



# Report on Four of Fewer Freedom: Contested conceptions of justice in Europe between 1941 and 1957

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## About ETHOS

*ETHOS - Towards a European Theory Of Justice and fairness*, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

## Executive Summary

This Working Paper contributes to the overall objective of formulating a European Theory of Justice and Fairness by concentrating on the conceptions of justice put forward, codified and side-lined in the early years of European formation. It takes a social constructivist perspective, focuses on the key actors involved in negotiating justice, the moments that mattered most and their geo-political background during and after the Second World War. The analysis is thus based on archival materials as well as secondary sources.

This timespan considered is that between the formulation of Franklin Roosevelt's Four Freedoms, notably including the Freedom from Want in 1941 and the codification of the – very different – Four market Freedoms set out in the 1957 EEC Treaties. Whilst many periods in European history could have been selected, this particular period is significant as a Grotian moment, in which Europe witnessed an emphasis, first, on a wide range of rights for everyone in the world, including socio-economic rights, to, second, a stronger focus on market freedoms.

Marking moments in this period were the formulation of the Atlantic Charter, the United Nations, the Universal Declaration of Human Rights, the pledge made during the Congress of Europe, the setting up of the Council of Europe and of the European Economic Community. A grounded analysis of the debates, negotiations and contestations of justice at these meetings reveals that it is possible to distinguish three categories of justice conceptions: those that *conquered* (like justice as peace, as freedoms and as supra-nationalism); those that remained *contested* (like justice as redistribution, as representation and as accountability) and those *circumvented* (like justice as universal, justice as recognition and justice as equality). The conclusion argues that the institutional results of prioritizing certain justice conceptions and ignoring others still cast their shadow over Europe today.

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CECE	:	Comité d'études pour la Constitution européenne
ECSC	:	European Coal and Steel Community
EEC	:	European Economic Community
ECHR	:	European Convention on Human Rights
EPC	:	European Political Community
P1	:	First protocol to the European Convention on Human Rights
UDHR	:	Universal Declaration of Human Rights
UN	:	United Nations

## 1) Introduction

A key aspect of investigating the European foundations of justice is to understand how these developed over time. Such an inquiry can begin in many different places and at many different moments. It could start in ancient Greece, with Aristotle's understanding of universal and particular justice and his principle of formal equality: to treat like cases as like.<sup>1</sup> It could start with the Roman law that left us with insights like 'ius est ars boni et aequi' and 'suum cuique'.<sup>2</sup> It could begin with one of the many long-term struggles, marking moments and documents that marked the gradual curtailment of the power of the sovereign to the advantage of individuals and the movement from divine justice to humanism. An alternative would be to start with those individuals that provided the philosophical foundations for these processes, like Locke, Hobbes and Mill. Or, as hardly ever happens, an inquiry into justice in Europe could focus on other parts of the world, where the injustice committed by European powers caused people to vocally assert alternatives, as with Bartolomé de las Casas or Multatuli. Another route towards an investigation of the history of justice in Europe could have been to start with the first steps towards the formulation of international law, be it in the writings of Grotius, the battlefields of Solferino, during the Hague Peace Conferences or at the time of the foundation of the League of Nations.

The ETHOS project, however, has opted to focus on Europe within and after the Second World War in order to achieve its wider objective of examining how justice is institutionalized in Europe. This has two main reasons. The first is that the Second World War was, in many different ways, the reason for closer cooperation within Europe and for the institutionalization of such cooperation. Another is that, as will be set out in this Working Paper, the period during and after the Second World War was still characterized by an openness and indefiniteness in terms of the type of justice to be institutionalized in Europe. By the time of the formation of the European Economic Community in 1957 this was very different – clear choices had been made in terms of the type of justice institutionalized in the European project. A close consideration of the particular debates that lead to these institutional outcomes, of the people involved and the ideas that they held can offer important insight into the conceptions of justice on and off the table in this early period of European formation.<sup>3</sup> This, then, is the objective of this working paper.

Surprisingly, justice as a concept and an overarching ideal is not often discussed amongst those studying Europe, most notably not amongst lawyers and others studying European institutions. It could well be that the notion of justice is simply too big, or too abstract to engage with. At the same time, recent scholarship has lamented

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<sup>1</sup> ARISTOTLE, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23.

<sup>2</sup> 'The law is the art of goodness and equity' and 'to each his own', respectively, both ULPIANUS.

<sup>3</sup> See for such an approach on the United Nations: ROGER NORMAND & SARAH ZAIDI, *Human rights at the UN: The Political History of Universal Justice* (Indiana University Press 2008).

(footnote continued)

Europe's 'justice deficit', explicitly calling for a systematic inquiry on the interrelationship between law and justice in the European project.<sup>4</sup> Williams, to quote an example, speaks of the 'uncertain soul' of Europe: 'People simply do not know what the EU stands for'.<sup>5</sup> Ward, another scholar concerned about the lack of engagement with larger questions of justice in Europe today, quotes Vaclav Havel in stating that 'Europe today lacks an ethos, it lacks imagination'.<sup>6</sup>

One way of answering this call is by analysing what conceptions of justice preceded and made their way into Europe's institutions. In those early periods of European integration, the times in which a united Europe was above all an ideal, instead of an institutional reality, what justice was it supposed to serve? In line with the overall approach, this part of the ETHOS project proposes to consider this broad but relatively *ignored* question, with its continued relevance today by taking a grounded approach, with a focus on the people that negotiated post-war justice for Europe, the principles they held, the key moments in these negotiations, the conceptions of justice that were invoked, debated and ignored.<sup>7</sup> In doing so, it proposes a social constructivist understanding of justice, looking at its material manifestations and considering it as something that gets understood and interpreted at a particular place in time, within a particular political context.<sup>8</sup> Such a grounded approach, based on the study of writings of key actors, the reports of key meetings, the travaux préparatoires of main legal texts and secondary literature on the topic, from a methodological point of view enables a bottom-up understanding of interpretations of justice, and thus offers an important inroad to the wider debate on justice in Europe.

Of course, such an approach has limitations. For one, the timespan covered and the amount of people involved, perspectives presented and key political debates within and outside of Europe make that the analysis will only be able to touch upon the surface of these processes, focusing on the large rivers rather than the many streams that fed into them, and on the watershed moments rather than the times that trickled along.<sup>9</sup> The analysis below, for instance, can pay little attention to the justice debates within European countries, and the way in which they fed into pan-European discussions. At the same time, such a helicopter perspective allows us to connect a number of bodies of literature that all shed light on justice in Europe, which are so far surprisingly disconnected. For one, there is literature on the transatlantic dialogue that introduced a very particular understanding of justice for post-War

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<sup>4</sup> DIMITRY KOCHENOV, et al., *Europe's Justice Deficit?* (Hart Publishing 2015).

<sup>5</sup> ANDREW WILLIAMS, *The Ethos of Europe: values, law and justice in the EU* (Cambridge University Press 2010), 9

<sup>6</sup> IAN WARD, 'A Decade of Europe? Some reflections on an aspiration', (2003) 30 *Journal of Law and Society*, 257

<sup>7</sup> It thus, from a methodological point of view, works on the basis of grounded theory; KATHY CHARMAZ, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage 2006).

<sup>8</sup> JACK DONNELLY, 'The social construction of international human rights', in Tim Dunne & Nicholas J. Wheeler (eds), *Human rights in global politics* (Cambridge University Press, 1999).; BENJAMIN GREGG, *Human rights as social construction* (Cambridge University Press 2012). M. WALZER, *Spheres of Justice* (Robinson 1983).

<sup>9</sup> NORMAND & ZAIDI., xxi. It is, of course, important to realize the degree to which the debates analyzed here interplayed with national debates, for instance those in the Netherlands analyzed in Y. S. KLERK & L. VAN POELGEEST, 'Ratificatie a contre coeur: de reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht', (1991) 5 *RM Themis*.

(footnote continued)

Europe, most notably with an emphasis on individual rights and international cooperation.<sup>10</sup> Next, there is emerging literature on the political history of European human rights law, as institutionalized with the Council of Europe and the European Convention on Human Rights.<sup>11</sup> Finally, there is extensive literature on the history of the European Union, a story often told without an eye for justice concerns, and with the early 1950s as a starting date.<sup>12</sup> This ignores the relevance of the Congress of Europe, as – as will be established – a crucial moment in determining which conceptions of justice would prevail in post-War Europe.

This Working Paper takes a different point of departure: the Four Freedoms speech of American president Franklin Roosevelt in 1941. This choice is not self-evident, and calls for an explanation. This lies in the fact that these Four Freedoms provided a first glimpse of a number of essential features of post-war institutionalization of justice in Europe, most notably via its combination of an emphasis on individual freedoms, an obligation towards multilateral cooperation to protect them and some form of supranational supervision on their enforcement. For sure, individual freedoms had been formulated and had fueled revolutions in many European nations, with the American conception of freedom easily understood as the main ideological luggage that Roosevelt's ancestor's carried along when they sailed to new Amsterdam in the 17<sup>th</sup> century.<sup>13</sup> For sure, too, multilateral cooperation with international law as its main fabric had many predecessors, like the Hague Peace Conference to the interbellum experiences with a key role for Woodrow Wilson who in turn greatly influenced Roosevelt. Previous codifications of freedoms, however, had not coupled such claims to an *international* community, just as previous forms of international cooperation had not explicitly sought to safeguard *individual* rights. As such, this period could be considered a Grotian moment, a paradigm shift in international law that transformed internationalization and crystalized conceptions of justice in an unprecedented manner.<sup>14</sup> A final reason for taking this particular moment as a point of departure is because the transition from the emphasis on the Freedom from Want, as one of the four

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<sup>10</sup> See, for instance, ELIZABETH BORGWARDT, *A New Deal for the World* (Harvard University Press 2007).

<sup>11</sup> With as key works ALFRED WILLIAM BRIAN SIMPSON, *Human rights and the end of empire: Britain and the genesis of the European Convention* (Oxford University Press on Demand 2004). and MARCO DURANTI, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2016).; MIKAEL MADSEN, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics', (2007) 32 *Law and Social Inquiry*; ED BATES, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010).

<sup>12</sup> Virtually all textbooks on the European Union start in 1950 with the Schuman Declaration seeking to establish the European Steel and Coal Community, see for instance DESMOND DINAN, *Europe Recast: A History of European Union* (Palgrave Macmillan Basingstoke 2004); WOLFRAM KAISER, et al., *The history of the European Union: origins of a trans-and supranational polity 1950-72* (Routledge 2008); MARK GILBERT, *European Integration: A Concise History* (Rowman & Littlefield Publishers 2011).

<sup>13</sup> RUSSELL SHORTO, *Revolution Song: A Story of American Freedom* (WW Norton & Company 2017). See also the speech by WINSTON CHURCHILL to the States General of the Netherlands in 1946 (from *Finest Hour* 161, 32), in which he emphasized how 'The Four Freedoms which the great President Roosevelt proclaimed have always been cherished in Holland and were carried by his forebears in their blood to the New World'.

<sup>14</sup> MICHAEL P SCHARF, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change', (2010) 43 *Cornell International Law Journal*,

(footnote continued)

freedoms, to the Four market freedoms codified 17 years later is one of the most notable shifts in the formulation of justice for Europe. The Freedom from Want, with its roots in Roosevelt's New Deal, could be considered to emphasize social justice, a concept notably absent from the Four market freedoms.

The initial formulation of the Four Freedoms marked the beginning of a set of foundational moments, in which certain conceptions of justice were tabled, ignored or enthusiastically embraced as Europe crawled out of war to take on its current institutional shape. The malleable character of this institutional shape also means that the 'Europe' we write about had different forms over time – from an ideal with supporters in nations all over the European continent to the institutionalized Europe in the context of the Congress of Europe, the European Coal and Steel Community and the European Economic Community.<sup>15</sup>

In order to analyze what those conceptions were, which ones dominated and which ones were ignored, this article first describes a number of key moments, personalities and processes that lead to the transformation of one justice ideal into a notably different one. Each codification of justice, after all, is 'propelled by individuals, and individuals are still inspired to positive action by ideas'.<sup>16</sup> Such individuals came from all corners of the globe: A large part of the initial conceptualizations of justice, during the War, took place in the context of transatlantic relations and at an international plane, whereas the movement towards a 'European' understanding of justice took off after the war. After a discussion of these marking moments the Working Paper analyzes which ideas, which conceptions of justice conquered, which would remain contested and which were more or less circumvented in this foundational period. In conclusion, it discusses the degree to which the codification of particular justice ideals and the neglect of others stills cast its shadow over Europe today.

## 2) Transatlantic foundations

Out of all the important moments in the formulation, the negotiation, the contestation and the institutionalization of particular conceptions of justice, some of the most important were the drawing up of the Atlantic Charter, the founding of the United Nations and the drawing up of the Universal Declaration of Human Rights, the Congress of Europe, the founding of the Council of Europe and the run-up to the European Economic Community. It is on these moments, therefore, that the discussion below focuses.

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<sup>15</sup> D. CHAKRABARTY, *Provincializing Europe: Postcolonial thought and historical difference* (Princeton University Press 2009)

<sup>16</sup> BORGWARDT., 298

(footnote continued)

## 1) FDRs Four Freedoms and the Atlantic Charter

The tale of the conceptions of justice that gained prominence during and after wartime Europe thus starts, possibly surprisingly, in Washington in January 1941. Whilst Europe was still reeling from the German invasion in Poland, Denmark, Norway, France, Luxemburg, Belgium and the Netherlands, the Americans were deeply hesitant about getting involved in yet another war on the other side of the ocean. Franklin Roosevelt might have won his third election two months earlier, and have pulled his country out of the Great Depression, but stood relatively alone amongst isolationists in his conviction that the US should support Europe.<sup>17</sup> The President's thinking on justice had been shaped by his law studies and his cosmopolitan upbringing, but even more by his work as a minister on 'archinternationalist' Woodrow Wilson's cabinet, his pleas – in early years – for the US to enter the League of Nations and his – futile – call for America to support the idea of a World Court.<sup>18</sup> In 1923, as a private citizen, he had prepared a 'doable plan' for a peace award, proposing an international conference that would lead to a brand-new organization instead of the League of Nations.<sup>19</sup> Next to his unprecedented popularity back home 'Dr. New Deal' was also popular overseas. Isaiah Berlin, for instance, would reflect how, in the Europe of the 1930s, when humanitarianism, liberalism and democratic forces were played out and the choice was 'between two bleak extremes, Communism and Fascism – the red or the black'... 'the only light in the darkness was the administration of Mr. Roosevelt and the New Deal in the United States'.<sup>20</sup>

In his State of the Union address that would be widely recognized as one of the most important presidential addresses ever, FDR emphasized how the war threatened the American way of life, and sketched his vision of the world order in future days, 'which we seek to make secure'.<sup>21</sup> These days needed a moral order, based on the 'cooperation of free countries, working together in a free, civilized society'. This world order would be founded on four fundamental freedoms. First, the freedom of speech and expression as a key principle in so much of European jurisprudence, be it not always respected by the American government itself at the time.<sup>22</sup> Next, there was the freedom of every person to worship God in his own way -- everywhere in the world. This did not only form a response to the persecution of the Jews in Europe, but also the articulation of an American ideal with deep roots in European history for instance with the Reformation.<sup>23</sup> Third, the freedom from want, possibly the most

<sup>17</sup> DAVID WOOLNER, et al., *FDR's World: War, Peace, and Legacies* (Palgrave MacMillan 2008); id. at

<sup>18</sup> It is estimated that as the Democratic vice presidential candidate, FDR made eight hundred speeches in support of the League of Nations in the 1920s. He, however, withdrew his support in 1932 (Hoopes 10) to very much become a realpolitiker (TOWNSEND HOOPES & DOUGLAS BRINKLEY, *FDR and the Creation of the U.N.* (Yale University Press 2000)., 10

<sup>19</sup> FRANKLIN DELEANOR ROOSEVELT, *My Own Story; from private and public papers* (Little, Brown and Company 1951)., 79

<sup>20</sup> ISAIAH BERLIN, 'Roosevelt through European eyes', (1955) 196 *The Atlantic*, 67

<sup>21</sup> JEFFREY A ENGEL, *The four freedoms: Franklin D. Roosevelt and the evolution of an American idea* (Oxford University Press 2016). All the quotes below come from the Four Freedoms Speech, as delivered on the 6<sup>th</sup> of January 1941 to American Congress.

<sup>22</sup> LISA EAD, 'Freedom of Speech', in Jeffrey A Engel (ed), *The four freedoms: Franklin D. Roosevelt and the evolution of an American idea* (Oxford University Press, 2016).

<sup>23</sup> TISA WENGER, 'Freedom to Worship', in see id. at. 73

(footnote continued)

controversial element, which amounted to a proposal to internationalize the New Deal, and was explained by FDR as ‘economic understandings which will secure to every nation a healthy peacetime life for its inhabitants’. The freedom from fear, finally, meant ‘disarmament, in such a manner that no country could commit an act of physical aggression against their neighbours.’ These four freedoms were written up by Roosevelt himself, with the President adding the explicit ‘everywhere in the world’ to each the freedoms in one of the last drafts.<sup>24</sup> When one of the speechwriters commented how this covered an awful lot of territory, wondering how interested Americans would be in the people of Java, the president reportedly responded that ‘The world is getting so small that even the people of Java are getting to be our neighbours now’.<sup>25</sup>

FDRs ‘doable plan’ for peace and the vision of justice underpinning the Four Freedoms speech can be summarized as combining liberty rights, social justice and security for everyone in the world, made possible by a world order based on cooperation. The connection of these ideals with the future of Europe would take place seven months later, on a ship on the Atlantic, when the British Prime Minister Winston Churchill, in a meticulously prepared celebration of Anglo-American relations, presented FDR with his ideas on what would become the Atlantic Charter.<sup>26</sup> The 8-point statement contained provisions on peace, calling for the abandonment of the use of force, no aggrandisement and no territorial changes without express support of the people. It also emphasized, as a common principle, the respect for ‘the right of all peoples to choose the form of Government under which they will live’. In addition, the leaders expressed commitment to doing away with trade barriers, in order to secure ‘for all improved labour standards, economic advancement, and social security’. Where it concerned the means to realize this, Churchill had proposed ‘an effective international organization’ to keep such peace, but found the provision struck out by FDR who feared a lack of domestic support.<sup>27</sup>

Just as was the case with the Four Freedoms speech, it was a small sentence scribbled down last-minute by a statesman that – inadvertently - contained the seeds for a future revolution in the field of justice: the statement that they hoped to see a peace in which ‘all the men in all the lands may live out their lives in freedom from fear and want’. It was Churchill, most probably, who added the ‘all the men in all the lands’ for poetic effect.<sup>28</sup> The underlying message of universal rights was, however, not lost on those colonized by the British, like the young lawyer Nelson Mandela, who would later write how ‘Some in the West saw the [Atlantic] Charter as empty promises, but not those of us in Africa’.<sup>29</sup> As people in many other British colonies explicitly started asking whether the Charter also applied to them, Churchill was called to the House of Commons the next month, where he

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<sup>24</sup> ALAN K. HENRIKSON, ‘FDR and the “World Wide Arena”’, in David Woolner, et al. (eds), *FDR's World: War, Peace, and Legacies* (Palgrave MacMillan, 2008), 48

<sup>25</sup> The dialogue with speechwriter Harry Hopkins is recounted in ELIZABETH BORGWARDT, *A New Deal for the World* (Harvard University Press 2007), 21.

<sup>26</sup> HOOPES & BRINKLEY., 36

<sup>27</sup> *Id.*, 37

<sup>28</sup> BORGWARDT., 20

<sup>29</sup> Recounted by *id.* at 29

(footnote continued)

explained that the Charter covered primarily ‘the restoration of sovereignty, self-government and national life of the States and nations of Europe now under Nazi yoke’.<sup>30</sup> Issues of self-governance for the colonies, he asserted, formed quite a separate problem. It was thus within weeks of the formulation of the Atlantic Charter that the majority of those governed by the United Kingdom were exempted from its promise.

## 2) *The United Nations and the Universal Declaration of Human Rights*

The Atlantic Charter, in the words Churchill was a ‘milestone or monument which needs only the stroke of victory to become a permanent part of the history of human progress’.<sup>31</sup> Even if this stroke of victory would take four more years, negotiations on the post-War order continued, leading to increasingly formal documents and worked out plans, mostly developed within the transatlantic context – the attack on Pearl Harbour had fully drawn the US into the War. One outcome of an extended visit to the US by Churchill was the term ‘United Nations’ – thought up by Roosevelt, who reportedly barged into Churchill’s bathroom in excitement to share the idea with him. One result was the January 1942 Declaration by United Nations, signed by 26 countries from all over the world, in which they expressed support for the purposes and principles of the Atlantic Charter and formulated as the purpose of victory ‘to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands’.<sup>32</sup> This was the first time for the term ‘human rights’ to emerge in a multilateral declaration, and has been marked as the emergence of modern human rights law.<sup>33</sup> Its insertion was the initiative of the Americans, as was the case with the reference to religious freedom (to the discontent of the Soviet signatories).

Yet, the inclusion of human rights as one of the objectives of the United Nations, to be formed in 1945, was far from given. The war might have caused scholars like Hannah Arendt to make the case for the ‘right to have rights’, as totalitarianism showed how ‘human dignity needs a new guarantee which can be found only in a new political principle, a new law on earth, whose validity this time must comprehend the whole of humanity’.<sup>34</sup> But when the US, the UK, China and the USSR came together in Dumbarton Oaks in 1944 the only main aim of the post-War organization they could agree upon was that of peace. The Economic and Social Council, propagated by the US, was already problematic to the Soviets, and the Americans were the only parties in favour of a provision on

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<sup>30</sup> WINSTON CHURCHILL, speech of 9 September 1941, as retrieved via <http://hansard.millbanksystems.com/>. See also H.J. GESINA VAN DER MOLEN, ‘Enkele opmerkingen over het zelfbeschikkingsrecht der volken’, (1962) *Ars*,

<sup>31</sup> *Id.*, speech 9 September 1941

<sup>32</sup> 1 January 1942 Declaration of the United Nations, Yearbook of the United Nations 1946-1947, 1. The original 26 signatories were: The United States of America, the United Kingdom, the USSR, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia

<sup>33</sup> BORGWARDT., 55

<sup>34</sup> HANNAH ARENDT, *The origins of totalitarianism* (Houghton Mifflin Harcourt 1973), ix

(footnote continued)

human rights.<sup>35</sup> Once the newly formed United Nations came together in San Francisco in June 1945 the emphasis was again strongly on peace: the first article of statement of purposes of the UN Charter mentions peace no less than five times, to subsequently stress the importance of international cooperation. It was only due to the smaller countries, and persistent NGO-lobbying (most notably by the American Jewish Committee) that the UN also formally purported to promote and encourage ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’.<sup>36</sup>

Where it concerns the negotiation and the codification of justice it is important to also consider the other document that was negotiated in San Francisco in the same month: the Nuremberg Charter. Both the UN and the Nuremberg Charter can be considered to encapsulate the same *zeitgeist*: the need to secure the freedom from fear of aggressive war.<sup>37</sup> The question what to do with the Nazi leadership, from a legal viewpoint, was a difficult one, as the main crimes committed were not considered as such under German law at the time, thus calling for a revival of the notion of natural law.<sup>38</sup> In the end, the Nuremberg judgments were based on pre-existing laws, thus adhering to the legal principle of *nulla poena* – no crime without a previous law. In addition the Nuremberg tribunal ended up focusing most on the outlawry of aggressive war, and the punishment of crimes like genocide during wartime. One reason here was that the idea of holding states responsible for violations of human rights during peacetime could have uncomfortable implications for colonial powers like the UK, and those discriminating minorities at home like the US.<sup>39</sup> Nevertheless, the Nuremberg tribunal was a key stepping stone towards the affirmation of the idea that there was an international community, whose collective conscience could be shocked, towards the formulation of international criminal law and the need for an international court to prosecute the gravest of crimes. The Nuremberg trials attained two things: to ‘stay the hand of vengeance’, the idea that there were certain crimes that fell under natural law, could not be left to realm of legal positivism, and to establish that it was up to the international community to work together in punishing them. As prosecutor Jackson famously put it at the opening of the trial: ‘That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason’.<sup>40</sup> Even the failure to recognize genocide as such at Nuremberg did, in the end, lead to the formulation of the 1948 Genocide Convention with its group-based definition of genocide as ‘acts committed

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<sup>35</sup> HOOPES & BRINKLEY., 142; JOHANNES MORSINK, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999).

<sup>36</sup> WILLIAM KOREY, *NGO's and the Universal Declaration of Human Rights: A curious grapevine* (Springer 2001)., 2.

<sup>37</sup> BORGWARDT., 236.

<sup>38</sup> PHILIPPE SANDS, *From Nuremberg to the Hague: the future of international criminal justice* (Cambridge University Press 2003).

<sup>39</sup> BORGWARDT., 195.

<sup>40</sup> As quoted in FRANCIS BIDDLE, *Nuremberg* (American Heritage Publishing 2018)., i

(footnote continued)

with intent to destroy, in whole or in part, a national, ethnic, racial or religious group'.<sup>41</sup> What the legal attention for the atrocities committed during the War did not include, however, was the type of attention for restorative justice that would become so important at the end of the century.

With the inclusion of a reference to human rights such rights still had to be worked out in the Universal Declaration of Human Rights, work undertaken by a commission on the leadership of Eleanor Roosevelt with a drafting committee of René Cassin of France, Peng-Chun Chang of China, Hernán Santa Cruz of Chile, Colonel William Roy Hodgson of Australia, Vladimir Koretsky of the USSR and Charles Malik of Lebanon.<sup>42</sup> Possibly as a result, the UDHR, adopted on the 10<sup>th</sup> of December 1948, contained an impressive range of civil and political, social and economic rights. The underlying principles were famously depicted by René Cassin as a portico with four founding principles: dignity, liberty, equality and brotherhood. Conspicuously absent, however, was the right to self-determination— a clear indication of the dominance of western (colonial) powers in the negotiating process. The Declaration also, for the same reasons, lacked an explicit right to equal treatment – even if the Indian Hansa Mehta had successfully ensured gender-neutral language by advocating changing “all men” into “all human beings” in the first article.<sup>43</sup>

Even if the UDHR is a relatively comprehensive document, it clearly reflects the dominance of American and western European viewpoints. The document contains references to social and economic rights, but not to the extent and with the weight that negotiating partners like the Latin American countries and the USSR would have wanted.<sup>44</sup> Another important emphasis is that on rights, more than on responsibilities, even if Mahatma Ghandi was hardly alone in underlining that ‘the very right to live accrues to us only when we do the duty of the citizenship of the world’ and in arguing in favour of a statement of duties’.<sup>45</sup> An additional neglect – again instigated by domestic American politics - was that of the position of minorities.<sup>46</sup> This would not be rectified in the institutionalization of justice in post-War Europe, a process to which we now turn.

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<sup>41</sup> WILLIAM A SCHABAS, 'Origins of the Genocide Convention: From Nuremberg to Paris', (2007) 40 Case Western Reserve University Journal of International Law, . The Convention was very much the work of RAPHAEL LEMKIN, 'Axis Rule in Occupied Europe', in (Carnegie Endowment for International Peace, 1944).

<sup>42</sup> MORSINK; MARY ANN GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002).

<sup>43</sup> GLENDON., 289; MORSINK., 118-119.

<sup>44</sup> ROGER NORMAND & SARAH ZAIDI, *Human rights at the UN: The Political History of Universal Justice* (Indiana University Press 2008)., 181

<sup>45</sup> JACQUES MARITAIN, 'Human Rights: Comments and Interpretations', in, *A Symposium* edited by Unesco (Allan Wingate, 1948)., 18

<sup>46</sup> JOHN P. HUMPHREY, 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities', (1968) 62 *The American Journal of International Law*, 870

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### 3) Negotiating justice in post-War Europe

Whilst the architecture of global justice was negotiated in the context of the first United Nations meetings in San Francisco and Paris, discussions on a separate supranational organization in and for Europe took up speed. Such discussions could build upon interbellum activities like the Pan-European movement by Richard Coudenhove-Kalergi presented in the Interbellum, partly inspired by Keynes book 'The Economic Consequences of the Peace' with a strong emphasis on solidarity, and on the Frenchman Briand's idea of how to turn an 'idea of philosophers and poets' into a federal European bond in the context of the League of Nations.<sup>47</sup> They were triggered by the notion of 'nie wieder' following the devastation of war, but also by a fear of the emerging geo-political reality. Communism was clearly on the rise in the East, and Churchill had already set out how 'an iron curtain has descended across the continent'.<sup>48</sup> Just like the UDHR has been described as the 'last train out of the station' for the United Nations, so did Spinelli describe the what was at stake in the small window of opportunity before the Cold War set in: 'In the brief, intense period of general crisis (when the States will lie broken, when the masses will be anxiously waiting for a new message, like molten matter, burning, and easily shaped into new mould, capable of accommodating the guidance of serious internationalist-minded men) the most privileged classes in the old national systems will attempt, by underhand or violent methods, to dampen the wave of internationalist feelings and passions and will ostentatiously begin to reconstruct the old State Institutions'.<sup>49</sup>

The question, of course, was in what mould the 'molten matter' would be shaped. As old as discussions amongst poets, philosophers and politicians on uniting Europe was the debate on the reasons for doing so. As Lenin had sneered years earlier: 'United States of Europe is possible as an agreement between the *European capitalists* ... but to what end? Only for the purpose of jointly suppressing socialism in Europe, of jointly protecting colonial booty *against* Japan and America..?'<sup>50</sup> The Union of European Federalists, as one of the many groups and organizations advocating European unity in the period just after the war phrased its dilemma as follows in a 1947 statement: 'We do not want a moribound Europe, marked out as victim for ambitions for every kind, and governed either by pseudo-liberal capitalism that supports human values to the money power, or by some totalitarian system seeking, by fair means or foul, to exalt its idea of justice over the rights of man and communities'.<sup>51</sup>

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<sup>47</sup> ARISTIDE BRIAND, 'Memorandum on the Organization of a Regime of European Federal Union, 17 May 1930', (1930) Special Bulletin International Conciliation, . The quote is from the Aristide Briand speech to the Assembly of the League of Nations, Geneva, Room Reformation, 5 September 1929

<sup>48</sup> WINSTON CHURCHILL, 'The Sinews of Peace', speech held at Westminster College, Fulton, Missouri, 5 March 1946

<sup>49</sup> Spinelli and Rossi 1998, quoted in: DESMOND DINAN, *Europe Recast: A History of European Union* (Palgrave Macmillan Basingstoke 2004)., 26. The quotation 'the last train out of the station', by historian Fromkin is given in ELIZABETH BORGFARDT, *A New Deal for the World* (Harvard University Press 2007)., 265

<sup>50</sup> VLADIMIR LENIN, 'On the slogan for a United States of Europe', (1915) 44 *Sotsial-Demokrat*, 339.

<sup>51</sup> UNION EUROPEENNE DES FÉDÉRALISTES, program declaration adopted in Amsterdam on 15 April 1947.

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Below we consider a number of key moments to see to what extent these fears materialized: the Hague Congress, the formation of the Council of Europe and, finally, the stepping stones that led to the formation of the European Economic Community.

### 1) *The Hague Congress: carving out the course of justice for Europe*

A decisive moment in bringing together all the initiatives, proposals, meetings, discussions on the future Europe, and thus in casting Spinelli's mould, would be the Hague Congress from 7- 11 May 1948, organized by Winston Churchill. The former Prime Minister had already laid the rhetorical foundations to 'recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and freedom', in the 1946 Zurich speech in which he proposed the United States of Europe.<sup>52</sup> Another speech, held in the Netherlands later that year, showed the degree to which the 'European civilisation' to 'rise again from the chaos and carnage' was based on a romanticized ideal of European history.<sup>53</sup> Churchill stated how 'There was a time when the Age of Faith endeavoured to prevent the Age of Reason, and another time when the Age of Reason endeavoured to destroy the Age of Faith' – and how a combined commitment to tolerance and free thought needed to be rekindled. This, thus, was the perspective that Churchill would take to the Hague Congress to be held two years later. At its opening, the Hague mayor spoke of the history of Europe as a river, with progress as the current in the river, and tradition as the bed that made its movement possible.<sup>54</sup> Churchill himself set the tone by emphasizing that, 'President Roosevelt spoke of the Four Freedoms, but the one that matters most today is Freedom from Fear'.<sup>55</sup> If anything was clear, both at the time and with the benefit of hindsight, it was the degree to which the Congress constituted a watershed moment, not only because of 'the doors that it opened, but also because of what it turned away from'.<sup>56</sup> A large part of the explanation for the choices in terms of justice made lies in the composition of the list of attendees. The audience, largely invited by Churchill and his son-in-law, was high profile but also very specific in its composition, with 44.5% politicians, 25.5% intellectuals, 14% business leaders and only 4.5% trade unions – even if the latter were a key force in calling for a united Europe.<sup>57</sup> In particular the absence of

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<sup>52</sup> WINSTON CHURCHILL, speech delivered at the University of Zurich, 19 September 1946.

<sup>53</sup> WINSTON CHURCHILL, speech delivered to the States General of the Netherlands, 9 May 1946.

<sup>54</sup> 'L'histoire de l'Europe repose sur deux idées fondamentales, celle de la conservation et celle du progrès. Le progrès, c'est le courant de la rivière, le long duquel la vie de l'Europe avance doucement ou bien s'agite orageusement; la conservation et la tradition façonnent le lit de cette rivière ou ce mouvement devient possible', Speech by W.A.J. Visser, Mayor of the Hague, at the opening of the Congress of Europe 7 May 1948, Verbatim report Congress of Europe, European University Institute.

<sup>55</sup> WINSTON CHURCHILL, address given at the Hague Congress, 7 May 1948.

<sup>56</sup> 'Si le Congrès de La Haye est un moment fondateur, c'est autant par ce à quoi il ouvre la voie, que par ce à quoi il tourne le dos'; ANTONIN COHEN, "'Une conception nouvelle du parlementarisme"? Différenciations sociales et clivages politiques à la Haye et au-delà', in Jean-Michel Guieu & Christophe Le Dréau (eds), *Le "Congrès de l'Europe" à la Haye (1948-2008)* (Peter Lang, 2009), 273

<sup>57</sup> Id. at 275.

(footnote continued)

British labour created a 'right-wing bias'.<sup>58</sup>

What came out of the four days of heated negotiations was a pledge that, in many ways, turned its back on earlier discussions and foreshadowed the direction – in terms of understandings of justice – that Europe would take. The preamble curtly stated how 'Europe's mission is clear. It is to unite her peoples with their genius of diversity and with the conditions of modern community life, and so open the way towards organized freedom for which the world is seeking. It is to revive her inventive powers for the greater protection of the rights and duties of the individual of which, in spite of all her mistakes, Europe is still the greatest exponent...Human dignity is Europe's finest achievement, freedom her true strength'.<sup>59</sup> The first article in the ensuing pledge underlined that the delegates desired 'a United Europe, throughout whose area the free movement of persons, ideas and goods is restored', thus prioritizing market freedoms and the demands of capitalism in line with American and free market thinkers ideals for Europe. In terms of the rights that Europe would have to stand for, delegates called for a 'Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition'. The social and economic rights, still enthusiastically debated by the delegates working on the UDHR in Paris were thus side-lined. The Economic and Social Committee might have passed a resolution, stating that the 'ultimate and sole aim of every economic activity' was to 'ensure that all shall enjoy better conditions of life, both material and cultural, which is the ultimate and sole aim of every economic activity', but this did not make it to the final pledge.<sup>60</sup>

A third element of the pledge introduced the idea of a Court of Justice. This revived the old idea of instating a World Court in the European context, and thus strengthening the rule of law at the European level – the Court would limit the sovereignty of states in supervising their compliance with a strictly defined set of rights. The two final articles envisaged the type of democracy that Europe would be, by proposing a European Assembly and pledging support to all persons and governments 'working for this lofty cause, which offers the last chance of peace'. The prioritization of persons over governments was not coincidental. At the time, the ideal of Europe had unprecedented support among the population at large, and the Congress itself could well be considered a 'civil society achievement'.<sup>61</sup> The Congress did, however, contain national delegations which reported back to their respective governments. As a result, the French, British and Benelux governments quickly agreed to prepare to set up a Council of Europe,<sup>62</sup> which would be officially founded in London one year later, in May 1949.

At the same time, the Congress also strengthened 'civil society cooperation' towards the institutionalization of justice in Europe. The first fruit of the Hague Congress was the creation of the European Movement, on 25 October

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<sup>58</sup> HENDRIK BRUGMANS, *Le congrès de La Haye - avant, pendant et après*, European Yearbook. -published under the auspices of the Council of Europe. 1969, n° Vol. XV. La Haye/The Hague: Martinus Nijhoff, 24.

<sup>59</sup> As recorded in: EUROPEAN MOVEMENT, *Europe Unites: The Hague Congress and after* (Hollis and Carter 1949).

<sup>60</sup> WILFRIED LOTH, *Building Europe: A History of European Unification* (Walter de Gruyter 2015).

<sup>61</sup> MARLIES GLASIUS, *The International Criminal Court: A global civil society achievement* (Routledge 2006).

<sup>62</sup> BRUGMANS at 29.

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1948. Sandys, son in law of Churchill, was its first President (1948-1950). Blum, Churchill, De Gasperi, and Spaak were named Honorary Presidents. The Movement represented six organizations,<sup>63</sup> including both Christian-Democrats and Socialists. These organizations held different views on the way Europe should be united. The Movement consisted of both ‘federalists’ and ‘unionists’, with the federalists seeking further reaching political integration while the unionists were in favor of simpler intergovernmental cooperation. National councils of the Movement were also set up. In February 1949, the Movement held a political Conference in Brussels. It was at this meeting that the International Juridical Section of Movement was set up, chaired by the French Pierre-Henri Teitgen, a Christian-Democrat. There was also discussion of an interim report on a European Charter on Human Rights, which, interestingly, mentioned that ‘individual, family and social rights of an economic, political, religious or other nature’ should be protected by a Court.<sup>64</sup> However, social and economic rights did not appear on the concrete list of rights that was annexed to the interim report.

## 2) The European Movement works towards a European Convention

It was the European Movement, as a ‘civil society organization’, that took the lead in translating broad conceptions of justice for Europe into specific proposals. On the 12<sup>th</sup> of July 1949, the European Movement submitted a Draft Convention on Human Rights to the Committee of Ministers of the Council of Europe. This draft proved to be crucial in the evolution of European human rights law, as it provided the basis for final the text of the ECHR which would be adopted only a year later. The chief aim of this draft was to lay down the freedoms that together would have to guarantee peace, and prevent a (re-)emergence of totalitarian regimes.<sup>65</sup> The drafters referred to the UDHR and acknowledged its importance as an expression of a ‘common aim and as an agreed standard of basic values in human life.’<sup>66</sup> However, the European Movement felt that Europe needed a legally binding human rights instrument, to safeguard individual freedoms.

The substantive provisions were Article 1, laying down individual freedoms, and Article 2, containing political liberties (free elections; ‘right of political criticism and the right to organize a political opposition’). Protecting western democracy was the draft’s main aim.<sup>67</sup> Social and economic rights were not included, but Article 4 provided

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<sup>63</sup> European Union of Federalists; United Europe Movement; Economic League for European Co-operation; French Council for United Europe; Nouvelles Equipes Internationales; Socialist Movement for United States of Europe.

<sup>64</sup> Walter Lippens and Wilfried Loth, Documents on the History of European Integration, Volume 4: Transnational Organisations of Political Parties and Pressure Groups in the Struggle for European Union, 1945-1950, Walter de Gruyter: Berlin, New York, 1991, p. 387

<sup>65</sup> ED BATES, The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights (Oxford University Press 2010), 53.

<sup>66</sup> EUROPEAN MOVEMENT, European Movement and the Council of Europe (Hutchinson & Co. LTD, London, 1949), 114.

<sup>67</sup> BATES, 60 and 63.

(footnote continued)

that the selected rights ‘shall not imply any limitation whatsoever of other rights not here enumerated and in particular of the rights proclaimed in the Universal Declaration of Human Rights’.

In order to understand the ways in which the justice conceptions that underlay this Draft Convention were contested, the 1949 publication of the European Movement entitled *‘European Movement and the Council of Europe’* provides insight.<sup>68</sup> The publication summarizes the then existing criticisms of the draft, focusing on seven criticisms in particular.<sup>69</sup> Several of these sound remarkably familiar for modern readers, including the criticism that the draft ‘only guarantees a limited number of rights and omits others’; that the ECtHR might encroach upon the jurisdiction of national courts, would be inundated with complaints, and would be exploited for political ends; and that the ECHR would involve some surrender of sovereignty. Apart from the fact that these issues are still hotly debated today, what is noticeable is the short shrift that is given to social and economic rights. A strategy appeared whereby social and economic rights were made invisible and discredited. Social and economic rights are not mentioned as such, and the only concrete right that is mentioned in the publication is the ‘right to rest’.<sup>70</sup> A legal-technical argument is used – only rights that are ‘practicable to enforce through the processes of a court of law’ were chosen for inclusion in the Draft – to mask what was actually a very contentious political issue, going to the very core of how justice was conceived.

Pierre-Henri Teitgen presented the European Movement’s Draft Convention with a passionate speech at the very first session of the Consultative Assembly of the Council of Europe, in Strasbourg in August 1949. At this point, many representatives attending the conference still believed that they were there to create some form of ‘economic and political’ European union as was decided at the Hague Congress.<sup>71</sup> The results of the meeting were to some extent a disappointment, as the Committee of Ministers rejected virtually all the recommendations that were produced concerning further European integration, save the ones concerning a Convention on Human Rights.<sup>72</sup> The Consultative Assembly discussed whether the Convention should only include the minimum number of rights necessary to ensure the functioning of democracy, or whether the scope of the Convention should be broader. In particular, there was debate on whether family related rights (e.g. the right to family life and the right to marry), the right to education, and the right to property should be included.<sup>73</sup> Bates concludes that ‘the original ambitions for the Convention were very basic indeed’ and that it was primarily seen as a ‘collective pact against totalitarianism’.<sup>74</sup> Whether the Convention should be a broader European Bill of Rights was still in question at this point.

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<sup>68</sup> EUROPEAN MOVEMENT, *European Movement and the Council of Europe* (Hutchinson & Co. LTD, London, 1949).

<sup>69</sup> *Id.* at 119-128.

<sup>70</sup> *Id.* at 120.

<sup>71</sup> BATES, 58-59; ARTHUR HENRY ROBERTSON, *The Council of Europe : its structure, functions and achievements* (Stevens & Sons, 1961), 83.

<sup>72</sup> BATES, 59.

<sup>73</sup> *Id.* at 67-68.

<sup>74</sup> *Id.* at 75.

(footnote continued)

### 3) Adoption of the European Convention on Human Rights (November 1950)

How the substantive provisions of the ECHR precisely evolved in the Council of Europe between the Consultative Assembly of late summer of 1949 and the adoption of the ECHR in November 1950 is not entirely clear, as the *travaux préparatoires* do not give a full account.<sup>75</sup> What is clear is that the right to free elections was dropped from the final text, at the insistence of the British.<sup>76</sup> Instead, it would be included in Article 3 of the First Protocol to the ECHR, together with the right to own property (Art 1 P1) and the right to education and the right of parents to choose the education of their children (Art 2 P1).<sup>77</sup> Against a backdrop of fierce political debate about colonialism and a fear of Communism, these three rights were all the subject of much contestation. For the European colonial powers these rights raised difficulties, as generally speaking they gave their colonial subjects few opportunities of democratic participation, and created only rudimentary education systems in the colonies.<sup>78</sup> Simpson mentions the British Colonial Office's stance that 'colonialism, as such, did not present human rights problems'.<sup>79</sup> Including a right to free elections in the ECHR would cause the Colonial Office embarrassment. The right to property was contested because socialist governments, in particularly the UK and Sweden, were concerned that it would hinder the nationalization of private property for political and social purposes.<sup>80</sup> The right of parents to choose the education of their children, raised the question whether Communist parents in non-Communist countries had the right to have their children educated in Marxism and Leninism.<sup>81</sup>

The final text of the Convention also included the so-called 'colonial clause' (then Article 63), which made that the Convention did not automatically apply to the overseas territories of the European powers. This clause had been much disputed in the Consultative Assembly. Léopold Sedar Senghor, later President of the Republic of Senegal, pleaded with the Assembly to suppress the clause: 'In adopting Article 63, the Assembly would transform the European Declaration of Human Rights into the declaration of European Human Rights. This would be to deny the same rights to other men. This would mean betraying the spirit of European civilisation'.<sup>82</sup> Though Sedar

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<sup>75</sup> Id. at 79-80.

<sup>76</sup> Id. at 92-92.

<sup>77</sup> Regarding the drafting history of the First Protocol, see ALFRED WILLIAM BRIAN SIMPSON, *Human rights and the end of empire: Britain and the genesis of the European Convention* (Oxford University Press on Demand 2004), Chapter 15.

<sup>78</sup> SIMPSON, at 758.

<sup>79</sup> Id. at 762.

<sup>80</sup> ROBERTSON at. 169.

<sup>81</sup> Id. at 169.

<sup>82</sup> Quoted in KARL VASAK, 'The European Convention of Human Rights beyond the Frontiers of Europe', (1963) 12 *International & Comparative Law Quarterly*, 1208.

(footnote continued)

Senghor and other critics of the colonial clause had managed to convince the Assembly, the Committee of Ministers reinserted it in the final text of the Convention.

Ultimately, the ECHR was a sort of trade-off compared with the UDHR. It was groundbreaking in the sense of creating a supranational court with the power to issue binding judgments. But this came at the expense of a broad conception of rights, as enshrined in the UDHR, as only civil and political rights made it into the Convention. As Duranti analyzes it, the adoption of the Convention ‘marked more than a momentous step forward in the genesis of international human rights law. It signified a rejection of the expansive understanding of human rights enshrined in the Universal Declaration and the emergence of a transnational conservative countercurrent to domestic policies implemented in recent years at the level of the nation-state’.<sup>83</sup>

#### 4) Thin conceptions of justice in the formation of the European Economic Community

Turning, now, to the institution that would one day become the European Union, the story of ‘the road not taken’ as regards EU human rights has been well documented by Gráinne de Búrca.<sup>84</sup> There was a moment of opportunity, in 1952 and 1953, when there was a real chance that further European integration would be aimed at protecting human rights and democratic institutions. The European Movement, which had a few years previously played such a crucial role in drafting the ECHR, set up the *Comité d'études pour la Constitution européenne* (CECE), which was tasked with drafting a constitution for a European political community. The CECE’s vision for a new European community was that it would guarantee ‘the common well-being, existence and external security of the Member States and of protecting the constitutional order, democratic institutions and fundamental freedoms.’<sup>85</sup> Subsequently a draft Treaty on a European Political Community (EPC) was created, but the EPC never saw the light of day. The draft Treaty was discarded when the French National Assembly refused to ratify the European Defence Community Treaty. Further European integration would be economic, starting with the European Coal and Steel Community in 1954. What is more, in contrast with the institutionalization of European human rights in the context of the Council of Europe, European economic integration would be more state-driven and technocratic.<sup>86</sup>

Justice conceptions became very thin, apart from two powerful ideas. The first of these was that economic cooperation would preserve peace, especially between Germany and France. This was famously put forward in the Schuman Declaration of May 1950, proposing the creation of a European Coal and Steel Community: ‘The solidarity

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<sup>83</sup> DURANTI., 278

<sup>84</sup> GRÁINNE DE BÚRCA, ‘The Road not Taken: the European Union as a Global Human Rights Actor’, (2011) 105 *American Journal of Comparative Law*; GRÁINNE DE BÚRCA, ‘The Evolution of EU Human Rights Law’, in Craig & de Búrca, *The Evolution of EU Law* (Oxford University Press 2011)

<sup>85</sup> Quoted in DE BÚRCA, ‘The Evolution of EU Human Rights Law’, 469.

<sup>86</sup> DURANTI, 359.

(footnote continued)

in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.<sup>87</sup> The second underlying justice conception, also already mentioned in the Schuman Declaration, was linked to the idea that economic cooperation would raise the standard of living. The resolution adopted at the Messina Conference (June 1955), which laid the groundwork for the future European Economic Community, reiterated this and stated that a policy of further European integration ‘appears . . . to be indispensable if Europe’s position in the world is to be maintained, her influence restored, and the standard of living of her population progressively raised.’<sup>88</sup> Apart from the mention of raising the standard of living, however, there is little evidence of justice concerns in the resolution.

The Treaty of Rome, establishing the European Economic Community (EEC) in 1957, contained, as mentioned, Four Freedoms of the internal market (goods; capital; services; workers) that are entirely different from President Roosevelt’s Four Freedoms. The Treaty contained no reference to human rights, only a provision on equal pay for men and women (Article 119). The economic community was premised on the idea that the Member States had strong national welfare systems in place, and that social policy at the European level could be minimal. The Treaty did contain a chapter on social policy (Articles 117-128), however – despite attempts by the French socialist Prime Minister Guy Mollet to the contrary<sup>89</sup> – the founding fathers agreed that the creation of the common market would not require harmonization of labour and social standards; this was the notion of ‘embedded liberalism’.<sup>90</sup> Domestic social policies would ensure that the fruits of European economic cooperation would be distributed fairly, in line with national preferences.<sup>91</sup> The important exception to this was agriculture, as the Treaty of Rome provided that a common agricultural policy would be established ‘to ensure thereby a fair standard of living for the agricultural population, particularly by the increasing of the individual earnings of persons engaged in agriculture’ (Article 39(1)b). Thus, Europe was sometimes called a ‘welfare state for farmers’.<sup>92</sup>

The underlying idea was that European economic cooperation would bring what later scholars have termed ‘upwards convergence’.<sup>93</sup> The standard of life would improve everywhere in Europe, diminishing differences across countries. In justice terms, the idea of ‘upwards convergence’ mostly translates to distributive justice rather than

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<sup>87</sup> The Schuman Declaration – 9 May 1950.

<sup>88</sup> Resolution adopted by the Ministers of Foreign Affairs of the Member States of the E.C.S.C. at their meeting at Messina (June 1 to 3, 1955).

<sup>89</sup> FRITZ W. SCHARPF, *The European Social Model: Coping with the Challenges of Diversity*, (2002) 40 *Journal of Common Market Studies*, 646.

<sup>90</sup> DIAMOND ASHIAGBOR, *Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, (2013) 19 *European Law Journal*, 303-324.

<sup>91</sup> FRANK VANDENBROUCKE, ‘The Idea of a European Social Union: A Normative Introduction’, in: VANDENBROUCKE e.a. (eds), *A European Social Union after the Crisis* (Cambridge University Press, 2017), 22-23.

<sup>92</sup> For a full historical account see ANN-CHRISTINA L. KNUDSEN, *Farmers on Welfare: The Making of Europe's Common Agricultural Policy* (Cornell University Press 2009).

<sup>93</sup> VANDENBROUCKE at 22.

(footnote continued)

redistributive justice. The newly created EEC was not constitutionally committed to the redistribution of wealth.<sup>94</sup> But the upwards convergence idea can nevertheless be connected to an egalitarian ideal, namely that equality should be reached by ‘levelling up’ rather than ‘levelling down’ (which would mean reaching equality at the level of the lowest common denominator, making everybody equally badly off).<sup>95</sup>

Eventually, the overarching aim of the Community was laid out in Article 2: ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.’ The references to harmony and stability point to a conception of justice as peace, and the reference to the standard of living hints at justice as prosperity, but there is not much else. Kochenov’s view is that, in later years, ‘[t]he grand promise of European integration ended up being hijacked, if not consumed by the Internal Market’.<sup>96</sup> Though this view might not be shared by everyone, it is clear that with this foundational document the Community that would, one day, become the European Union thus definitely moved away from the wide variety of justice conceptions present in earlier years, to a much more narrow interpretation.

## 4) Conceptions of Justice

What, now, in very general terms, can be considered the conceptions of justice that underpinned the early days of the institutionalization of Europe? Justice is, as is established clearly in other ETHOS working papers is a concept understood in many ways, with different meanings to philosophers, poets, politicians and lawyers. In the case of the latter two, justice can emerge wrapped in rhetoric, as an element in negotiations or in a legal text before it comes to have an impact on everyday life. In analyzing the understandings of justice as they emerged in day to day encounters in the key moments described above, as well as in the key texts, it is clear how such understandings shifted over time, shaped not only by the geo-political context but also by individuals and the coalitions that they formed. In all, in these foundational years of Europe, there were clearly conceptions of justice that conquered and were thus codified in legal text, others that remained deeply contested and others that were more or less circumvented. This section briefly considers each of them.

### 1) Conceptions that conquered

If there was one understanding of justice, one overarching objective shared by all negotiators in the period analyzed, it was that of justice as *peace*. Franklin Roosevelt’s emphasis on the ‘Freedom from Fear’ for everyone in the world pointed at the simple need for an absence of warfare, but also for disarmament and international cooperation towards that overarching objective. The first article of the UN Charter defines maintaining

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<sup>94</sup> See for discussion ANDREW WILLIAMS, ‘The Problem(s) of Justice in the European Union’, in: DIMITRY KOCHENOV, et al., *Europe’s Justice Deficit?* (Hart Publishing 2015), 39-42

<sup>95</sup> See, e.g., SANDRA FREDMAN, *Discrimination Law* (OUP 2011, 2<sup>nd</sup> ed), 10; LARRY TEMKIN, ‘Equality, Priority, and the Levelling-Down Objection’, in MATTHEW CLAYTON & ANDREW WILLIAMS (eds.), *The Ideal of Equality*. (Macmillan 2000), 126-61.

<sup>96</sup> DIMITRY KOCHENOV, ‘The Ought of Justice’, in DIMITRY KOCHENOV, et al., *Europe’s Justice Deficit?* (Hart Publishing 2015), 27.

international peace and security as the first purpose of the United Nations, with other goals as subservient to that end. At the Congress of Europe Churchill quoted freedom from fear as the main objective of European integration. The ECHR emphasizes that fundamental freedoms are the ‘foundation of justice and peace’, and the Treaty of Rome underlines that economic and social progress, and eliminating trade barriers would ultimately ‘strengthen peace and liberty’. Peace, in both cases, is the overarching objective.

Another outcome of the negotiations, much less logical to many, was the understanding of justice as *liberal freedoms*. The ‘Freedom of every person to worship god in his own way’ and the ‘freedom of speech and expression’ that FDR formulated as what was essentially at stake in war, also became key objectives of peacetime cooperation. Whereas the UDHR still included a much broader understanding of rights and freedoms, the ECHR exclusively codified these civil and political rights. Such freedoms were combined with an emphasis on the free market, an approach already apparent during the Congress of Europe of 1948 and later codified in the EEC.

In terms of the institutional architecture needed to guarantee both peace and these particular freedoms it was *supranationalism* that proved victorious. Such supranationalism went much further than the mere intergovernmental cooperation in the United Nations. It included the commitment, of the nations that founded the Council of Europe, to hand in part of their sovereignty to strengthen the rule of law at a European level – the European Court of Human Rights, after all, was given the mandate to control whether states complied with their human rights obligations. In these choices one discerns a concept of justice as working together, with the movement ‘towards an ever-closer union’ as a manifestation of justice in itself.

## 2) Conceptions contested

The justice contestations in post-War Europe saw clear winners. Other concepts, side-lined in the process, were only to emerge much later. Most notably, this applies to the understanding encapsulated in FDRs ‘Freedom from Want’, which could roughly be translated as *redistributive justice*, with social and economic rights as key stepping stones towards this aim. Such an internationalization of the American New Deal was still an option at the start of the negotiations on the United Nations and the UDHR.<sup>97</sup> The Congress of Europe, however, proved to be a key moment in side-lining social and economic rights, which subsequently were conspicuously absent from the ECHR. The Congress of Europe did deal with social and economic questions in its Social and Economic Committee, but the soon to be formed Council of Europe did not have jurisdiction on these matters. With the bifurcation of the European project into the Council of Europe and the European Economic Communities, and with the exclusion of social and economic rights from the ECHR, questions of distributive justice thus became mainly the province of the EEC. However, while the EEC was based on the ideal of upwards convergence, apart from in the field of agriculture, there was little in the way of actual redistribution of wealth and resources. The European founders were standing on strong national welfare states, reliant on national welfarism, not on Europe, to bring redistributive justice.<sup>98</sup>

Justice as *representation* was similarly sidelined. What was at stake here was whom would get to participate, in what manner, in the newly shaped European polity. The groundswell movement for such a polity, clearly,

<sup>97</sup> DANIEL J. WHELAN, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010).

<sup>98</sup> SAMUEL MOYN, ‘Human rights and the age of inequality’, in: LETTINGA & TROOST eds, *Can human rights bring social justice? Twelve essays*, (Amnesty International 2015), 12.

consisted of individuals and what would these days be called civil society. They provided the philosophical grounding, wrote the pamphlets, organized the meetings and public support. They, also, ensured that ‘human rights’ made it as an objective of the United Nations. In addition, they arduously pleaded for a democratic European parliament. In the end, however, such public participation in the European project would be marginalized, with both the Council of Europe and – even more – the European Economic Community as intergovernmental entities.

A third conception of justice for which the seed was planted in the post-War era, but which would remain in the freezer for half a century afterwards, was that of justice as *accountability*. Nuremberg came to stand for an ideal closely related to natural law, the notion that there are certain crimes so heinous that they shock the conscience of mankind, and thus deserve persecution by the international community – whatever the laws of the land. This understanding of justice made it to the Genocide Convention, but its actual institutional consequence – the setting up of a permanent international criminal court to prosecute the crimes concerned – was not taken any further as the Cold War set in.

### 3) Conceptions circumvented

For all the openness in the post-War period, Spinelli’s ‘molten matter’ saw very little attention for a number of understandings of justice which a modern-day spectator would consider as key. For one, FDR’s ‘everywhere in the world’ would largely prove to be a hollow phrase. The idea of *universal justice* for all mankind might have been rhetorically present in negotiations on the UDHR, but the millions of people in European colonies, under colonial rule, were quickly exempted from the justice codified in the post-War period. This is not only apparent in the way in which FDR’s idea of self-determination, for countries large and small, disappeared from the table. It also shows in the lack of regard for the rights enshrined in the European Convention in the wars fought by many European countries against independence movements in their colonies, and in the inclusion of the ‘colonial clause’ in the text of the Convention itself.

This raises the question of who the subject was of European justice conceptions during this phase. How did the founding fathers (and a few mothers) imagine the subject of justice, and how universal was this subject? Clearly, he was European, not living in the overseas territories. During the Congress of Europe, there were a few representatives from women’s organizations who lobbied hard to be given a voice in the proceedings, and who appealed to the Congress to not forget the role of women when creating a new European ‘home’.<sup>99</sup> They reassured the Congress, ‘nous ne sommes pas des féministes revendicatrices’, we are not grumbling feminists, we are and we want to remain feminine, and we want to create a new Europe hand in hand with our brothers.<sup>100</sup> Their influence

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<sup>99</sup> Congress of Europe, verbatim report Plenary Sessions, The Hague 1949, 23 (Archives European University Institute).

<sup>100</sup> Id.

(footnote continued)

remained limited however. The final text of the Convention does not include a free-standing right to equal treatment, only a prohibition of discrimination (Article 14) that is accessory to the other substantive rights in the treaty. Moving to the European economic communities, Menéndez has argued that the subject of economic justice was the region, not the individual.<sup>101</sup> Farmers were the exception. And while the internal market was thought to lead to a higher living standard for everybody, it created personal opportunities for a limited group: those who were economically active and willing and able to cross borders.<sup>102</sup>

Finally, it is striking to which degree justice as *recognition* of minority rights was absent in post-War discussions. The protection of minorities was a central object of international cooperation in the interbellum, and direly needed in the period after the Second World War. Still, there was very little attempt to codify protection of those groups that suffered most from discrimination because of their position as a group. One reason could be the way in which the explicit attention for particular groups had led to the atrocities of the Second World War. Another, more political, could be that the lobbying position of minorities as such was not as strong as that of other groups.

## 5) Conclusion

This paper has emphasized the degree to which the codification of justice in Europe was the outcome of the work of individuals, at a particular moment in time, against the background of geo-political forces. One of these individuals, Hendrik Brugmans - president of the European Union of Federalists and one of the leaders of the European Movement - remarked that the 10<sup>th</sup> anniversary of the Congress of Europe in 1958 was a tepid affair.<sup>103</sup> By then the inspiration in FDR's Four Freedoms speech and the passion clearly present at the Congress of Europe had worn out, and given way to technocratic and pragmatic cooperation around a specific conception of justice. If justice is understood as 'a set of practices and procedures developed from our responses to injury and wrongdoing, a notion born of experiences – of sympathy, compassion, pain, suffering and outrage',<sup>104</sup> it is clear to what degree both the wartime experience and that of subsequent events shaped initial institutional responses and debates. It was the assault on peace that led to its prioritization, the abuse of power by the nation-state that led to its curtailment in the form of human rights and supranationalism, and the fear of communism that led to the emphasis on liberal and political rights. Also, European justice was – though less explicitly – formulated against the claims to universality and self-determination that many people in the colonies, under European rule, stood for.

Justice as it was conceived, debated, negotiated and ultimately institutionalized in post-War Europe can be understood as a movement from 'four to fewer freedoms'. In empirically considering justice in Europe, as is the objective of the wider ETHOS project, it is striking how these institutionalized conceptions still cast their shadow over Europe today. What this paper calls the 'contested' and the 'circumvented' conceptions of justice – justice as redistribution, representation, accountability, universality, and recognition of minorities – have remained salient,

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<sup>101</sup> AGUSTÍN JOSÉ MENÉNDEZ, 'Whose Justice? Which Europe?', in DIMITRY KOCHENOV, et al., *Europe's Justice Deficit?* (Hart Publishing 2015), 148.

<sup>102</sup> For a more positive account see VANDENBROUCKE at 23.

<sup>103</sup> BRUGMANS at 25.

<sup>104</sup> SIONAIDH DOUGLAS-SCOTT, 'Justice, Injustice and the Rule of Law in the EU', in DIMITRY KOCHENOV, et al., *Europe's Justice Deficit?* (Hart Publishing 2015), 63.

or have become even more salient over time. The narrow understanding of justice as human rights in general, and liberal and political rights in particular has led to critiques on the lack of attention for not only social and economic rights, but also for social and economic justice in the broader sense. The lack of accountability for large-scale violence, be it during the war or before – as in the case of Armenia – continues to dominate feelings of (in)justice in Europe. One of the other key critiques of Europe today, concerning the lack of democratic legitimacy, can also be related to conceptions of justice as participation and representation side-lined in those early days. Finally, the largest challenge facing Europe today can be argued to be global inequality. Here, too, the lack of attention for universal justice in the early days of European formation casts its shadow over current affairs. But also within Europe itself, the lack of attention for equality, and for the needs of minorities – as two sides of the same coin – remains one of the most prominent justice concerns. An understanding of the place of such conceptions of justice in earlier periods of European history can help see how these understandings were also once trickles or streams feeding into the river of justice in Europe, and could be strengthened again in the future. If justice, as institutionalized and codified, was the work of men in their times, it is also possible for the men and women concerned about the course it took to renegotiate its contents in this day and age.

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