* of integration. Later on, in the last 20 years or so, a number of EU actions have added a second pillar and placed the Holocaust as the central and essential element of European memory.² After enlargement, however, political actors from eastern European countries voiced numerous claims

¹ Melissa Williams (1998) argues that memory has to be complemented by history and a notion of shared public reason in which empirical evidence, while always contestable, is accepted in principle as valid basis for public decisions. Maier (1993: 143) emphasizes the inevitably discordant and plural character of history and the need for historians to reconstruct causal sequences. In contrast, *the retriever of memory does not have the same responsibility to establish causal sequencing. Triumphs, traumas, national catastrophes make their presence felt precisely by their re presence or representation. Memories are to be retrieved and relived, not explained.*

² See section 1 for more details. Lately, certain other “events of memory” have found a place alongside the Holocaust: the EP, for instance, has approved resolutions on the Armenian genocide (European Parliament resolution on a political solution to the Armenian question Doc. A2-33/87) and the Ukranian *Holodomor* (European Parliament resolution of 23 October 2008 on the commemoration of the *Holodomor*, the Ukraine artificial famine (1932-1933) P6_TA(2008)0523). Both resolutions not only enlarge the number of events involved in European memory but also the geographical scope of its construction. The granting of the Sajarov Prize to the Russian NGO Memorial in 2009 shows a similar willingness to enlarge the geographical reach of EU’s concerns with memory.

in different environments demanding EU memory-related policies. EU institutions have accepted only one of these claims: the 2008 EP resolution in which the EP accepted demands that the 23rd of August be recognized as the date of commemoration of the victims of communism.³ But other claims remain unmet- such as those that seek to criminalize the denial of communist crimes.⁴ Moreover, some of these specific claims on memory, such as equating the crimes of communism with the crimes of Nazism, are hotly contested. Thus, the normative question refers to an existing conflict which demands practical and policy-based responses (although doing nothing is, of course, a policy in itself).

The second test refers to the epistemological standing of the inquiry on memory (i.e. is the inquiry relevant and important from the perspective of normative theory?). Even if the political agenda renders the question topical, this does not mean that it merits a normative response. That is, while an inquiry may relate only to the formulation of EU policies and may even be significant, it would not need to be based in the normative domain. Again, the response is an easy one: whilst all policies transmit certain community values, memory and the policies associated have this as its (almost exclusive) function. In particular, policies on memory are closely associated with identity-formation, and identity and its role in political communities is a central concern of normative theory. The central thesis in this paper is that claims on memory in the EU are claims for recognition and, because of this, the way in which they are addressed contributes to the construction of an EU-specific model of identity. This model thus addresses the issue of identity at two different levels: at the level of specific nations within the EU and at the level of European (EU) identity.⁵ Claim makers perceive a lack of action as a question of injustice; the way in which these claim are addressed contributes to shaping EU-specific articulations of justice and these are in turn closely relate to the model of community.

³ Report from the Commission to the European Parliament and to the Council *The memory of the crimes committed by totalitarian regimes in Europe* COM(2010) 783 final Brussels, 22.12.2010

⁴ On 22nd December 2010, the governments of 6 Member States (Lithuania, Bulgaria, Hungary, Latvia, Romania and the Czech Republic) addressed a letter to the European Commission demanding it to take further steps “including a possible legal initiative to criminalize the justification, denial or gross trivialization of the crimes of totalitarian crimes against groups of people defined by social status or political convictions.” The letter was sent just the day the Commission published its Report. On 15th May 2011, the Czech Senate approved a Recommendation asking the EU Commission to seek actively the creation of conditions for the punishment of crimes based on class and political adscription. Prague Daily Monitor 16 May 2011 <http://praguemonitor.com/2011/05/16/senate-calls-ec-seek-totalitarian-crimes-punishment>

⁵ I have consciously avoided entering into the discussion of whether the EU is or not, should or not be a proxy for Europe. Eliciting the question does not add or detract anything from the argument.

In order to discuss this thesis, the argument proceeds in the following way. Firstly, I present a summary overview of memory and memory claims addressed to the EU and the emerging conflict around these (Section 1). This description focuses particularly on the claims that new member states raised after the 2004 EU enlargement, since these claims expressed a conflict vis-à-vis existing (or, rather, almost non-existing) EU policies on memory. Conflict over the issue of memory raises a puzzling question: why do some groups demand recognition of their respective memory? The response is that memory is strongly related to identity (memory acts as the temporal construction of identity) and the construction of identity depends on recognition by third parties. Thus, memory and recognition are linked and claims on memory can be presented also as claims on recognition. At this point, the paper takes a normative turn: following pluralist conceptions of justice, I assume that the denial of recognition may constitute a source of injustice. Hence, denying recognition of memory may be equally considered to be a source of injustice and this in turn means that memory is equally related to justice through recognition (Section 2 elaborates this argument). However, in the domain of justice, some claims appear occasionally to be claims on justice for victims (which can be labeled as restorative justice) and/or justice for perpetrators (retributive justice). Why does this happen and what is the relation between criminal justice, justice for victims and memory? Michael Walzer's notion of spheres of justice serves to clarify apparent confusion: whilst each of these (memory/identity/recognition; restorative and retributive) are separate spheres of justice, it is nevertheless true that there are goods which possess social meanings of justice in different spheres and this means that they may overlap. Or, in other words, claims on restorative or retributive justice can be understood (and, hence, *partly* addressed) as claims on recognition (Section 3 presents this thesis).

Previous theoretical arguments have been constructed in relation to nation states and occasionally in relation to the international community of states (and this on a much smaller scale). As the EU fits neither of these models, theoretical discussion needs to be tailored to its specific characteristics. Models of memory and recognition, as well as justice in states and in the international global community, are presented (Section 4), creating thus the background for discussing the role of the EU and memory: the EU is a multilevel community made of states and citizens, and this not only means that recognition has a role (both in normative and functional terms) but also that goods of justice can operate differently in the two levels of the community (the EU and the state). Section 5 argues this thesis and the conclusion recapitulates the argument.

1. Claims for recognition of memories in the EU: an emerging conflict on memory

At the time of creation of the European Communities, little attention was paid to policies of memory within a political context which had a different moral orientation than nowadays. In the aftermath of WWII (when the Union was created), the Western Europe states' strategy for dealing with memory was universal neglect of the Holocaust with a parallel *victimization* of certain nations (for example, the Austrian, Belgian and Dutch nations). Social consensus in post-war West European societies relied very much on the myth of resistance and on myths of victimised nations (Judt; 2005) (Droit; 2007: 203). It was only in the 1960s that the memory of the Holocaust was brought to the fore by a series of war crimes trials in some European states. Yet these weak beginnings were overcome, and as Tony Judt argues, the centrality of the Holocaust in Western European identity and memory seemed secure by the end of the XX century (Judt; 2005: 820) (Onken; 2007: 31).

While Judt's observations refer to European *states*, a similar evolution has occurred within the EU with a gradual shift toward policies that recognise the centrality of the Holocaust. Initially the EP adopted a practical course of action and dealt with several resolutions on the question of restitution of property to Jews. However, it has progressively moved onto symbolic policies and thus by the year 2000, the Parliament sought to commemorate the 27th of January as International Day against Fascism and Anti-Semitism.⁶ In a Written Declaration one year later, the EP argued that *Holocaust must be forever seared in the collective memory of all peoples*.⁷ The 60th Anniversary of the liberation of Auschwitz also marked a significant step forward: on the 27th of January 2005, the EP approved a Resolution on the remembrance of the Holocaust, anti-Semitism and racism; its President made a Solemn Statement in front of the EP and a delegation of the EU comprising the EP and the Commission plus the EU Presidency attended commemorations at the camp. At the UN, the EU Presidents made solemn declarations in the same sense.⁸ And in 2007, in what has been termed as the "Europeanization of German memory

⁶ EP Resolution on countering racism and xenophobia in the European Union OJ C 377/366 29.12.2000.

⁷ EP Written Declaration on the remembrance of the Holocaust OJ C 121/503 24.4.2001

⁸ Thus: *It is in Europe that the Holocaust took place. And (...) it is out of that dark episode that a new Europe was born* EU Presidency (UK) Statement on Holocaust Remembrance in the UN General Assembly 31st October 2005; *The EU, like the UE itself, was born out of the catastrophe of war and genocide. Our peoples at the time were moved by the firm resolve to never let this happen again.* EU Presidency (Germany) Statement in the UN General Assembly after the adoption of the Resolution on Holocaust Denial (A/61/ L. 53)

politics” (Leggewie; 2009: 2) or “Europeanization of the Holocaust” (Banke; 2010: 6),⁹ a German-led initiative resulted in the approval of a framework decision penalising the denial of the Holocaust.

Successive enlargements of the EU did not substantively transform this original interpretative framework. The states that participated in the 1970s enlargement belonged to a group which had experienced continual democracy since 1945 and their eventual issues with current members were settled before accession to and outside of the Communities. In the Mediterranean enlargement of the 1980s, membership was granted to former authoritarian regimes; this had been anticipated by the EU through the formulation of a strong and implicit conditionality policy which stipulated that Member States must be democratic and respect human rights. However, none of the three new Member States made claims for recognition related to policies of memory which may have challenged the predominant narrative on the past within the EU. And, finally, the enlargement of the EU in 1996 included states whose possible future claims were perfectly aligned with those of existing members. Not one of these rounds of enlargement challenged the foundational narrative of the EU and, hence, the self-understanding of the community (of states and peoples). This was not the case, however, with the enlargement that included Central and Eastern Europe.

The 2004 enlargement opened the EU structure of political opportunities to the expectations and hopes of citizens, groups, social movements and also of states – all of which came with a history of structured expectations of recognition and denial (Fossum; 2005: 140). Among the constituencies of new Member States, the widespread desire for recognition has stemmed from a different interpretation of events in Europe after 1945 and on what may constitute a common European memory. Indeed, politicians from a number of former Soviet communist states have voiced an interpretation of their history that challenges the prevailing narrative of the EU and European integration.¹⁰ Where the West presents a story of success and prosperity, the East has presented a picture of subjugation and suffering which are often attributed to the West’s total lack of concern. In many cases, the very emblematic date of the 9th

⁹ Even those reluctant to speak of a ‘Europeanisation’ of the Holocaust (i.e. Müller; 2007) concede that *a pattern seems to have emerged that individual European nations acknowledge their role in the Holocaust, while at the same time affirming its “universal significance”* (Müller; 2007: 107). In fact, the declaration of 27th of January as the date for remembrance of the victims of Holocaust was originally a German decision in 1995, followed afterwards by a number of countries, the UN and the EU itself.

¹⁰ For a fuller picture of the claims made, see Closa, C. (2010).

of May is presented as the date that marks the transition from one form of totalitarian subjugation (Nazism) to another equally bloody thirsty one (Soviet communism). Claimants argue that, because Westerners have not experienced communist totalitarianism, they fail to recognize that it imposed similar suffering and human rights violations on the same massive scale as Nazism. The central claim made is that both regimes were equally criminal, particularly if the type of crimes and the number of victims of both are compared. While in some cases this has led to the use of the notion of “genocide” to refer to the Stalinist repression, there have been a number of additional consequences. Among them, the demand that communism be condemned on the same grounds as Nazism and that the same kind of measures taken against Nazism be also applied to communism- in particular, that the criminalization of the denial of Nazi crimes be extended and applied to the denial of crimes of communism. More specific demands have followed: that a commemoration date be established for the victims of communism (similar to the existing date for the commemoration of the victims of Holocaust on 27th January) or that an attempt be made to “unify history”- including the way history is taught in the West, with references to the experiences of domination and suffering in former Soviet communist states.

The origin of these claims and demands can be detected in circumstances specifically related to the process of accession to the EU- such as the resentment felt by some over the imposition of the “implicit” Holocaust *memorial conditionality criterion*.¹¹ What is pertinent here is that when actors seek new alternative claims in the EU, they begin by presenting them as claims or demands for justice and they then demand satisfaction at/from the EU; a level of governance above the nation state that has not traditionally been involved with memory. What is

¹¹ This expression refers to the implicit understanding that recognition of the Holocaust was a *sine qua non* of accession (Droit; 2007; Leggewie; 2006). Although recognition of the Holocaust was not explicitly formulated as a conditionality criterion, its discussion in connection to Eastern enlargement somehow nuances Weiler’s fears of enlargement (...) *becoming Europe’s very own triumphalist “end of history” as heralded at the 2002 Copenhagen summit, bringing closure to what which in fact has had very little openness* (Weiler; 2003: 94). Not only did enlargement trigger new claims but it also reactivated more attention to the Holocaust. Though I have my doubts, that, as Müller 2007 claims, *one consequence (of the unfreezing of memories after the fall of the Wall in 1989) appears to be that many myths of resistance and purity of the post-war period have been dissolved* (Müller; 2007: 107). From here, EU institutions have moved more assertively into an explicit formulation in relation to other named cases of genocide (i.e. Armenian) and other applicants (i.e. Turkey). In 2004, the EP issued a clear call for Turkey to acknowledge “the genocide perpetrated against the Armenians, as expressed in the European Parliament’s earlier resolutions with regard to Turkey’s candidate status (from 18 June 1987 to 1 April 2004)” and it has repeated this position ever since. In 2006, the EP rejected a provision that would have otherwise called the acknowledgement of the Armenian genocide a “precondition” for Turkey’s European Union accession. MEPs nevertheless stress that, although the recognition of the Armenian genocide as such is formally not one of the Copenhagen criteria, it is indispensable for a country on the road to membership to come to terms with and recognize its past. <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20060922IPR10896>.

also relevant is that these new claims lead to conflict: whilst actors have held that their claims are self-evidently a matter of justice, frequent criticism and even rejection of these claims argues to the contrary.

On the one hand, the legitimacy of these claims has been bitterly questioned, with some arguing that in reality they serve to call the Holocaust and its uniqueness into doubt. Take, for instance, the views that Simone Veil expressed in her address to the Bundestag 27th January 2004:

La Shoah n'est pas encore suffisamment reconnue dans un certain nombre de pays d'Europe de l'Est : manipulé par les régimes communistes longtemps au pouvoir, le souvenir des souffrances infligées par l'occupant nazi aux peuples occupés a oblitéré le souvenir des souffrances infligées aux Juifs, avec parfois la complicité de ces peuples. Dans les pays d'Europe de l'Est désormais libérés du joug communiste, d'autres souvenirs-écrans viennent à présent recouvrir le nécessaire travail de mémoire sur la Shoah : pour ces peuples soumis pendant presque un demi-siècle à la domination soviétique, les victimes du communisme ont effacé celles du nazisme. Plus grave, la mémoire et l'histoire sont parfois manipulées au point de servir à justifier l'antisémitisme par la référence aux souffrances infligées par les soviétiques. Au moment où l'Europe s'élargit à l'Est, il faut s'alarmer de ces dérives, car ces apparentes controverses historiques touchent en profondeur à l'identité de l'Europe future.¹²

On the other hand, however, these new claims have not only challenged the dominant narrative in the EU. Certain actors, for instance the communist and Marxist parties of the West, have also seen their position challenged within broader European and national narratives. As heirs to the communist parties, these actors have rallied against what they see as attempts to downplay memories that they perceive in a very different light. As an example, the statute of the European Left (a parliamentary grouping with representation in the EP and which integrates legitimate parties from several member states) includes the following declaration:

We defend this legacy of our movement which inspired and contributed to securing the social certainties of millions of people. We keep the memory of these struggles alive including the sacrifices and the sufferings in the course of these struggles. We do this in

¹² Discours de Mme Simone Veil devant le Bundestag, Berlin, 27 janvier 2004 www.fondationshoah.info/FMS/DocPdf/Discours/FL%20Discours%20Berlin.doc . Veil is not alone and a significant number of other authors keep a similar view (for instance, Uhl ; 2009)

*unreserved disputation with undemocratic, Stalinist practices and crimes, which were in absolute contradiction to socialist and communist ideals.*¹³

Thus, claims to recognition of specific memories (i.e. the crimes of communism) do not just shift conflict to another arena but they also contribute to creating further conflict. These are demands for forms of corrective action on the dominant distribution of a specific good (recognition of memory) and these demands are based *both on self-interest and genuine concern for the public good* (Hirschmann; 1994: 212; *Italics in the original*). As the conflict refers to the distribution of justice, the relation between memory (the source of the conflict) and justice needs to be clearly specified.

2. Memory as justice

The purpose of this section is to extricate the logical connection between memory and justice and this works throughout two intermediate phases: memory as identity, and identity as recognition. As a warning, it must be said that constructing a logical connection between memory and justice does not mean accepting (implicitly or explicitly) that all claims of memory are ‘just’; as such the end of the section discusses also the normative conditions under which claims of memory can be considered just.

2.1. Memory as identity

Memory inserts a subjective component in the perception/interpretation of historical facts and events. These become significant not (only) because of their specific epistemological value in explaining the process of historical becoming but because they are significant and necessary for individuals and groups to understand their identity. Individuals (and groups) thus project their self-comprehension back towards the past to find meaning in their current identity. In this sense, memory becomes essential in the formation of identity; identity is not only constructed in the contemporary temporal plane but also in the past temporal dimension. Following Paul Ricoeur’s work on narrative identities, Hildebrandt (2007: 66) argues that to take on an identity one must be able to link and communicate one’s past into an integrated story, a narrative that explains the

¹³ Statute of the European Left. Revised version after the 3rd EL congress in Paris 03-05.12.2010 http://www.european-left.org/nc/english/about_the_el/documents/detail/zurueck/documents/artikel/statute-of-the-party-of-the-european-left-el/

complex and contradictory people that we become in the course of life. It is this story that explains why we are the same self over the course of time. Identity claims seek to establish the sameness, the continuity, of a person or community across time and in the face of apparent change (Booth; 1999). Equally, Habermas (1990: 390) links his “form of life” to identity: *our form of life is connected with that of our parents and grandparents through a web of familiar, local, political and intellectual traditions that is difficult to disentangle –that is through a historical milieu that made us what and who we are today*. Naturally, in the thesis of memory as identity, there is an underlying tension between the past and memory-based identity, on the one hand, and the requirements of political membership based on universalist-democratic principles, on the other. In order to resolve this tension, either empirical evidence on memory and identity is upgraded to the level of normative principle (i.e. nationalism) or the normative requirement is upgraded irrespective of its empirical sustainability (cosmopolitanism). Alternatively, there is a third way (republicanism, constitutional patriotism) but this represents an inherently unstable compromise. This tension is not examined in this paper, however, but is merely recorded and acknowledged.

In any case, the relation between memory and identity is not automatic or unidirectional. On the one hand, actors normally choose to identify and preserve specific facts that have specific value/significance for them and which, because of this, are essential in the construction of their identity. On the other hand, the relationship between collective memory and collective identity is a circular one in which memory creates identity but also identity creates memory.

2.2. Identity and recognition

Identity is not something genetically acquired but rather a result of interaction. Charles Taylor has expressed this process in the following way: *we define our identity always in dialogue with, sometimes in struggle against, the things that our significant others want to see in us* (Taylor, 1992: 33). Essentially, this means that identity requires significant others (providing meaning for actions, values and “things” since identity cannot be constructed in isolation). Identity is also a result of a dialogical process (Taylor; 1992: 34)- one that could be understood as the exchange with significant others. Recognition appears connected to identity in this dialogical relationship: an individual learns to grasp that his or her self is both a full and a particular member of the community by being gradually assured of the specific ability and needs

that constitute his or her personality. In this way, patterns of reaction are approved by generalized interactive patterns (Honneth; 2004: 354; Taylor; 1992:32). Philosophers and legal theorists coincide with sociology's acknowledgment of the dialogical dimension of identity (Ricoeur; 1992, Mead; 1934/59) in that the sense of self is born in interaction with the "other" and this provides a very robust empirical basis for theoretical construction.

This dialogical character automatically grants normative significance to others: my identity does not depend only on myself and my own enterprises but also, crucially, on the positioning of others towards myself. Thus, others have a role in determining my own identity: in order to become myself, I need recognition of my identity from other subjects. In more general terms, in order to develop a personal identity an individual is dependent upon recognition from different, concrete and generalized others.

We may now return to the notion of memory and its link to recognition: with memory being part of identity, claims on memory are subject to the same kind of dialogical relationship that characterizes identity in general. That is, they need to be recognized by significant others; an unrecognized memory undermines the identity of its bearer (whether an individual or a collective). The next step is to identify the moral obligation that leads us to speak of recognition in terms of justice.

2.3. Recognition as justice

Since identity is dialogical (i.e. it depends on the interaction with others), these significant others have both an empirical and normative significance. Empirically, identity cannot exist a-socially, outside of society. More importantly, the other has a normative (moral) function: it can inflict real damage if recognition is absent or if it mirrors back a confirming, demeaning or contemptible picture. Non-recognition or misrecognition can thus inflict harm and be a form of oppression, imprisoning someone in a false, distorted and reduced mode of being (Taylor; 1992: 25). Similarly, Honneth argues that experience of social injustice is always measured in terms of withholding some sort of recognition considered to be legitimate (Honneth: 2004: 352). Hence, pluralists argue that recognition is a moral obligation: Walzer maintains that simple recognition is today a moral requirement, that is, we have to acknowledge that every person we meet may be at the very least a potential recipient of honor and admiration, a competitor or even a threat (1983: 259). The central pillar of Honneth's theory of justice is

recognition- the fact that social recognition is morally and socially necessary (Honneth: 2004:352). Although without going to this extreme, I would agree in that recognition is essential for identity, and as such, denying recognition may contradict our basic moral understanding of justice (not depriving anyone unfairly).

Before moving to the next point in my argument, some clarification is required regarding the concept of recognition (normally presented as ‘mutual recognition’). Honneth (2004: 354) argues that the normative integration of societies only takes place by way of institutionalizing principles of recognition. These principles in turn regulate - in a comprehensible way- the *forms of mutual recognition* through which its members become involved in the societal context of life. Mutual recognition is widely popular because it implies reciprocity, equality and symmetrical recognition. In the EU, moreover, the principle is commonly related to the free movement of goods and its normative value in this area has even been extrapolated to other spheres (Nicolaidis; 2007)- although its significance is totally different in these.¹⁴ The significance of mutual recognition as a *legal principle*, however, differs from mutual recognition as a *normative principle*. *Legally*, mutual recognition is the foundation of non-discrimination whilst, as a *normative principle*, mutual recognition justifies precisely unequal treatment as a result of differentiated demands on identity. Thus, although it is unquestionable that subjects deserve in equal measure the *degree of social recognition that permits them successful identity formation* (Honneth; 2004: 355), it is also unquestionable that the degree of social recognition required for identity formation will differ greatly for every person and for every collective etc. Hence, although equality in recognition means an equal expectation to be recognized in their different subjectivity¹⁵, this subjectivity implies that the degree of recognition cannot be always the same. Walzer (1983: 255-256) makes the point much more forcefully: *whilst wealth and commodities can always be redistributed, collected by the state and given out again in accordance with some abstract principle, recognition is an infinitely more complex good. In some deep sense, it depends entirely upon individual acts of honoring and dishonoring, regarding and disregarding.* From this, he concludes that *in the struggle for recognition there cannot be equality of outcomes, there can be- I have been writing as if there is- equality of opportunity.* For Walzer, the idea that

¹⁴ On mutual recognition in the domain of criminal law, see Hildebrandt; 2007: 73-75. Kep; 2004 warns against moving ahead with mutual recognition in the domain of criminal law.

¹⁵ *The right to be recognized in their needs, in their legal equality and in their contributions to society* (Honneth; 2004: 358)

simple equality of recognition is possible is a “bad joke”. In comparing the actual practice of mutual recognition within the EU and the principle of recognition, it is apparent that mutual recognition of goods and services applies to the end result. Recognition as a principle of justice - in the domain of identity formation- refers to the moral right of each individual to equally demand recognition. That is the principle of recognition does not refer to the extent or form finally granted.¹⁶

2.4 The moral validity of claims to memory

Creating a link between memory, identity, recognition and justice may incite the idea that claims of memory are, in themselves, “just”. Afterall, such claims are connected to identity while recognition also has the comcomitant duty to carry justice out. The argument of this paper, though, has a different objective: that is, any claim on memory must be treated as an equal claim on recognition and, hence, as a claim on justice. This does not mean that a claim provides automatic entitlement to specific goods related to justice (recognition, reparation, restitution). Rather, it suggests that accessibility to these specific spheres is, in itself, essential to the notion of justice. Following Honneth, the different spheres of justice/recognition have “overhang validity”, i.e. the possibility that previously unaccounted facts/experiences may provide access to the sphere.

This means that spheres of justice are not sealed away in a fixed and final configuration of distribution. For Honneth, within each sphere, it is always possible to launch a moral dialectic between the universal and the particular by calling upon the general principle of recognition (love, law, achievement) to appeal to a particular aspect (need, situation of life, contribution) that had not yet been adequately considered in the previously practiced conditions of application (Honneth; 2004: 361).

Thus, whilst claim-making undeniably serves as a means of discussing the reconfiguration of spheres of justice, this does not mean granting that every claim or demand for recognition is, a priori, *morally legitimate or defensible*. Rather, claims need to comply with some sort of test of acceptability, not least because claims are also in themselves a memory-constructing device. In fact, many tales told from memory are shot through normative claims.

¹⁶ Moreover, in practical terms, empirical conditions tame formal equality: *the relative standing* [of those claiming recognition] *will depend upon the resources that individuals can marshal in the ongoing struggle for recognition* (Walzer; 1983: 256)

How can the acceptability of claims be tested? Honneth proposes that claims for recognition are morally legitimate or defensible *when they point in the direction of a societal development that we can grasp as coming closer to our notion of a good or just society* (Honneth; 2004: 353).

This requirement is particularly important when confronting claims on memory; such claims often acquire a “liturgical” and non-negotiable character, i.e. memory becomes quasi-sacred, unquestioned and in fact unquestionable (Müller; 2007: 112). Moreover, claims are usually made not as part of an exchange, but as an authoritarian statement- one which flows from the stark power of personal conviction (Bet-El, 2007: 17). In a plural polity, the undisputable character of claims and the non-deliberative way of asserting them should be checked for conformity with predominant standards - which are expressed by the values of the community (in this case, the values of the Union). Both aspects should, furthermore, also be required to obtain recognition by means of public deliberation on the facts of the memory proclaimed and their normative value for the community.

3. Recognition and overlapping spheres of justice

The discussion on memory, identity, recognition and justice has systematically referred to the “community”, the human collective to which the former terms apply. A normative proposal on memory within the EU requires previous clarification of which model of community is meant when referring to the EU. The thesis underlying this paper is that since theories of justice have been constructed using the nation-state as the main referent, these theories need to be adapted when applied to a different kind of community such as the European Union.

This paper however does not attempt such reconstruction but it rather applies existing theories of justice to the new object. To this end, pluralist conceptions of justice, such as those of Walzer or Honneth, are highly appropriate; one of the most generally agreed conceptions of the EU is that of a *plural* community. Indeed, this was a feature captured in the *motto* associated with the defunct EU Constitution - *Unity in Diversity*.

The basis of pluralist conceptions is that the allocation of justice may follow different logics in different spheres: *different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves* (Walzer:1983: 6). For Walzer, “goods” satisfy justice but they do not have a fixed and constant value; rather, the value of any

given good depends on its social meaning or the understanding that a community has of a specific good. The precondition of pluralism is that *social goods have different meanings* and these meanings are “contextual”: i.e. historically and culturally determined.

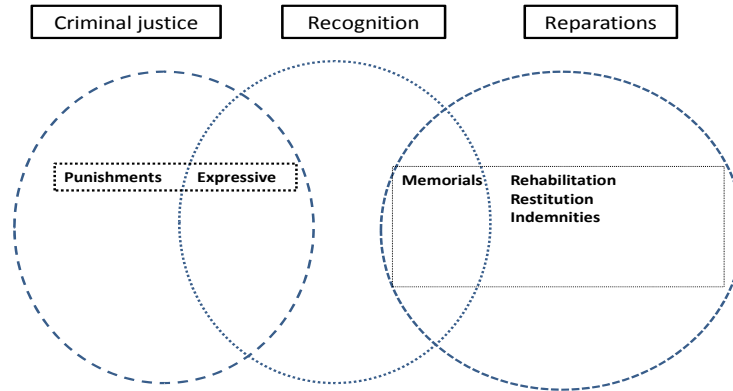
That spheres of justice are differentiated does not imply that they exist in isolation to one another but rather that they overlap. As the social meaning of goods may be determined in overlapping spheres, certain goods may be meaningful in different spheres.¹⁷ The sphere of recognition, for example, overlaps with two additional spheres to provide goods with cross-sphere social meanings:¹⁸ the sphere of retributive justice (or retribution, or justice towards perpetrators) and the sphere of restorative or reparative justice (restoration or reparation or justice for victims).¹⁹ Figure 1 below illustrates this overlapping and proposes examples of goods that may acquire social meaning in both of the overlapping spheres.

¹⁷ I am indebted to Michael Walzer for this clarification

¹⁸ Whilst this paper considers only two spheres associated with recognition, the paradigm of transitional justice has greatly enlarged the scope of measures associated with justice. For instance, in a sober proposal, Garton Ash considered 4 general measures (trials, purges, forgetting and historical writing) (Garton Ash; 1998). Other authors have further enlarged this list; for instance, Boraine (2006) lists five “key pillars” (accountability, truth recovery, institutional reform, reconciliation and reparations); Crocker (1999) numbers eight “goals” (truth, a public platform for victims, accountability and punishment, rule of law, compensations to victims, institutional reform and long term development, reconciliation and public deliberation). These list comprise objects with different epistemic value in light of the above theorization, involving specific goods (trials, purges, a platform for victims), sphere of justice proper (accountability and punishment), other associated processes (institutional reform and long term development), etc. The paradigm of transitional justice has also engaged in a debate on the tradeability of the different measures. Some authors support a holistic approach which rejects the possibility of exchanging different measures because of its weak moral basis. Boraine (2006: 27) also endorses a holistic approach but in a contrary sense: *the holistic approach to transitional justice affords a genuine opportunity for at least some accountability, some truth, some reconciliation and healing, some transformation and some reparations for victims*. Others adopt a more realistic approach and accept trade-offs between these measures. Thus, Crocker writes: *in particular circumstances, the achievement of one or more of the goals would itself be a means (...) to the realization to one or more of the others*.

¹⁹ I am of course simplifying the rich connotations and theoretical debates on the proper definition of both of these models.

Figure 1
Overlapping spheres of justice



It is commonly accepted that criminal justice overlaps with the sphere of recognition and identity. Thus, the German constitutional court argued in its Lisbon sentence that *by criminal law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions of law, is regarded so grievous and unacceptable for social co-existence in the community that it requires punishment.*²⁰ The Court merely follows theoretical opinions on the close relationship between criminal law and identity: criminal law codifies the moral foundations of the community and, in that sense, is essential to community identity (Washburn; 2006). In a very strong sense, criminal law is constitutive of the identity of those who share its jurisdiction; the constraints sanctioned by the law may be considered as crucial to the survival of the polity that has criminalized them – such constraints are the core that unites a people, what demonstrates their sameness and selfhood (Hildebrandt; 2007: 65). Precisely because of this connection, criminal law can be occasionally used with a strong expressive bias and this has led some theorists to argue that criminal law inherently serves expressive purposes.²¹ There is thus a circular relationship between the sphere of recognition and identity, on the one hand, and the sphere of retributive justice on the other: identity informs criminal law and criminal law has a constitutive effect on identity.

²⁰ BVerfG, 2BvE 2/08 30.06.2009 para 355

²¹ See, *inter alia*, Feiberg; 1970, Beale; 2000, Sustain; 1996.

Similarly, restorative justice is also deeply associated with the sphere of recognition and identity: what a victim is and how she must be treated depends on conceptions of community and notions about identity and recognition. In contemporary societies, care and attention given to victims has occurred largely as a result of the belief that the victims are deserving because of their suffering. Todorov writes that the victim has an unlimited right to state his claim and demand his due; in taking up this position, he assures himself his own gratification (Todorov; 1995: 131). Yet because victims saw their dignity violated, and because they were denied due process and respect of their rights, the attention to victims is not only an act of justice but also an affirmation of the basic values which sustain democratic policies. And, given the thick network of positive connotations associated with it, the status of “victim” has become a valuable possession (Maier; 1993) since it provides a strong resource in the struggle for recognition: prior suffering has a strong moral claim for honoring and recognition. In fact, Todorov warns on possible excesses linked to the temptation for anyone to identify herself with the role of victim in a long term basis, since the status has some “advantages”: few material compensations but particularly, the moral claim mentioned above: in taking the position as claim maker, he assures himself of his own gratification (i.e. the right to complain).

Leaving aside the specific restorative intentions, justice for victims also acts as a mechanism to include victims in the community and to also reassert the boundaries of that community, particularly when victims and perpetrators can be dissociated along the lines of the self and the other. De Greiff (2002: 28) has further assigned functional properties to the “duty of remembering”: the duty to remember is justified because it is a way to gain the *trust* of those whose ancestors were victimised. Interpersonal trust is essential if there is to be cooperation between strangers- and this in turn is a pre-requisite for the large-scale political organisation on which modern democracies are based.

Justice for victims involves a host of measures (or goods in the restorative sphere) to redress past wrongs, such as restitution (property and employment), rehabilitation, material compensations, etc.²² Whilst these fulfill their specific instrumental function within restorative justice, many of them have a direct effect on recognition since they sanction the community’s commitment to repair and compensate victims and restore their position in the said community. Furthermore, justice for victims includes measures exclusively associated with recognition; i.e.

²² See a canonical description in van Boven; 2009

the symbolic measures adopted in favor of victims. This is particularly the case with victims of genocide, crimes against humanity and war crimes, whose nature makes it impossible for survivors to return to their position prior to the violation of rights or to “repair” this violation. Reparation measures for such crimes will of necessity be symbolic (Fertsman et al; 2009: 9).

To summarize the argument so far, the kind of social goods that serve to carry out justice as recognition may be sphere-specific (for instance, policies on memorialization or commemoration of historical heroic figures). But there are goods which *prima facie* belong to other spheres and which nevertheless acquire social meaning as recognition goods related to memory. Throughout history memory has been associated with specific individuals or groups - not only heroes - who suffered for belonging to a community of identity (victims); yet in a negative sense, memory is also associated with those who inflicted suffering (perpetrators). Justice for both victims and perpetrators is normally organized with goods which, *prima facie*, do not strictly belong to the sphere of recognition. Thus, an inventory of the catalogue of the measures for justice for victims will find goods with a clear material component (reparations, compensations, restitution of property etc.) next to goods which have a more moral significance (rehabilitation, restitution of office, for instance). In parallel to this, perpetrators are subjected to “goods” which very clearly belong to the sphere of retributive justice: a look at the catalogue of measures shows all kinds of criminal penalties (including the death penalty) next to a variety of administrative measures (such as lustration and vetting). Whilst it could be argued that these kinds of goods are sphere-specific, it is true that the social meaning of goods operating in the sphere of retributive and restorative justice also become significant in the sphere of recognition.

The overlapping of the social meaning of goods produced in different spheres explains why occasionally actors may make claims in one sphere (for instance, claims on retributive justice) whilst in reality the most valued component in the goods claimed belongs to a different sphere. For instance, claims on criminal justice may primarily be seeking the kind of recognition that derives from sanctioning a certain behavior as a crime rather than specific punishments or criminal proceedings. Thus, even if spheres are considered to be separate, disentangling them may prove futile.

4. Models of recognition in different communities

Much of what we can say about justice in the EU depends on how the EU is characterized. Scholars have attempted to encapsulate the nature of the EU in a concept or term: ‘federalism’, ‘confederation’, ‘union of state’, etc. have met with varied success and academic acceptance. Yet rather than propose a new *conceptual* attempt to capture the nature of the EU, it could be worth accepting a certain epistemological consensus: that the EU is neither a state nor a traditional international organization of states but rather something in between these two points. The exact location between these borders may vary for each policy or issue considered and this applies also to recognition and memory.

4.1. Memory, recognition and identity in nation states

Nations are quintessential to the construction of justice models: because they are based on the thick glue of national identity, strong demands for justice in different spheres are made and are often met within nations. Indeed, justice within nations reaches the spheres of redistribution, retribution, reparation, rehabilitation and, naturally, recognition. Identity (national identity) possesses an enormous capacity to provide social meaning to social goods and, among these, goods which are linked to recognition.

Memory policies and the recognition associated with them fulfill an important identity function in nations. They serve to convey the identity of the nation over time; to re-create the community and to give it a sense of temporal continuity and coherence. Yet this does not occur automatically as historical perceptions are shaped and modeled (eventually) according to contemporary demands and, because of this, a selection bias is essential. As Renan puts it: (the act of) *forgetting, I would go as far as to say ‘historical error’, is a crucial factor in the creation of a nation; thus, the progress of historical studies is often a danger for national identity...the essence of a nation is that all individuals have many things in common, and also that they have forgotten many things* (Ernst Renan). In the European context, the aftermath of WWII provided a moment in which this selective bias operated: a myth of complete victimization by the Germans produced social solidarity even among peoples who had in fact benefited from the occupation (Judt; 2002). Past facts (narrated and/or re-interpreted) myths, symbols, suffering and heroism, repression and fate provide elements that set temporal yardsticks and that enable the community to be identified over time. That is, such elements serve to re-create the community and give it a

sense of coherence over time. Indeed, understanding the past and its demands on the present is precisely the function that nationally-conscious individuals perform by means of a “collective, national memory” (Snyder: 2004: 50). National collective memory thus provides a framework for nationally-minded individuals to place and organize their histories in a wider context of meaning and thus forming a collective identity (Müller; 2004: 3). As such, policies of memory help to delimit the borders of the perceived community and serve to reinforce solidarity among its members. This seems particularly evident in the case of commemorations: “commemoration activity” usually serves to strengthen the feeling of community and solidarity among those commemorating – a solidarity that is not necessarily based on consensus over past events, but rather extends to several generations, social classes and political events (Gillis; 1994).

The primary model of recognition implicit in a nation state’s memory and memory policies projects its identity through time rather than space. That is, that the intensity of temporal identification in national narratives may actually be superior to territorial identification: Spaniards, for example, would probably find it easier to identify with their compatriots of 100 years ago than with their European contemporaries. Contemporary peoples/nations are perceived as an external referent for identity and also as being constant over time. Thus, the French role as a historical referent for Spanish identity goes back two centuries, whilst the Spaniards are themselves an unavoidable referent for understanding Portuguese identity. In a radical interpretation of the Schmittian form, other peoples could be constructed as the *existential enemy* - although the more benign form portrays other nations as merely separate and different. Several normative conceptions of citizenship attempt to nuance the empirically incontestable reliance of national citizenship on national identity. However, these conceptions remain precisely that: normative attempts to address empirical sociological evidence which has also strong normative defences. In any case, if goods associated with justice are to be realized in other spheres (for instance, redistribution) , these goods need to acquire the intensity of meaning that is provided by national communities.²³

²³ On the impossibility of redistributive social rights because of the lack of a strong community feeling, see Closa (1996).

4.2. Memory, recognition and identity in the international community of states

Political philosophers (Walzer; 1994, Margalit; 2004) agree that the density/intensity of morality of international society differs greatly with that of states. This difference strains the capacity of international society to provide social meanings to goods related to different spheres of justice. This happens very clearly, for instance, in the sphere of redistributive justice (take, for instance, the relatively limited impact of the UN *Millennium Global Development Goals*) but also in the sphere of recognition (and in the spheres of retribution and restoration). Walzer contraposes the memory of specific societies to the memory-less humanity: *Societies are necessarily particular because they have members and memories, members with memories not only of their own but also of their common life. Humanity, by contrast, has members but no memory, and so it has no history and no culture, etc.* (Walzer; 1994: 8). Margalit, in turn, argues that only “thick” ethical communities like families and nations have a duty to remember in the first place whilst a universal ethical community of memory is unviable and even undesirable. In his view, humanity as such should remember only striking examples of radical evil and crimes against humanity, such as enslavement, deportations of civilian population and mass extermination (Margalit; 2004: 78).²⁴

A quick overview of the global status of memory seems to at least partly agree with the diagnosis linked to the density of morality. The kind of goods which are relevant in the understanding of recognition as identity and memory created by the community of states (“humanity at large”) confirm the above diagnosis. Of key importance in this process is the UN Holocaust Remembrance outreach program, sustained in a series of UN and UNESCO Resolutions²⁵ which set 27th January as the date for the commemoration of the Holocaust proclaimed by the UN, and the *Stockholm International Forum on the Holocaust* which, in its 1998 Declaration, stated that “*The Holocaust (Shoah) fundamentally challenged the foundations of civilization. The unprecedented character of the Holocaust will always hold universal meaning.*” Beyond these multilateral initiatives, states have been increasingly involved in making reference to memories of third parties- the Armenian genocide, for instance, has been solemnly acknowledged by a large number of national parliaments. The explanation for this turn

²⁴ Margalit uses the distinction between “thin” moral communities and “thick” moral ones. In his view, “thin” moral relations (and humanity at large) are not and should not be concerned with memory.

²⁵Resolution 60/7 1 November 2005 on Holocaust Remembrance, Resolution 61/255 22 March 2007 condemning the denial of Holocaust; UNESCO Resolution 34c/61 on Holocaust Remembrance

of events can be found following Margalit: these (i.e. the acts condemned) are acts of radical evil that undermine the very foundation of morality itself and, consequently, the object of recognition in these policies is , predominantly, humanity as a whole and, secondarily, national or group narratives associated to these memories and historical facts.

The international provision of goods in the two spheres theoretically connected with recognition as justice (i.e. criminal-retributive justice and justice for victims or restorative justice) is rather more slender than the state-level provision of such goods. However, some of the goods provided in these connected spheres have acquired social meanings associated with universal recognition of memory (or at least of certain memories). In the sphere of criminal justice, the international community has advanced both in defining crimes considered to be contrary to basic human morality and in the creation of procedures for implementing retributive justice: an advance that began with the Nuremberg Statute and has continued with the ICC and the regional criminal courts (Rwanda, former Yugoslavia, etc.).²⁶ International criminal justice has a subsidiary role *vis-à-vis* domestic criminal justice and, in some cases, states (China or Russia) have challenged global jurisdictions (i.e. the ICC). Beyond these specialized international criminal jurisdictions, regional and non-specialized jurisdictions have become progressively involved with cases pertaining to criminal justice which, additionally, have strong implications for the recognition of memory. Thus, the *Interamerican Court* has been involved in revising Latin American amnesty laws with an important jurisprudence which has forced domestic debates on the past.²⁷ As well, the *ECHR* has been involved in the revision of domestic cases related to crimes such as genocide, crimes against humanity, etc.

Even in the international community, the sphere of retribution provides goods which are meaningful in the sphere of recognition. In principle, the justification of international criminal justice presents two goals which may be perceived as sphere-specific (and which are also characteristic of nation state retributive spheres): retribution and deterrence.²⁸ But international

²⁶ Margalit warns against the risk of ‘biased salience’ in the sense that the atrocities of Europe will come to be perceived as morally more significant than atrocities elsewhere (2004: 80). However, the intensity and extension of criminal justice seems to be increasingly focused on non- European countries- which may reveal a different type of bias.

²⁷ Velasquez Rodriguez Case, Judgement July 29, 1988, Inter-Am. Ct H. R. (Ser C) No. 4 (1988); IACHR, Report 1/93, Report on the friendly settlement agreement in cases 10.288.; Barrios Altos case, Judgement November, 30, 2001, Inter-Am. Ct. H. R. (ser. C) no. 87 (2001).

²⁸ See Ramji Nogales (2010) and the bibliography quoted. Ramji (2010:7) questions the retributive value of international criminal justice: international criminal law does not serve an adequate retribution function in the context of mass violence, as criminal sentences served for mass crimes before internationalized criminal courts

criminal law has also a powerful expressive function, both because punishment establishes an “authoritative schedule of moral values”²⁹ and because proceedings in international criminal courts have a strong expressive component.³⁰ Whilst this statement refers to specialized criminal jurisdiction, non-specialized jurisdictions have employed recognition as a specific way of dealing with the past and with specific memories.

The creation of goals with social meaning in the sphere of restorative justice (i.e. justice for victims) is the result of an accumulation of different measures (reparations, restitution and rehabilitation). Whilst in the sphere of retributive justice the definition of crimes and perpetrators provides a good referent for a common minimum morality, the global identification of victims presents added challenges. The international definition of victims and victimhood attempts to reflect and *acquis* of “global identity” based on the identification of persons affected by certain crimes (genocide, war crimes, crimes against humanity). But these definitions have only tangentially sought to recognize something akin to a global memory. This has happened despite the fact that contemporary international human rights law owes its existence in no small measure to the horrors of the Holocaust and the fact that the UN Charter Preamble conceived humanity as a collective victim of the suffering of world wars which caused *untold sorrow to mankind*. While a first attempt at defining “victims” differentiated between victims of crime and victims of abuse of power, this second definition was found to be richer since it referred to persons who had suffered violations of internationally recognized norms relating to human rights.³¹ The ICC Rules of Procedure (art. 85) link the definition of victims to the kind of crimes defined in the Statute.³² Since these definition of these crimes come closer to the expression of some form of

differ little from these served for individual crimes. *In other words, criminal sanctions are inadequate in addressing the extraordinary notion of mass atrocities*. Their deterrence value has also been questioned. Evidence from recent cases casts doubts on the claims that international trials deter further atrocities, contribute to consolidating the rule of law, or pave the way for peace (Snyder and Vinjamuri; 2004: 20).

²⁹ Lubam (2008) argues that because punishment establishes an “authoritative schedule of moral values”, criminal law can be used to manage public discourse and establish social norms. See also Sloane (2007).

³⁰ Ramji (2010:6 and 8) argues that the expressive function does not translate well across cultures since the assumptions underlying the justifications for domestic criminal law do not hold true at the international level.

³¹ “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly 96th plenary meeting A/RES/40/34, 29 November 1985.

³² (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

global morality, the same property may be presumed to be invested in the parallel notion of victim. The most conclusive definition of victim – one that expresses a sense of global community- is contained in the UN 2005 *Basic Principles and Guidelines*³³. Accordingly, the status of victim derives from being affected by *gross violations of international human rights law, or serious violations of international humanitarian law* and not from being affected by crimes defined at a domestic level. Commentators (Ferstman et al; 2009; van Boven; 2009) have been eager to underline these international commitments although they accept that these fall short of creating an effective obligation for states. And what is a common trait in all existing international definitions is that victims are individuals and not collectives; this marks a strong difference to the way in which victimhood may be presented at state level.

Progress has been more precise in the international definition of the *contents* of the sphere of restorative justice. The 1985 UN Basic Principles listed restitution, compensation and assistance as mechanisms for justice. The 1998 Statute of the ICC (article 75) established that the Court must create instruments for reparations such as restitution, indemnities or rehabilitation. The 2005 UN Basic principles and guidelines listed the following restorative mechanisms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. With these guidelines, the UN moved towards sanctioning functions beyond restorative justice for reparations: satisfaction (for victims) includes verification of truth, an official declaration or judicial decision restoring the dignity of victims, public apologies, commemoration and tributes to victims.

Again, international involvement with each of these specific mechanisms has had an uneven record with each of these different mechanisms. In the field of *reparations*, these have been historically an inter-state affair only- with the vanquished state making payments to the victor (as was the case in the Treaty of Versailles). After WWII, the model of reparations started to move towards singling out victims individually. The 1952 German individual reparations

³³ For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Resolution adopted by the General Assembly 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Sixtieth session 21 March 2006.

program for the victims of the Holocaust were the first instance of a massive, nationally sponsored reparations program to individuals who had suffered gross abuses of their human rights- indeed the program marked a watershed moment in the history of reparations (Boraine, 2006: 24). Whilst inter-state and state-to-victims' reparations have been established, there are not large-scale and purely international programs that express some sense of the international community's ethical obligation to victims. There have been some *ad hoc* international compensation programs: the 1981 Trust Fund for Victims of Torture in Chile; the 1983 Fund for Victims of Apartheid in South Africa ; and the Trust Fund contemplated in the statute of the ICC for the benefit of victims of crimes (and their families) within the jurisdiction of the Court.

In the arena of *restitution*, international involvement has been much more intense via jurisdictional control of national programs (rather than the provision of internationally recognized goods in the field of restorative justice). Rights such as equality and non-discrimination (article 26 International Covenant on Civil and Political Rights; article 14 European Convention on Human Rights), the right of property (Article 1 of Protocol 1 of the European Convention HR) have provided the basis for an intense involvement with restorative justice , with a strong spill-over effect on the recognition of memory. Significantly, some authors (Macklem; 2005; 13) have noticed that *by beginning to engage with and speak to the injustices of the Holocaust and communist rule (....), international human rights law is starting to cut against its own grain and construct legal spaces for the expression of collective memory.*³⁴

It is clear that the thick web of international covenants and treaties provides a larger basis for eventually acting internationally on any of the different measures that compose restorative justice. What could be argued, however, is that the thicker the community of states becomes in terms of relationships, the more likely it is that social meaning is assigned to justice-related goods and, hence, that there is a predisposition to actually provide for some of these goods. This is epitomized by actions taken by existing international organizations in Europe. As well, the

³⁴ The same author quickly notices the different treatment afforded by different jurisdictions: *International human rights law, as embodied in the jurisprudence of the Human Rights Committee and the European Court of Human Rights, thus stakes out radically different positions on the extent to which the collective memories of religious, ethnic and cultural communities inform the equality rights of European citizens. According to the Human Rights Committee, equality involves remembering certain pasts in efforts to promote just relations in the future. The European Court's conception of equality, at least in the context of post-communist reform initiatives, is to defer to Member States in their calculations of the legal significance of certain pasts* (Macklem; 2005: 21). He contra-poses the solutions in the Brok case HRC with the Malik case (ECHR).

Council of Europe itself has gradually created goods addressed to the recognition of memory, initially dealing with Nazism³⁵ and the Holocaust but lately also extending to Communism.³⁶

4.3 The European Union as a Union of States and citizens

Within the EU, citizens belong to different plural peoples (*demoi*) but they are also bound together without the mediation of states. Their activities more and more project them in the European dimension, as users of euro, as students, as travelers and as workers in another member state. Almost from its inception (markedly from the 1970s' inquiries on European identity and explicitly from the 1992 Treaty of Maastricht), the EU has progressively upgraded the position of citizenship (citizens) as subjects of the Treaties. Article I-1.1 of the EU Constitution sanctioned this evolution: *Reflecting **the will of the citizens and States of Europe** to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.* Sadly, this provision is part of the collateral damage inflicted on the Union by the rejection of the Constitution and national governments have restored the traditional provision that presents the states as the true and only masters of the treaties. Article 1 of the Treaty of Lisbon now reads: *By this Treaty, the **High Contracting Parties** establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.*

Despite this political regression, the doctrinal interpretation and construction of EU citizenship - qualitatively different from any other international organization- seems firmly established as a central category that captures the nature of the Union. From different perspectives, scholars have designated the EU citizenship as postnational (i.e. Habermas), a multiple *demoi* citizenship (Nicolaidis), or a new "social contract" and an expression of the *telos* of integration with potential to anchor notions of fate and destiny (Weiler), etc. Regardless of differences, the point of agreement among these different approaches can be constructed *ab negatio*: EU citizenship is not a national form of citizenship nor does it involve a "thick"

³⁵ For instance, PACE constructed an argument on the CoE special responsibility on preventing the resurgence of Nazi ideology that may apply exactly to the EU: Modern Europe has been conceived on the basis of a total rejection of Nazi ideas and principles, to ensure that such horrendous crimes as these committed by the Nazi regime in the name of "racial superiority" will never be repeated. PACE Resolution 1495 (2006)

³⁶ For instance, PACE resolution № 1481 on 25 January 2006, called for the condemnation of the repressive communist system, established by the Soviet Union in Eastern Europe after World War II.

identity in the national sense. European citizenship represents the boldest form of a growing belief that others/foreigners deserve an equal treatment to nationals.³⁷ By granting a few rights previously reserved for nationals from other EU member states, non-discrimination against EU citizens within the border of the state (and even beyond) becomes the key principle of the human community of the EU. This implies a subtle (even though partial) enlargement of the scope of definition of the ethical community (to use Margalit's terms) or a movement from an initially moral community towards a more ethical one. In terms of identity, the model of community embedded by EU citizenship relies on a much thinner sense of identity than nation states³⁸ but, normatively at least, thicker than mere "human" identity. Whatever the expression chosen, the structural foundation of EU citizenship is the same: the relative opening up of the exclusivist and privileged relation between rights and nationality or between rights and the existence of an ethical community. This model of community provides the background for discussing recognition of memory in the EU and, for this purpose, the next section begins by discussing the normative and empirical value of the other two models of community memory when applied to the EU.

5. Delimitating the role of memory in the EU

The question that has informed this paper is whether the EU should produce norms in the domain of memory. Or in other words, why should the EU distribute goods related to the sphere of recognition? With the EU being a plural and multi-level community, an answer to this question may also explain whether or not the EU level is appropriate. ? And this question has to be responded taking into account the models of community described above and their implications for the distribution of goods of justice.

³⁷ There are, of course, all class of thorny issues on the question of "moving borders", i.e. the extent to which greater inclusion of EU citizens has provoked (or not!!) in parallel a growing conscience on the non-EU "other". In my opinion, the widespread utilization of the expression "*non-comunitari*" in Italy captures very well how this development has established itself firmly at least in some constituencies' perceptions.

³⁸ In particular, the notion of EU citizenship is antagonistic with the Schmittian friend/foe comprehension that some may identify at the essence of national citizenships. Thus, Margalit writes: *it is a historical fact that the bond of solidarity in many nations depends to a considerable extent on hatred, whether active or platonic, of the nation's neighbors* (Margalit; 2004: 77).

5.1. The EU as a national community for memory: an unviable normative proposal

As discussed above, the model of the nation state provides a coherent framework for bridging memory, identity, recognition and justice. However, very few, if any, theoretical constructions have attempted a normative model of the EU based on the nation state. Two reasons, in particular, provide strong normative arguments against using this model. On the one hand, certain points of view tend to attribute state-like properties to the EU and have an antagonistic vision of both nations and the EU. These views question the possibility of the co-existence of nation states and an eventual European identity, despite the theoretical normative (and empirical) construction of multi-level identity. Specifically in the domain of memory, it could be argued that memory is a sphere of justice exclusively located at the level of the nation state and that eventual EU actions in this domain could be perceived as intrusive, threatening or even aggressive. Indeed, such rejection has occurred in relation to specific EU symbols of memory; namely, the expulsion of Europe day from primary EU legislation (as it explicitly appeared in article I.8 of the EU Constitution). For some, such symbols may indicate the construction of an excessively “national” EU and claims for recognition on memory in the EU may thus be rejected precisely on the grounds that this is a function normally realized by nations and nation states. A second argument *against* the normative value of the nation state model is *prima facie* equally compelling: since identity has a dialogical dimension, an easy expedient for constructing the significant other is the identification of an external enemy. It could even be argued that narratives on European identity have constructed functional equivalents by means of external negative referents. The USA, for instance, has implicitly fulfilled this role and, similarly, some constructions of Europe as a Christian continent have had a similar function in certain narratives (for instance, to justify the exclusion of Turkey on the basis of religious differentiation as non-Christians). These are nonaggressive attempts to formulate a national-like European identity (in comparison with more assertive national identities) but nevertheless they have no empirical basis nor do have they found strong normative acceptance.

5.2 The EU as a community of sovereign states: what memory?

Some scholars and politicians have defended a purely international or intergovernmental interpretation of the EU from a normative perspective. Even conceived as a community of sovereign states under international public law, the EU has been able to construct social meaning

for certain goods related to recognition (i.e. recognition among states). This applies first and foremost to the long-standing narrative on reconciliation which has existed from the very origins of the Communities in the 1950s (starting with the Schuman Declaration³⁹) and since then rhetorically reaffirmed on countless occasions by European leaders,⁴⁰ politicians and institutions. While reconciliation has meant some form of moral rehabilitation of other peoples within a shared project (the European Union), this concept falls short of the normally more demanding understanding of reconciliation among citizens (victims and perpetrators) in a post-conflict situation.⁴¹ Mainly, reconciliation within the EU has meant that other peoples (i.e. nations/states) are no longer perceived as a Schmittian existential enemy while the predominant narrative would argue that war seems almost unthinkable between former enemies. In fact, the narrative on European integration as the foundation of lasting peace has found a central place in the narrative on reconciliation⁴². Surprisingly though, this perception (i.e. integration as peace) has not been translated into proper rules of relation among EU Member States: war may seem an unthinkable possibility - as did massacres among former neighbors in Yugoslav villages-but it is nowhere ruled out among EU member states. Retained state sovereignty thus means that EU Member States have not yet renounced the last recourse of treating each other as the enemy.⁴³ National memories still contain a good repository of referents in which current partners were former existential antagonists.⁴⁴

Shifting from this initial and simple structure of recognition based on international law, the new claims made on the EU and its member states subtly transform the comprehension of the

³⁹ The main argument in the founding declaration argued *the coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany* and this would generate *de facto* solidarity.

⁴⁰ As examples of this ongoing narrative, the Joint Italian-German Declaration signed in Trieste on 18 November 2008 (marking the anniversary of German invasion of Italy) argued that Italy and Germany shared the ideals of *reconciliation*, solidarity and integration which are at the basis of the process of construction of Europe.

⁴¹ Boraine (2006: 22) nuances this claim, though: *at its best, reconciliation involves commitment and sacrifice; as its worst, it is an excuse for passivity, for siding with the powerful against the weak and dispossessed* (22). In an extreme (and cynical) understanding, reconciliation can be disguised as (merely) forgetting.

⁴² *L'idée européenne est précisément née de la tragédie de la guerre, des guerres, des génocides. L'Europe s'est inventée par le pardon, cette grande vertu que le christianisme nous a enseignée et qu'on a si rarement pratiquée. Les ennemis séculaires ont commencé ensemble, dans les années cinquante, à tracer un avenir commun.* Van Rompuy, Herman Discours d'acceptation du Doctorat honoris causa à l'Université catholique de Louvain-la-Neuve 02.02.2010

⁴³ Cfr. Müller; 2007: 127: (the Union) *...seeks to turn enmity, the possibility of a deadly conflict, of killing and being killed, into a matter of peaceful economic competition, and of reasonable debate: an exchange of commodities, on the one hand, and a exchange of arguments, on the other.*

⁴⁴ There are, however, some practical examples of the attempts of former enemies at reconciling memories within the EU, for instance, the revision of shared history of the Franco-German Joint History textbook project.

community. Nation states that were at the fringes of European integration from 1945 onwards, may perceive founders, the first enlargement members and the EU itself, as *a significant other* - one which grants meaning to their own identity. This is not only the case with Central and Eastern European countries; one good example is Spain, in which recognition as a member of the EU has been vital in asserting its national and contemporary identity. The same argument, however, also makes sense for countries such as Germany, which experienced reunification within European integration. For these countries, the recognition granted by the significant other (the Europeans) is significant for the construction of their own national identity. The EU is perceived as a meaningful entity for justice-making (at least in the domain of recognition). This means that some groups may feel that they are denied recognition by the EU because of the nature of their particular grievances and this misrecognition is perceived as injustice. These demands express highly asymmetrical needs (according to the deeply unequal structure associated with recognition): the type and intensity of demands that different memories may make diverges enormously- and in fact, in some cases, no demand whatsoever is made for recognition of national memories in relation to the EU. What could be argued is that this moves the comprehension of the EU towards the third model of community of recognition as discussed above. The EU, even if originally accepted as a purely functional union of sovereign states, has come to be more closely associated with providing goods that have to do with forms of justice but which go far beyond any such forms that may exist between states.

5.3 Memory and recognition in a community of citizens (and states)

Section 4.3 above has outlined the nature of the community of citizens (and states) which is the EU. The argument here is that recognition of memory is coherent with the principle that inspires the creation of a community of citizens: the relative opening up of national “ethical” communities and the creation of an EU community of citizens that goes beyond the mere “moral” human community. As for this first argument, claims for recognition of memory in the EU open up parts of national narratives on memories. Since recognition is not an automatic result of a claim but needs to fulfill requirements of conformity with values, any demand for recognition needs to satisfy a test of its legitimate acceptability. Thus it is not the national-specific view of history that makes a claim acceptable for discussion and to be transformed into policy. Nevertheless, isolated from their concrete meaning for a specific community, the facts of

memory are meaningful in the sense that they point in the direction of a societal development that we can grasp as coming closer to our notion of a good or just society (Honneth; 2004: 353). “Societal development” here refers not to the social development of nation states alone but mainly to the contribution that these claims may have for the joint social development that the EU represents. This is the basic condition that different *demos* may establish in order to accept claims for memory. Claim makers, thus, not only need to evaluate their claims in the light of the conceptions of justice within their communities but also they need to reflect on the inherited and often uncritical narratives of memory of different communities and *demos*. For instance, eventual narratives regarding claims of crimes against the Spanish nation may be totally natural for Spaniards, yet it is doubtful that such narratives would be hypothetically accepted as a matter of fact within the EU. Hence, claim makers need to reflect on the compatibility of their claims; at the level of the EU, claim-making represents basically the same kind of “opening up” which supra-nationalism has meant in other arenas. A number of scholars have supported this view; thus, Jean Marc Ferry (2000: 177) has referred to a self-critical “opening” of national memory among Europeans, as well as the attempts to achieve a kind of “overlapping consensus” through civilized conflict and confrontation, whilst Müller (2007: 105) has stressed the eventual capacity for de-centering national memories and the concomitant creation of an “enlarged mentality” inherent in a mutual opening (which he otherwise perceives as potentially risky).⁴⁵ The kind of substantive criteria that any claim of memory needs to meet has been proposed by Weiler (1997: 509): *The substance of membership (...) is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment, inter alia, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationalism- those human features which transcend the differences of organic ethno-culturalism.* The interest of an enterprise enlightened by this kind of criterion is not to create a single “European memory” but to define procedures to help specific national communities to revise their memories in light of the comprehension setting that comes with EU membership. In this respect, the Europeanisation of national memories serves to

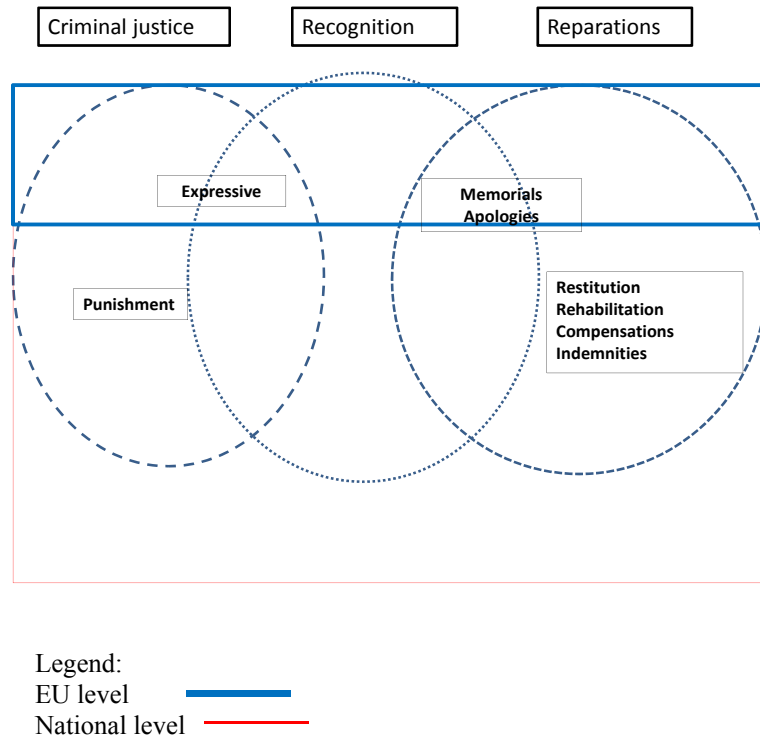
⁴⁵ Müller however warns: a shared European public reasoning- with respect to its collective pasts and the “admonitory meaning and moral purpose” it might thereby furnish- is profoundly desirable: Euro-nation building through negative nation building is not (Müller: 2007: 112). Joerges and Singh Ghaleigh argue that the reflection on the dark legacies of the past provide admonitory significance: we have to face our past in order to understand our present and we do so in the interest of our future (Joerges and Singh Ghaleigh; 2003: ix). Weiler (2003) further adds that confronting the past has a constitutive function (next to merely understanding) in line with community linked theories

preserve diversity and asymmetry whilst creating a structure for the revision of national histories. But also, in a much stronger sense, belonging to the EU should be interpreted as a mandate for nations' to revise their "darker legacies". This should not be confused with the creation of a single and unified memory: the normative argument for memory in the EU applies exclusively to Member States' memories and the claims for recognition of domestic constituencies. In other words, the argument does not attempt to construct any normative foundation whatsoever for "EU memory". However, because of the effect that they have in creating a European identity, claim making and recognition imply a subtle transition from a specific model of a community of states towards a model of a community of citizens. Since making claims implies recognizing the EU as a legitimate other (on to which claims can be projected), these claims for recognition also project a demand to renegotiate European identity; to make it more inclusive of these memories which did not provide substantive referential elements. Claims for recognition contribute to the definition of what being a European means, primarily by forcing a reflection on what kind of memory facts are or are not compatible with the moral perception that we- Europeans- have of ourselves in the XXI century.

5.4 Recognition in a plural multilevel community

So far, this paper has argued the case for the EU becoming a community for recognition. Being recognition-specific community, the multilevel character of the EU and the overlap of spheres between levels need to be taken into account. The existence of more than one level of community means that the social meaning of goods related to justice may be totally determined in one particular sphere, in each of them separately from the other or in the overlapping area between them. To a certain extent, the distribution of competences between EU and member states can be a useful analogy here, even though our interest is not specifically in the existing powers but, rather, in the normative foundation for a proper allocation of these powers between levels. Additionally, the social meanings associated with a good of justice in a given sphere may cross over into an associated sphere. At this point, spheres and levels combine: goods may carry out a specific social meaning at one level within a sphere yet they may also carry out an additional social meaning at a different level and within a different sphere. Figure 2 below tries to capture visually the overlapping of spheres and levels.

Figure 2
Overlapping spheres of justice in the EU multilevel community



The EU used recognition-specific goods such as condemnation of regimes, remembrance, etc to grant recognition of specific memories. But recognition has also derived from EU - generated goods belonging to connected spheres, specifically, that of retributive justice. And this has happened despite the fact that, for a long time, the idea of a European criminal law was discarded on the grounds that it is –and it should be- part of the national legal traditions (Hildebrandt 2007: 66). The Framework Decision on Denial of Holocaust is perhaps the most salient piece of legislation in this respect: having its origins in measures to combat racism, xenophobia and anti-Semitism, it evolved under German sponsorship into an obligation to criminalize denial of the Holocaust. Some critics have seen this legislation as a triumph of the model of “militant democracy” characteristic of countries still haunted by their “dark past” (Pech; 2009). Others still (Iontcheva Turner; 2011) have criticized the use of EU competence because the decision fails to address specific practical needs (i.e. the transnational dimension of

the crimes) and because an exclusively expressionist rationale informs it. These criticisms serve to illustrate how particular and underlying misperceptions of identity in the EU inspire an evaluation of specific measures with recognition value: Pech interprets the FD as an imposition of a specific requirement for national recognition whilst Turner interprets both Union and national identities as a kind of zero-sum game.

Despite these criticisms, the FD can be considered as a successful attempt to deliver goods for recognition in a plural and multilevel polity with overlapping spheres of justice. On the one hand, the FD's practical efficacy depends totally on national-specific configurations of the crime and, in this respect, the crime of denial operates completely within the national retributive sphere of justice. In this respect, plurality of national models (with some granting greater weight to free speech, for instance) may be preserved in the implementation of the FD; in these cases the model in relation to criminal offences is not so clearly imposed. On the other hand, the Framework Decision creates a symbolic commitment of EU member states to certain values. In this respect, the FD fulfills an expressive function in the sphere of recognition at the EU level. Naturally, the distribution of social meaning between levels (i.e. states and the EU) is asymmetric and it depends on and differs among member states. However, the subject matter of the FD (denial of the Holocaust) does not present a confrontation between an eventual EU interpretation vis-à-vis an eventually different national one.

The bias towards expressivity is not an innovation of the FD; the same identity component appears in other criminal justice measures of the EU (even though they may not be aimed at recognizing specific memories). Thus, the EU-wide policy on the death penalty⁴⁶ reflects a strong identity component: *the death penalty is cruel and inhuman; it violates human dignity and the fundamental rights on which the two organizations [i.e. EU and CoE] are founded. Capital punishment is wrong and future generations deserve to live in a death penalty free world.*⁴⁷ Expressive identity is not only asserted for EU member states but is also projected

⁴⁶ The prohibition of death penalty is enshrined in article 2 of the Charter of Fundamental Rights and Freedoms (art. 2.2. *No one shall be condemned to the death penalty, or executed*).

⁴⁷ Joint Council of Europe / European Union declaration to mark the European Day against the Death Penalty and the World Day against the Death Penalty - 10 October, 2010. See also the European Parliament resolution of 7 October 2010 on the World day against the death penalty P7_TA-PROV(2010)0351 and the EU Guidelines on the Death Penalty: revised and updated version <http://www.eurunion.org/eu/images/stories/dpguidelines.pdf>. The prohibition has a strong identity-defining dimension in relation to other world actors such as USA and China. Latvia is the only EU member state which still retains the death penalty in exceptional circumstances. The EU has fallen short of making its prohibition a formal requirement of membership.

beyond EU borders, tracing a differentiated position vis-à-vis, for instance, USA, Russia or China. Equally, a similar identity-making component informs EU policy in relation to war crimes and crimes against humanity,⁴⁸ and EU policy on the ICC.⁴⁹

With such a background, this recourse to connected spheres of justice and particularly to criminal justice, is replicated in claims of former communist states seeking recognition of their experience of memory. Take, for instance, the claim that seeks to criminalize the denial of the crimes of communism. As is the case with the FD on the denial of the Holocaust, it is difficult to argue that there is a pragmatic need behind the claim, particularly when states have not criminalized the denial of communism at the domestic level.⁵⁰ It would seem that rather than the practical efficacy of the measure, what proponents of this claim are seeking is that by criminalizing the denial of communist crimes, the EU and its member states recognize the equal

⁴⁸ A 2002 Danish proposal called for closer cooperation among national authorities in investigating and prosecuting war crimes and crimes against humanity. Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on the investigation and prosecution of *inter alia* war crimes and crimes against humanity (2002/C 223/09) OJ C 223/19 19.9.2002. The ensuing decision underlined Member States commitment to put an end to perpetrators impunity and to the principle of the ICC Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes OJ L 118/12 14.5.2003

⁴⁹ In the two first Common Positions on the issue, the EU set itself the objective of supporting the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute. To this end, it called on the then applicant countries (and associated states) to apply the common position. Council Common Position 2001/443/CFSP of 11 June 2001, on the International Criminal Court OJ L 155, 12.6.2001, p. 19; Council Common Position of 20 June 2002 amending Common Position 2001/443/CFSP on the International Criminal Court OJ L 164/1. The much more recent 2011 decision reinforces the “identity” dimension in the international scene. In its action on the international scene, the Union has sought to advance the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and international law, as provided for in Article 21 of the Treaty. Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP OJ L 76/56. See also the *Agreement between the International Criminal Court and the European Union on cooperation and assistance* Brussels, 6 December 2005 14298/05

⁵⁰ Four Member States have national legislation on the denial of crimes committed by totalitarian regimes which explicitly includes the crimes committed by totalitarian communist regimes. In the Czech Republic, the criminal code contains a specific offence for a person who publicly denies, puts in doubt, approves or tries to justify Nazi or communist genocide or other crimes of Nazis or communists against humanity (new criminal code, in effect from January 1, 2010, § 405). In Poland, the public and counterfactual denial of Nazi crimes, communist crimes and other crimes against peace and humanity or war crimes is a criminal offence (Article 55 of the Act establishing the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998). In Hungary, public denial, calling into question or trivializing the fact of the genocide and other crimes against humanity committed by the national socialist and communist regimes is a criminal offence (amendment to the Criminal Code, passed into law on 24 July 2010). In Lithuania, publicly condoning, denying or grossly trivializing international crimes and crimes committed by the USSR or Nazi Germany against the Republic of Lithuania or residents thereof it is a criminal offence (Article 170 of the Criminal Code). Additionally, in Latvia, on the basis of Articles 74 and 71 of the Criminal law, the denial of genocide, crimes against humanity, crimes against peace and war crimes based, among others, on political belief or social class could be considered as a criminal offence. Report from the Commission to the European Parliament and to the Council *The memory of the crimes committed by totalitarian regimes in Europe* COM(2010) 783 final Brussels, 22.12.2010

standing as citizens (i.e. bearers of fair but potentially conflictive claims) of these holding such claims *vis-à-vis* other citizens and member states. One proposal that may follow from the argument in this paper is that the specific retributive and restorative dimensions of justice belong *a priori* to the level of nation states since they have the kind of ethical communities to which these goods are usually referred. However, these claims have also an explicit demand for recognition which does not need to be satisfied in the spheres of retribution and restoration. Since these claims for recognition also imply a demand to recognize national specificity, the EU could be the provider of this good (i.e. recognition) *if* claims satisfy the test concerning the values of the Union. However, recognition is not the immediate result of raising a claim, particularly when the content of these claims have not found a specific place in current European memories- as is the case with the eventual status of a nation as collective victim.

6. Concluding remarks

Within the EU model of community of citizens and states, recognition of *just* claims on memory emerges as a moral duty. Some communities (i.e. states) seek recognition of their specific past as a means to dignify their own self-understanding. And the subjects from which recognition is sought are both the Union and its member states. Recognition of memories is a means for *some* states and peoples (hence, the inherent EU pluralism) to regain respect for their own projects within the EU. Hence, denying recognition may become a source of injustice and may express disrespect; whilst recognition is barely the basis of a thick community, denial of recognition hampers the possibility of any community whatsoever. Naturally, the caveat that inspires this paper must be repeated: claims are not just in themselves but need to be contrasted against minimal and shared moral understandings.

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