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Some Remarks about Totalitarian Legacy

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EUROPEAN TRADITION OF INTERNATIONAL LAW: SOME REMARKS ABOUT TOTALITARIAN LEGACY

By Iulia Motoc*

Abstract

The process of EU enlargement towards the East forged the need of a new common ground between the Eastern and Western European perspectives and traditions of international law to create a European vision. Our paper explains this should not be addressed as a mere synthesis between the two, but rather as a reflexive approach, by which the legacy of the East's totalitarian past is assumed by the West and, at the same time, builds on the pillars of the European culture. In this respect, the common roots of the European culture are traced in the Greek-Roman legacy. Furthermore, it should be well reflected at the Eastern-European tradition of international law during communism which was one of 'delegitimation', when the international law was considered a simple tool, whose meaning changed depending on the context it was to justify, without any consistency. This tradition has been followed after the demise of the communism, by the major rupture between law and its actual application. On the other side, the Western European tradition laid on the fear against another European conflagration, federalism and constitutionalism. The paper concludes that in order to create a unitary tradition of European international law, both the West and the East must take as point of departure assuming the Other as Friend (Friendship understood in the Aristotelian terms as Virtue, not Pleasure or Utility).

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From where do we come? How can I trace back a European tradition of international law? In our attempt to do so, we may identify two sources of this tradition, which lead back as far as to the Greek-Roman culture.

If I follow the Greek line of the European tradition, we notice that many of its concepts and ideas prepared the ground for the European key-concepts that we now call *tradition*: for example, *paidea* anticipates the modern philosophy of education; the tragedy, originally a literary term, informs many of the European concepts that were to come.

Paidea, which conceptualised beauty and social good, developed into a trend in education that aimed to shape citizens devoted to the aforementioned values. *Paidea* represented the cultural formation of individuals and contrasted to learning a trade or an art. It helped the tradition of the European international law to define itself within an intellectual context[1].

According to the interpretation given by Nietzsche of the key concepts of ancient Greek thinking the tragedy, the Apollonian vocation, which was inherent to the normativeness of the *paidea*, received its complementary concept in the Dionysian sublimation of violence and of irrationality[2]. This opened the path of the willpower that reinvents itself and glides on its own reflection, like Narcissus, demanding the apparition of the *Übermensch* and the raise of radical politics.

The Romans bequeathed the formalism of the Roman civil law, as it had been codified under the Emperor Justinian in the *Corpus Juris Civilis*; it relied on the distinction between *jus civile* and *jus gentium*, later rediscovered at the edge of the Middle Ages by the French and Italian interpreters of Bartolus, the forefather of international private law.

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[1] See. For the intellectual tradition of European International Law M. Koskenniemi, *The Gentle Civiliser of Nations, The Rise and Fall of International law, 1870-1960*, (Cambridge University Press, 2004), *passim*

[2] "That life is at the bottom of things, despite all the changes of appearances, indestructibly powerful and pleasurable [...] With this chorus the profound Hellene, uniquely susceptible to the tenderest and deepest suffering, comforts himself [...] Art saves him, and through art – life" (Nietzsche, *The Birth of Tragedy*, section 7

Nevertheless, if we look back at the tradition the way we have, we interpret it from a meta-historical and mythological perspective. Tradition means the history of a domain that developed its own methods and means of investigation; within its margins it continuously questions its very own methods previously invented.

What kind of questions should it answer and what type of problems is it supposed to solve? In the face of globalisation and devastating perils the main voices of political philosophy have called for a planetary response involving the transition from classical international law, still anchored in the nineteenth-century model of the nation-state, to a new cosmopolitan order in which multilateral institutions and continental alliances would become the chief political orders[3]. The raise of international institutions after the end of the cold war and their growing influence on the behaviour of international subjects bring up the question of the legitimacy of international governance. This line of thinking automatically leads to the question about the nature of boundary between regimes, international organisations and governance. The debate about the legitimacy of international governance has to be conducted in a broader way, even if the actual proposals address international organisations or certain political regimes. The debate about the means of increasing legitimacy cannot avoid a debate about the ends of international governance and about the nature of the international *polis*.

We launched several hypotheses which can be only sketch in this article but which diverse a further deep analysis. We defined the recent European tradition on which the society relied as scarred in part by totalitarianism. Eastern Europe experienced communist totalitarianism, while Western Europe experienced reconstruction after the Holocaust and after World War II. This is why we preferred to use European law as a branch of the once united international law in order to support our arguments. We are going to show some of the communist international law characteristics and especially the distance between the theory and the practice the most difficult question to be understood within the communist regime. In their attempt to wipe off totalitarism European law has formulated some pertinent but partial answers to the nation state

[3] G. Borradori, *Philosophy in time of terror, dialogues with J. Habermas and J. Derrida* (The University of Chicago Press, 2003), p. XVI.

crisis. Until now, international law has not come with a plausible solution because it constantly refused to rely on theory.

While for the Fascist period[4] a number of studies on history of law appeared, even if looked upon suspiciously for the Communist period no time or effort were spent on such an enterprise. The history of law during the Communist period is considered to be irrelevant to the Communist doctrine[5]. Or, the inconsideration of this tradition had various and important outcomes: violations of human rights, knowledge and justice, the integration of a part of Europe whose past we refused to know within a larger context, and last, the only complete revaluation of Marxism, which related Marxist theory to Marxist political practice. As Derrida wrote: "Finally the scene of our times, dominated by the spectre of defeated communism that has come to haunt the future of a unified world under globalisation and the triumph of the market economy [...] incapable of mourning over what it claims to have put to death"[6]. We will try to outline some lines of development of international law under communism. It is impossible to define the recent European tradition of international law ignoring its Marxian praxis in Eastern Europe.

It is common knowledge that Europe sadly experimented colonialism, but also the fall of political modernity within its very own boundaries by the communist experiment. This is an example equally important, yet completely ignored by now. It is as true that Europe cannot pretend to expand to a territory whose past it systematically refused to know and acknowledge.

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[4] C. Joerges, N.Singh Ghaleigh, *Darker Legacy of Law in Europe, The Shadow of National Socialism and Fascism and its Legal Traditions* (Hart 2004). See also M. Koskenniemi, "By Their Acts You Shall Know Them ... (And Not by Their Legal Theories)", *EJIL*, Vol. 15 (2004) No. 4, *passim*.

[5] C. Mieville, The Commodity-Form Theory of International law : An introduction, *Leiden Journal of International law*, 17(2004), p. 276-277, see.also C. Mieville, Between Equal Rights : A Marxist Theory of International law, Brill, 2005. It is worthwile to notice that the debate fascism communism was highly politised seeeg. . Furet, François et Nolte, Ernst, "*Fascisme et communisme*", (Paris, Ed. Hachette, 1998). Besançon, Alain, "*Le malheur du siècle*",(Paris, Ed. Fayard, 1998) Courtois, Stéphane et al., "*Le livre noir du communisme*", (Paris, Ed. Robert Laffont, 1997). Courtois, Stéphane, "*Du passé faisons table rase ! Histoire et mémoire du communisme en Europe*", (Paris, Ed. Robert Laffont, 2002).

[6] J. Derrida, E. Roudinesco, For what tomorrow.a Dialogue, p.78, see.also Specters of Marx, *Specters of Marx, the state of the debt, the Work of Mourning, & the New International*, translated by Peggy Kamuf, (Routledge 1994),*passim*

In which ways the consequences of totalitarism were taken into account in Western Europe. European law has developed an original thinking related to the Nation-State. Is it possible that international law should develop in this direction, or is it the same old history of "conceptual re-colonisation"?

1. The Eastern European Tradition

There are elements of communality and elements of difference in the region. The most commonalities in the outer empire of the URSS were the result of policies imposed by the URSS. Indeed, in Eastern Europe between 1948 and 1989, the very use of the words independent, sovereign, and domestic to describe the ideological, political, military, and economic linkages between the Soviet hegemony and its East Central "outer empire". Soviet military presence was a clear and determinative factor in beating back the impressive range of heterogeneous resistance these satellites still managed to generate[7]. Without a domestic change of a hegemon it was extremely difficult for both Central and Eastern European elites and people to initiate new political processes that might led to transformations[8].

Much of the pre-1989 literature of the countries of the region suffered from two analytical problems. Initially a major strand of the literature began with such an exclusive focus on the region's shared status as "satellites" that the significant heterogeneity of the pre-communist and communist state-society relations of each country was played down. Later many scholars began to emphasise the uniqueness of the countries they specialised in[9].

The corpus of Marx's work is very large and intricate. It is not in our intention to analyse the Marxist doctrine of international law; we would rather follow Habermas and examine the relation between the various aspects of Marxism: genuine Marxism, Marxian-Leninism, and the social practice. As we pointed out in the introduction, we

[7] During the GDR riots in 1953, during the Hungary revolution in 1956, and after the Prague Spring of Czecholsovakia in 1968, Soviet troops were used to alter the course of domestic polics. See J. Linz, A. Stepan, *Problems of Democratic Transition and Consolidation*,(John Hopkins University Press, 1996.), p. 237.
[8] *Ibid*. p.238
[9] *Ibid*

study the tradition of European international law as it is today; in this context, we are interested in the Marxist project as a failed utopian project of modernisation[10].

We will further demonstrate that there is an unquestionably direct relation between Marxian philosophy and the creation of communist society. If one denies this, then there is little chance, if any, to redeem anything of the Marxian thinking. Even if, as Brad Roth observed, Marx dismissed utopian political thought and he was interested in the scientific development of the society[11], we cannot deny that the very project of a society without social classes and, ultimately, a society which exists in the absence of a state was a utopian project. It is more than that, the most utopian project of modernity; a project that, according to Krygfier, has furnished few resources to struggle against the usurpation and brutalities[12].

1.1. The Delegalisation

(1) Law as Superstructure – the Cult of Inconsistency

Zdanow, one of the great theorist of Soviet Marxism, made a famous declaration cited on every possible occasion by Soviet writers as a politico-philosophical directive as well as an explanation of all the sudden and arbitrary changes in Soviet political practice and theory: "One and the same idea, under different circumstances, can be, depending on the case, reactionary or progressive". The cult of change persists in the Soviet theory as truly consistent with the interest of proletariat. The Soviet government feels authorised to decide unilaterally whether and what change it is necessary to carry out[13]. This lack of consistency appears obvious in the frequency of controversies and in the arbitrary

[10] The philosophical discourse of justice lacks its institutional dimension, toward which the sociological discourse on law is directed from the outset. Without the view of law as an empirical action system, philosophical concepts remain empty. However, insofar as the sociology of law insists on an objective view from the outside, remaining insensitive to the symbolic dimension whose meaning is only internally accessible, sociological perception falls into the opposite danger of remaining blind. J. Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy*, (Translated by William Rehg. MIT Press 1996), p.32.

[11] B, Roth, Retriving Marx for Human Rights Project, *Leiden Journal of International Law*, 17(2004), p.32

[12] M. Krygier''Marxism and the Rule of law: reflections After the Collapse of Communism'', *Law and Social Inquiry* 15(1990), p.633.

[13] M.S.Korowicz, Present aspects of sovereignity, *RCADI*, 1961, vol.1, p. 30.

changes in international law. It was rather frequent that Soviet authors changed their opinions in compliance with the interests of the USSR.

(2) Totalitarianism: International Law – the "Weapon of the Enemy"

During the early years of the Soviet system, there was much to make distrust of Soviet leaders in international law. The world was hostile to the new Soviet government, and favourable arguments were frequently retrieved from international law. Payment of debts of the Tsarist regime were required; soviet decrees nationalising industrial and commercial establishments were resisted whenever this property was in the non-Soviet courts; Western governments were participating in the war against the Soviet government[14].

It is nonetheless true that the quality of jurisprudence is also weak. The lack of confidence in international law reflects a more general and widely spread lack of confidence in the power of law. The *Manifesto* already prepared an answer: "The proletariat will use its political supremacy to wrest, by degree, all capital from the bourgeoisie [...] Of course, in the beginning, this cannot be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production"[15]. From this perspective, the Constitution becomes a temporary legal instrument, useful only until the state as a form of government ceases to exist[16].

For example, the Constitution of the People's Republic of Romania of 1952, one of the most evidently revolutionary Communist constitutions, tackled fundamental human rights and liberties in chapter seven. "He who would not work, would not eat" is one of the legal principles stipulated in this constitution. The right to work comes first in a hierarchy of human rights, which soars as far as equality in rights is concerned. The core of the Communist constitution lies in the transformation of the right to private property. The rights of work, study, and association were protected, as were the freedoms of speech and assembly in the 1952 Polish constitution. The constitution provided no

[14] J.Hazard, The Soviet Union and International law, *Soviet Studies*, vol,1, no.3, p.189.
[15] K.Marx, F.Engels, *The Manifesto of the Comunist Party*, 1848.
[16] For the interpretation that the absence of the rule of law during communism can be traced in the Marx analysis of liberal state and society see. M. Krygier''Marxism and the Rule of law: reflections After the Collapse of Communism'' *supra* 13.

mechanism for the individual to put into effect these rights and freedoms. The government claimed that there was no need for an enforcement mechanism since the necessary benefits of those governing and those governed were the same The Communists rejected as basically defective the notion of an independent, politically neutral judiciary. Judges in a socialist system constituted part of the state's coercive apparatus, consequently no procedures were essential to control the constitutionality of statutes. Judicial review was rejected because it would constitute a limitation of the sovereign rights of Parliament[17].

Deprived of any specific meaning or of autonomy, the law loses its normative status (*sollen*). In Kant's words, the legal system in totalitarian societies is reduced to its material reality (*sein*). This is why the subjects of totalitarian societies are as submissive to official law as they are to the laws of nature. This is the first stage of the history of the subjects separated by their fundamental rights, as a mature Marx had noticed. As Hannah Arendt has noticed the rule of law during totalitarianism became like the law of nature described by Hobbes[18].

1.2. Post-Totalitarianism[19]: Dynamics and Movement

We consider communist post-totalitarian law as being characterised by a significant gap between the state law and the applied law. This gap is the result of adopting a legal framework which is entirely incompatible to the legal culture of a certain state[20].

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[17] I.Motoc, Manifestul Partidului Comunist, Totalitarismul , Statul de drept posttotalitar, trei fete ale refuzului modernitatii politice"(The Manifesto of the Communist Party,Totalitarism and Post-Totalitarian Rule of Law- Three Dimensions of Political Modernity Rejection) in Karl Marx, F. Engels, Manifestul Partidului Comunist (Manifesto of the Communist Party) (commented Ed), Nemira Publishing House, Bucharest, 1998.

[18] H. Arendt, *Le système totalitaire*, (Paris .Points-Politique), 1972, p.4o et sq.

[19] Post-totalitarism is considered by J. Linz and A. Stephan to be the late evolution of the totalitarian regime where the regime elites ''may collectively decide to constrain the completely arbitrary powers of the leader, to reduce the role of leader and to begin to tolerate some non-official organizations to emerge in what had been virtually a complete flattened civil society. Starting with '70 the communist regime was considered to be posttotalitarian''.J.Linz, A.Stepan, *supra* p.293.

[20] One of the most important difference among states does not pertain to the difference in their constitutions or in their law systems, but to the extent to which the official law is applied. The almost complete ignorance in this respect is a result of the positivist approach, for which all norms with no juridical relevance have been ignored. The organization of society based on legal rules relies on the assumption that these rules are objective in some sense while political ideas, views, or personal preferences are not. To show that law is objective – one may act on two levels. On the one hand, it aims to

As we try to demonstrate the gap between theory and practice, we choose to present two relevant doctrines: that of the relation between the State and the Capitalist World and that of human rights. The evolution of human rights during communism has deeper effects that one may guess. At the end of the eighties, under the influence of the political upheaval in Eastern Europe, European thinking agreed to "return to law" ("*le retour au droit*")[21].

(1) The State and the Capitalist World Economy

For the Marxist theory of international law, the formal definition of the state laid down in the Montevideo Convention on Rights and Duties of States fails to recognise that the State is a function and form of social relations. It failed to record that the modern state emerged in response to certain fundamental social transformations representing the transition from feudalism to capitalism that visited sixteenth- and seventeenth-international law bourgeois state from the beginning coexisted with the colonial state in an evolving capitalist world economy, indelibly marking the body of international law[22].

It is true that socialist ideology supports a hostile attitude towards capitalism, the destroy of private property, and the fusion between politics and economy. In the post-totalitarian age, the influence of the totalitarian state on economic activities weakens, while the formerly centralised state economies turn into negotiated economies. The state appears more and more vulnerable when facing the pressure of the new economic patterns. The totalitarian state is now replaced by a weak state, which finds itself incapable of managing a good functioning of the fiscal system and the correct redistribution of income.

After the totalitarian period there is not anymore any totalitarian ingerence of the State in the economic sphere. The economies which were formally planified became "negotiated" between the communist leaders and the leaders of states enterprises. The

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ensure the *concreteness* of the law by distancing it from theories of natural justice; on the other hand, it aims to guarantee the *normativeness* of the law by creating distance between it and actual state behaviour, will, or interest see M. Koskenniemi, The politics of law, *EJIl*, 1990, pp.1-2.

[21]A. Renaut, L.Sosoe, *Philosophie du droit*, (Paris PUF), 1991, p, 21

[22] BS Chimini, An Outline of a Marxist Course on Public International Law, *Leiden Journal of International Law*, 17(2004), p. 5

weak state seems to be common to all utopian societies. Corruption is a characteristic of all post-communist societies[23].

The creation of an economic class from the political class is taking place exploiting the legislative amorphousness characteristic of the prerogative state. An example of this stage is the dual ownership of fixed assets in the state sector: sometimes these assets are regarded as being in assigned group ownership, at the other times they consider a state property. The communist leadership became bourgeoisified. What had been developed was "Brezhnevism", "goulash communism", an implicit social pact in which elites offered the prospect of the social welfare in exchange of silence[24].

In 1848, Marx and Engels explained this to their contemporaries: "you are frightened because we want to abolish private property. But, in the society you lead and in which you live now, private property is non-existent for nine tenth of its members"[25]. The public law completely colonised the territory of the private law except for one last relic: the right to personal property. The history of right to personal property makes one of the most interesting stories of totalitarianism[26].

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[23] A. Prezworski, *Democracy and the market, political and economical reforms in Eastern Europe and Latin America,* (Cambridge University Press 1991), *passim*

[24] *Ibid*, p.2.

[25] K. Marx, F.Engels, *supra*. 16

[26] I.Motoc. Manifestul Partidului Comunist, Totalitarismul , Statul de drept posttotalitar, trei fete ale refuzului modernitatii politice"(The Manifesto of the Communist Party,Totalitarism and Post-Totalitarian Rule of Law- Three Dimensions of Political Modernity Rejection) in Karl Marx, F. Engels, Manifestul Partidului Comunist (Manifesto of the Communist Party) (commented Ed), Nemira Publishing House, Bucharest, 1998 According to Marx and Engels, the expansion of public law in the detriment of private law was supposed to put the civil and political rights into practice. This objective seemed so unfeasible that no Communist constitution included it among its principles. In the communist state, and resembles the fruit seller portrayed by Havel, who displayed the motto "Workers from all the world, unite" in the window of his small fruit shop. To the citizens of the communist state, the Constitution shares the status of the Communist Manifesto, namely it is an external object, a special type of nature law. Havel explained the exercise of daily opportunism of the grocer by the fact that he was corrupted by means of "small advantages", offered by communism in its consumerist stage. If the grocer did not display the motto on a daily basis, he would be refused the "small advantages": to own a summer house, to spend long vacations with his family. This minor key and trivial consumerism really corrupts. Individuals do something very powerful and dangerous when they "live within a lie". They thereby contribute to the general panorama of ideology which maintains the structure of power. Small affirmations and compliances with this ideology serve to confirm this panorama. Because of this, Havel observes, each and every individual bears a portion of guilt for the functioning of the system. Everyone thus functions as both victim and oppressor. Ones position of power only determines one's degree of implication; as Havel puts it, "the fault lines run through each individual.

(2) Human Rights

Even for those who argued the compatibility of the Marxist vision with human rights movements it is clear that Marx's project cannot be reconcilated with a natural rights approach, nor can Marx be interpreted to embrace the view that "moral rights" are distinctively useful construct in reasoning about political morality[27].

The USSR's representatives in the Human Rights Commission of the United Nations have questioned the statement of several rights as infringement of several of the rights as infringement of sovereignty. It was argued that to let United Nations itself, or other nations to enforce human rights as infringement of the sovereignty. The URSS Rights accepted the Declaration of Human Rights adopted by the General Assembly in 1948 but it was cautious about the provisions relating to enforcement. It wants no other state or an international tribunal to enforcement. It wants no other state or international tribunal to act as a policeman or court in prosecuting a trying a state for violating the principle of the Declaration and any Covenant. Considerations of the Genocide Convention by the United Nations brought forth similar hesitation. Again, a breach in the wall was accepted by the URSS at Nuremberg[28].

In the Soviet Union and Central and Eastern European countries, international law could not be directly invoked before and enforced by domestic courts. Under the Soviet system, international obligations would be applicable domestically only if they were transformed by the legislature into a specific statute or administrative regulation. As a result, the Soviet Union was able to sign the various United Nations human rights treaties yet still avoid any implementation of these rights in domestic law.

Nevertheless, after the Final Helsinki Act was signed, there was an incontestable evolution in the human rights conception in Eastern Europe. This new broadening of views was profoundly beneficial to the human rights movements; their militants understood they had to prevail first from the regulations in international law and from the human rights stipulated in the constitution.

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[27] B. Roth, Retriving Marx for Human Rights, *Leiden Journal of International law*, 17(2004), p.32.
[28] J. Hazard, *supra* 15 p. 194.

But “modern” Soviet human rights law did not come together until the early 1970’s. This new law was intended as a careful response to the wave of dissident movements inside the USSR in the late 1960’s. The Soviet government sought to achieve two interrelated goals: to give the characteristic bases for its contemplated counterattack against its dissidents at home, and to create the appearance of aligning its laws with the evolving international standards on human rights. On one occasion this new law was design by Soviet lawmakers, Soviet commentators went to work on a systematic validation of the new law.

“Modern” Soviet constitutional law differentiates between: moral rights and legal rights; human rights and natural rights; positive rights and inalienable rights; group rights and individual rights; obligatory (peremptory) rights and discretionary (optional) rights; and socio-economic and cultural rights on the one hand and civil and political rights on the other. This law also expresses the general principles governing the relationship between the citizen and the state on the one hand and between the individual and society on the other. It must be borne in mind throughout that Soviet constitutional law of human rights operates against the backdrop of two fundamental principles of Soviet law: the doctrine of abuse of rights and the principle of the interdependence of rights and duties of citizens.

The section of the 1977 constitution dealing with the Bill of Rights is considerably more extensive than the corresponding sections of the earlier Soviet constitutions; chapter 7 contains thirty separate provisions. This does not mean that the Soviet citizen possesses new substantive rights nor that he has been saddled with new obligations. Rather, those rights that in the past had been treated merely as statutory rights have now been elevated to the constitutional level. It is true, however, that some of the old constitutional rights have broadened. Professor Voevodin of Moscow State University Law School, a leading Soviet constitutional scholar, dispels the notion of any intended difference between the two groups of enumerated liberties with the following explanation: “By individual rights or freedoms, in a strictly legal sense, one means the legally recognised opportunity of an individual to choose the form or mode of his conduct, to utilise those blessings afforded him by law both in his self-interest as well as

in the interest of society at large. [...] Such legally recognised opportunities sometimes are traditionally referred to as "rights", whereas at other times they are referred to as "freedoms". Between these two concepts, it is difficult to draw any meaningful distinction, because the same opportunity may be interchangeably characterised both as right and as freedom. [...] In other words, there are two forms that express the legally recognised opportunity of an individual to choose his mode of conduct. When such an opportunity is linked with the exercise of a specific social blessing the law traditionally speaks of a "right, whereas when the reference is to a degree of choice of mode of conduct the law speaks of "freedom". Compare, for example, the right of education, the right of medical care, with the freedom of conscience and the freedom of creativity.

The position toward human rights has changed also toward the concept of "*jus cogens*". As states by Tunkin the delegation of Socialist States and most of the delegations of the Afro-Asian countries firmly supported the article concerning the principle of *jus cogens*. Their representative stated that the rule of *jus cogens* were a cornerstone of the progressive development of contemporary international law and were essential for the stability of international relations[29].

The human rights issue has acquired in Poland and Czechoslovakia special importance because of the large-scale repression: in Czechoslovakia after the defeat of the Prague Spring, and in Poland during the student unrest in 1968 and then in the wake of the workers' riots in Ursus, Radom and other localities in 1976. The Polish oppositional groups have at first concentrated on the defence of workers persecuted for June 1976 riots now concern themselves with human rights and at the same time with the need for change in the country's governance and social life. A reform program was formulated by an impressive array of former Politburo and Central Committee members. In the spring of 1981, a character in A. Wajda's film, *The Iron Man*, explained this strategy: the unjust laws must have been criticised, but the state had to respect at least the constitutional rights of citizens[30]. Kundera, by means of Mirek, the character from *The Lost Letters*, presents the same hypostasis of the communist subject in the same sense as the *Iron Man*. Mirek, who ends his life in prison, is invented as a result of the relation between

[29] G.Tunkin, **International Law** in the **International** System, *RCADI* 1975, t.148.p.323.
[30] A. Renaut, L.Sosoe, *Philosophie du droit*, supra, 22 p, 21.

the novelist and his novel; at the same time, by his constant relation with his personal life, the character relates to the Constitution[31].

According to Michnik, dissidence had a special status in Eastern European economies: the radicals and the exiled cultivated the illusion that dictatorship was a result of constraints solely. Long-term dictatorial regimes created their particular state of sub-normality and a culture associated with it. They also created a human type who had lost the sense of freedom, truth, dignity and self-consciousness[32]. The rebels were no more than a minority that counted very little. In the aftermath of the reforms in the sixties, most intellectuals sided with the official power. Had Soljenitsyne lived in Hungary, he would have never written *The Gulag Archipelago*; instead, he might have enjoyed the privileges of having been elected president of the Hungarian writers' association, Miklos Haraszti wrote[33].

The communist intellectual as a typology was described by C. Milosz, who compared them with the Islamic *ketman*. Similarly, the intellectual whose most precious possession was the truth shouldn't have his person and wealth exposed to all those who follow a wrongful way; consequently, he should hide his thoughts. When confronted with the representatives of political power, the *ketman* know they have the truth ignored by the enacting power and this sole truth makes them happy[34]. In post-totalitarian societies we may speak of a national, aesthetic and metaphysical *ketman*[35].

The Charter '77 was created and has survived to the present day as a movement exposing victimisation practices, *i.e.* violations of human rights and international commitments in this sphere. The human rights orientation was dominant in the sense of

[31]Mirek is the only character influenced by political modernity: his relation with his own life is rational and he always requires the protection of law. Thus, he acts as an authentic anti-Marxian. In the post-totalitarian universe, Mirek is caught between the Fruit Seller, who exerted his Communist rights, and the Poet, who did the same, in the name of a pre-modern hierarchic moral order. I.Motoc, The Manifesto of the Communist Party, *supra* 18.

[32], Adam Michnik, *Letters from Prison and Other Essays*,(BerkleyUniversity of California Press, 1985*), passim*

[33] M. Harastzi, *The Velvet Prison: Artists under State Socialism,* (New York, Basic Books), 1987, p.178.

[34] C. Milosz, *The Captive Mind*,(New York Vintage Books) 1990.

[35] I.Motoc, L'Europe unie et l'Europe après le communisme: rationalite et ethique de l'elargissement in E. Barnavi, P.Goossens, *Les frontieres de l'Europe*,(Bruxelles De Boeck), 2001, p. 174

a demand that the regime should bring its legal system in line with its own constitution and the United Nations covenants on rights and freedoms[36].

The publications from that period showed us that the Polish movement was constantly related to law by the Western intelligentsia. Suddenly, there was a consensus that revolved around legal values. Prior to that, in the seventies, the power of the leftist movements, everything was politics; law itself was a war. Once the social movements in Eastern Europe extended, Western subjects began to understand that the reference to law coexists with all forms of democratic consciousness[37].

The years that followed were devoted to the interpellation of force in the name of law; the left enthusiastically adopted this practice, as well. Thus, the Soviet intervention in Afghanistan was denounced in the name of the rights of peoples; in a different time we would probably have assisted to a harsh critique of imperialism followed by references to a philosophy of history that promoted the perspective of a socialist future. At the same time, the interpellation of force in the name of law moved to the reports presented by smaller groups, such as *Amnesty International* or *Médecins sans frontières*[38].

2. The Western European Tradition

There are two reasons why we have chosen European law as a descriptor of the European tradition of international law[39]. On the one hand European law had an answer for totalitarianism at the end of World War II; on the other hand, with the help of political theory and political science, it offered answers to the problems of federalism, constitutionalism and to international legitimacy.

[36] H. Rigby''Politics in the Mono-organizational Society" in A. Janos, *Authoritarian Politics in Communist Europe*, Berkely, 1970.
[37] A. Renaut, L. Sosoe, *supra* 22.
[38] *Ibid.*
[39] The publication of Stein's article, 'Lawyers, Judges and the Making of Transnational Constitutional'in *American Journal of International Law* in 1975 marked the separation between European law and international law. In the same time, European law has enough efficient means to comply with international legal standards: accession, legal succession, autonomous references (e.g. Art. 6 [2] EU), and general principles of law. The Community institutions are, however, quite reluctant to limit their scope of action and to compromise the autonomy of the EU law.

We have chosen to analyse these problems from an ethical perspective that is the theory of virtues. We thus examine the development of the European law through the theory of moral philosophy, as we want to emphasise that the foundations of the European concept are moral and meant to put an end to conflicts and to promote a community based on law, not on violence.

As we read in the dictionaries of moral philosophy dedicated to virtues, "Virtue ethics is an approach that deemphasises rules, consequences and particular acts and places the focus on the kind of person who is acting. The issue is not primarily whether an intention is right, though that is important; nor is it primarily whether one is following the correct rule; nor is it primarily whether the consequences of action are good, though these factors are not irrelevant. What is primary is whether the person acting is expressing good character (moral virtues) or not. Perfection, in character, is called virtues and their opposites are vices"[40]. In Aristotle's understanding, the "virtue" (*arete*) meant excellence in fulfilment of a particular function.

It is obvious that the virtues of states are much different from those of individuals. The ethic discourse on states is almost inexistent. European integration crucially challenged the realist assumption of an international society of states that involves independent sovereign states governed by the principle of anarchy[41]. We have chosen to analyse two of the virtues of the EU, such as the search for peace and the *nomos*.

2.1. Fear as Virtue: the Search for Peace in the Process of European Integration

The virtue of courage stands between cowardliness, which involves excessive fear, and a sort of foolhardiness, which involves a deficiency of fear Book II of Aristotle's *Nicomachean Ethics*. As far as the relations between European states are concerned, fear turns into a virtue. As Haltern wrote: "the Union born from the ashes of Auschwitz,

[40] *Stanford Encyclopedia of Philosophy*
[41] A. Winer Towards a Transnational Nomos - The Role of Institutions in the Process of Constitutionalization, *European Integration - The New German Scholarship*, Jean Monnet Working Paper, No.9/03 www.jeanmonnetprogram.org/

millions dead and indescribable destruction was a reaction to the destructive force of politics, eroticism"[42].

In the immediate aftermath of World War II, the cause of European integration was sustained by the United Europe Movement and by the US and the Marshall Plan. The movement reached a high in 1948 when the European Congress imposed the creation of the Council of Europe. As an intergovernmental organisation, it soon disappointed the promoters of the movements and the US alike. The US then insisted on continuing the Marshall Plan within the Organization for European Economic Cooperation(OEEC)[43].

Five years after the end of World War II, sensing the danger of a Cold War, Monnet proposed a new plan for reconciliation. What came out of that was a reaction dominated by feelings: Europe beyond the borders of the Soviet bloc had to evolve towards a union meant to reconstruct and prevent future possible wars. The European unification efforts that started with in 1950 Schuman plan and led to the Treaty of Rome in 1957. This meant a very deliberate overcoming of the racist imperialism of the Nazi regime. Immediately after World War II, peace was the most explicit and evocative ideal of the European Union.

Schuman Declaration of 9 May 1950 "the gathering of the nations of Europe requires the elimination of age-old opposition of France and Germany requires the elimination of age-old opposition of France and Federal Republic of Germany; the first concern in any action undertaken must be these two countries. This solidarity will make it plain that any war between France and Federal Republic of Germany becomes, not merely unthinkable, but materially impossible[44].

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[42] U. Haltern, Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination Constitutionalism Web-Papers, ConWEB No. 6/2002 http://les1.man.ac.uk/conweb/ p.19

[43] J.D.Donahue, M. Pollack, Centralization an its discontents : the Rythms of Federalism in the United States and the European Union in K. Nicolaidis, R.Howse, *The Federal Vision Legitimacy and Levels of Governance in the United States and the European Union* ,(Oxford University Press pp.73-118.

[44] J.H.H. Weiler, *The Constitution of Europe - do the New Clothes have an Emperor?* (Cambridge Univ. Press, 1998), p.240.

The discourse on peace comes forward at the end of the Cold War, mostly when the relations with the former Yugoslavian space were re-established. The discourse of the commissary for extension in Sarajevo stands as a proof.

You may think that I ask for the impossible, just ten years after the violent break-up of Yugoslavia. But let me remind you that Robert Schuman made his declaration on European unity in May 1950, just five years after the Second World War. Thus, when the founding fathers of Europe decided to bury their swords and set up the peace project that is nowadays called the European Union, the memories of terror, death and fear were still vivid in the minds of these political leaders, as well as of the peoples of Europe[45].

The Convention's preamble lacks any obvious reference to the genesis of European integration: the catastrophes of the 20th century and particularly World War II. Such an orientation could also give a convenient response to the question; the architects of Europe emerged from the horrors of the Second World War determined to thwart even the option that something alike could reoccur. One might object that the Convention's preamble does refer to "the ancient divisions" which are to be "transcended", and Article I-3 para. 1 declares that the "Union's aim is to promote peace"[46].

Intergovernmental Conference introduced into the Convention's third reading of the preamble (now the second of the TeCE) the words "after bitter experiences". With these words, "bitter experiences", the TeCE links to of the catastrophic events of the 20th century; they appear to be a possible ground for a common interpretation of crucial historic events that might also permeate the European Union with a deep significance"[47].

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[45] In that regard the EU is a victim of its own success. I believe young Europeans of the EU do not appreciate the EU as a peace project as naturally and as profoundly as their parents or grandparents do. After 60 years of peace they take it for granted. But peace or democracy can never be taken for granted – they have to be constantly pursued, and new generations won over.Speech Commissioner Rehn would have delivered to students at Sarajevo University on July 11 2005 *http://europa.eu.int*

[46] Armin von Bogdandy, The European Constitution and European Identity: Potentials and Dangers of the IGC's Treaty Establishing a Constitution for Europe in *Symposium*: *Altneuland: The EU Constitution in a Contextual Perspective No5/04* www.jeanmonnetprogram.org

[47] *Ibid.*

2.2. *Nomos* as Virtue : Federalism and Constitutionalism

Justice derives from *nomos* in the sense of a divinely ordained Law; and Hesiodus emphasises that Zeus' laws are reliably enforced. Homer has less to say explicitly about justice equally well translated as 'virtue' or 'excellence'. Justice is understood to be a part of *aretê* or, as we would say, it is a virtue. More particularly it is the virtue governing social interactions and good citizenship or leadership. As James Tully stated, "[T]he Greek term for constitutional law, *nomos*, means both what is agreed to by the people and what is customary"[48]. *Nomos* develops by means of two interconnected principles: federalism and constitutionalism.

The principle of federalism should be mistaken for the specific manifestations of a certain federation. When certain idealists believed that the shift from nation-state to federation can be accomplished at a global level via the UN, the rivalries within the actors of the Cold War stifled their enthusiasm. The recently de-colonised states resisted to give up their newly acquired statehood this way. The model of the United States of Europe was perceived too revolutionary at the time. Functionalism seemed a more attainable and practical solution. The new approach was made possible by transferring the collective security issue to another organisation, the NATO[49].

At the end of the sixties, it appeared obvious that the European Communities began to make arrangements based on functionalism. The actualisation of this confederation may have looked in two ways: a union of states, each of which may be constructed in the form of etatism but which together had pooled certain powers for mutual advantages; or as a union of unions in which sovereignty is vested in the people of each member unit and through them at is whole[50].

It is true that the history of federalism and constitutionalism in the EU was told so many times that it has become obnoxious. In spite of all these, we have to agree with Haltern when he wrote different the weary old judicial review debate; however, Europe's constitutionalism debate has, I believe, not even reached the heart of the matter.

[48] A. Winer, *supra* 47.
[49] J.D.Donahue, M. Pollack, *supra* 45
[50] Ibid.

Element of it may be the uncertainty about what "constitutionalism" means. Take Professor Craig's essay on European constitutionalism in a recent issue of the *European Law Journal*, which suggests no less than five different meanings of "constitutionalism" and "constitutionalisation"[51].

We will try to present three perspectives on European constitutionalism, encompassing three different points of view:

Europe was shaped on the ashes of World War II, which witnessed the most terrible estrangement of those thought of as aliens, an alienation which became annihilation wrote Weiler. What we should be thinking about is not just the avoidance of another such massacre: that's the easy part nevertheless events in the Balkans tells again us that those "demons are still within the continent". More problematical is dealing at a profound level with the foundation of these attitudes. In the area of the social, in the public square, the relationship to the alien is at the heart. "It is hard to envisage something normatively more important to the human condition and to our multicultural societies".

Tucked away in the fairyland Duchy of Luxemburg and blessed, until recently, with benign neglect by the powers that be and mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe. It is true that, as it was pointed out in *The Transformation of Europe*, beginning with 1963 and going on through the seventies, the ECJ stated the four doctrines that found European constitutionalism: the doctrine of direct effect, the doctrine of supremacy, the doctrine of implied powers and the doctrine of human rights.

The mid-seventies and the eighties did not bring much in this respect; it happened so because of the international situation and because of the ascent of new states that shared different ideas as far as integration was concerned. What was really important in this period was the deepening of the differences between the competences of the

[51] U. Haltern, *supra* 46.

member-states and the Community. Whereas this is explicitly stipulated by constitution, in the case of the EU it appeared and developed somehow implicitly[52].

Though, the following stage of integration which began in the 1990s, following the essential instant of the Maastricht Treaty, has created a quite dissimilar background within which the position of law and the European legal system plunges to be assessed. The Treaty on European Union, which in a formal logic moved the European polity beyond the previous incremental approach to integration and took a fundamental pace towards economic and monetary union, as well as move in the trend of political union, is at the present usually perceived as having abrupt and be associated with the first genuine sign of a popular legitimacy crisis[53].

The European present constitutional structural design represents this option, civilising approach of dealing with the 'other'. Constitutional Tolerance is encapsulated in that original expression of its meta-political purpose in the preamble to the EC Treaty. In political terms, this Principle of Tolerance finds its manifestation in the political organisation of the Community and Union which defies the normal premise of constitutionalism. In the Community, the European peoples are subject to constitutional authority although the peoples are different. Constitutionally, the Principle of Tolerance finds its expression in the understanding which has now come under discussion: a federal constitutional authority which, though, is not entrenched in a "statist formalized constitution"[54]. What defines the European constitutional architecture for Weiler is not the exception, it is the quotidian, even if executed since the new staff regulations need that it be done in such a new way[55].

Ante Winer has identified three stages of the constitutional construct in the European Union: first, integration through supranational institution-building; second Europeanisation through domestic institutional adaptation; and third, late politicisation as the more complex process of socio-cultural and legal institutional adaptation in vertical and horizontal dimensions. The particular organs of the Union are treated as

[52] J.H.H. Weiler, Constitution of Europe, supra .pp.10-101.
[53] *Ibid*.
[54] ibid
[55] ibid

'hard' institutions elsewhere in one interpretation. The appearance of so-called 'soft' institutions such as ideas, social and cultural norms, rules and/or routinised practices and their respective intersubjective relation with the appearance and resonance of the institutions of constitutional law are at the centre of this interpretation The phases are distinguished with orientation to significant changes in *type*, *place* and *dynamics* of integration that caused institutional change within the European multi-level governance system. For that reason the first stage is characterised by bottom-up institutional building, the central examination attention being about more or less integration; the centre theories involved the discuss over 'grand theory' among neo-functionalist and intergovernmentalist approaches in international relations theories[56].

The second stage is distinguished for Winer by a top-down research perspective on institutional adaptation. At this time study concern focused on the question of more or less Europeanisation. Theoretical orientation for this viewpoint is provided by the hodgepodge of the explanatory and increasingly all-encompassing multi-level governance method, organisation theory, the various neo-institutionalisms, and regime theory as well as constructivist research; theoretically this phase brought a shift from international relations towards comparative governance and public administration[57].

The third stage is made up by the more and more complex challenge of reintegrating bottom-up institution building, *i.e.* the changing institutional basis of the European political organs, as well as the parallel and interrelated process of top-down Europeanisation of formal institutions in politics, the market, and the legal and administrative structures in the respective candidate countries. Also, in the face of bulky enlargement this third phase also involves the requirement to think again, assess and describe the position and sense of values and norms that lie at the centre of European governance and – most importantly – the possibilities of their eventual expression within a distinctly defined constitutional framework. The description of 'late politicisation' stresses by Winer the often conflictive and contentious processes and the be short of of shared instruments or values to guide conflict solution and set shared standards of behaviour. During this phase, interdisciplinary theoretical work bringing

[56] A. Winer, *supra* 47.
[57] Ibid

together law, political science and sociology and, if still much less established, cultural studies has begun to undertake the more considerable normative, functional, legal and political questions of European integration as a procedure that might have surpassed its dynamics of institution-building and expansive potential as a process of consolidation both in domestic and world political matters. An expected result of this phase are criticism spheres which are produced by the lack of norm resonance between different socio-cultural contexts, and unintended consequences of institution-building, *i.e.* following strategic norm setting within the accession *acquis* e.g. norms such as for example minority rights that have been added on the *acquis communautaire* for security reasons are expected to expand a sense that will ring back into the previously Western normative structure of the EU producing a 'boomerang effect[58].

The third perspective was exposed by Ulrich Haltern in his article "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination Constitutionalism". He considered that legal studies act in response to the Union's social legitimacy deficit either by channeled the puzzle into empirical sociology, or by pay no attention to it on the whole. Haltern argues that the predicament in social reception can be traced back to the texture of EU law. Law is more than a quantity of rules: It is a social practice, a structure of meaning, and a system of beliefs. National law has a deeply textured pad of cultural assets to trust in. In difference, EU law exemplified the flowing facade of consumer characteristics. The Union's counter-measures – adding pathos and patina to counteract our distrust – have demonstrated ineffective. The forward-thinking after that, is coming to terms with the market citizen, more willingly than believing in, and forcing upon the consumer, stories of joint values and in times gone by situated shared aims. Haltern maintains that such treatment of one of the core problems of European integration is inadequate. Social scepticism is not the limited area of empirical sociology. More willingly, it is intimately linked with the area of law. Social legitimacy, then, is a matter of legal consideration, and deserves attention from the perspective of the law.

[58] Ibid

And yet which is the relevance of this debate for the public international law? As Anne Orford has shown, international law is not a knight clad in white mantle, waiting in some (European) capital to intervene when politics goes wrong. It is always *already* there structuring the private and public relations within which material and spiritual resources are distributed in the world[59].

Though there are many features of European integration that imply that global processes are improbable to just duplicate European processes with a time lag, there are prominent resemblances among contemporary international law and European law. Equally international law and European law are no longer limited jurisdictionally to a comparatively obviously limited area. Equally European and international law the link connecting the state consent and the appearance of legal obligations is frequently eased. The spread of non-consensual international obligations created by separated groups of actors has increase meaningfully. Constitutional arguments invoking democracy are beginning to be articulated in Western liberal democracies to challenge the legitimacy of international law, in much the same way as discussion of the democratic deficit has dominated European debates in the last decade[60].

The first lesson learned from European law is methodologic. European law examined the problem of the nation-state in an appropriate manner, as it constantly co-operated with political theory; this happened only accidentally in international law after 1950. It goes without saying that international law cannot copy the European model. Beyond the moral and political status of a prospective conceptual recolonisation, there are more practical arguments. As it has been demonstrated repeatedly, European law cannot be reproduced to any different regional scale. On the other hand, most of the contemporary societies are utopian and they survive in contradiction with the European model of integration, keeping *nomos* at margins. The deciphering of these societies remains the greatest work field of contemporary political theory. Communist societies make one of the outstanding examples.

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[59] Martti Koskienniemi about Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003

[60] Kathrin Blanck *et al.*, Conference Report — *Europe's Constitutionalization as an Inspiration for Global Governance? Some Viennese Conference Impressions*, 6 GERMAN L J 227 (2005), Mathias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework*, 15.5 *EJIL* (2004), 907

3. Post-Communism: Friendship in International Law

Aristotle was the first philosopher who wrote extensively on the importance of friendship. For Aristotle, ethics is essentially the art of living well. Those who have friends, because friendship provides the ideal conditions for the successful pursuit of excellence, can only achieve this. Or, 'complete' friendship is an essential part of what Aristotle calls 'the good life'.

Aristotle divides friendship into three species: friendships of *good* people, friendships based on *utility*, and friendships based on *pleasure*. Friendships based on utility and/or pleasure *alone* is described by Aristotle as incomplete, while friendships of good people, similar in virtue, are *complete* friendships. The reason friendships based on utility are incomplete is that they are motivated by short-term considerations and are contingent on changeable circumstances. Similarly, friendships based on pleasure are contingent on feelings and accidental conditions. The friendship of good people is most enduring, and complete, because they "wish goods to each other for each other's own sake", in addition to being useful and pleasant to each other[61].

Cicero in *Laelius de Amicitia* proposed a vision on friendship that differentiated between friendship of ordinary folk, or of ordinary people –although even these are source of pleasure and profit and the true and perfect friendship the kind that was possessed by those few men who have gained names for themselves as friends[62].

We may continue with the history of friendship but, in order to find some common grounds between friendship and normativeness we have to return inside the citadel. Thus, we found Hannah Arendt's interpretation of Ancient Greek thinking most relevant for our case. She believed that the Greek acceptation of friendship was inseparably related to life in society; in lack of this, as Rousseau also wrote in his time, the modern man risks alienation. This is why friendship becomes of public importance. For Aristotle, friendship meant more than the abandonment of civil wars: the essence of friendship consisted in the discourse. Citizens can be united only by dialogue. As

[61]D. Thunder, Friendship in Aristotle's Nichomachean Ethics: An essential component of the Good Life http://www.nd.edu/~dthunder/Articles/Article4.html
[62] Cicero, *Laelius de amicitia*, (University of michigan press, 1971).

opposed to private conversations, dialogue envisaged public wellness first. For Arendt, the world is humane because it is created by humans and it becomes humane only when the voice of humanity resonates harmoniously. Humanity is accomplished by friendly conversations in the acceptation that ancient Greeks gave to *philanthropia,* love for people, "*amour de l'homme*"[63]. The lack of this civic friendship is a characteristic of totalitarianism, Arendt wrote.

At the beginning of this study we wrote that *paidea* is one of the European sources of international law. As Koskenniemi wrote, the tradition of European law is intellectual; the jurists define themselves as a consciousness of humanity[64]. What happened after 1960? According to Koskenniemi, this type of tradition disappeared as a result of the disappearance of public international law interest for problems without practical value. We have tried to prove that within European law, the interest of jurists for theory and political sciences did not fade, while they became more engaged in human rights issues, more evident in the eighties.

The eighties meant social engagement for the European jurists. Also they tried to analyse and interpret the law in particular political economic and historical contexts. The European University Institute was created in 1972 by the Member States of the founding European Communities. Its main objective was "to provide advanced academic training to Ph.D students and to promote research at the highest level. It carries out research in a European perspective (fundamental research, comparative research and Community research) in history, law, economics, political and social science". This was, for example, the message of the editors of the *European Journal of International Law* founded in 1990[65]. In terms of its orientation, the *EJIL* is distinguished by: its emphasis upon critical and theoretical approaches, its commitment to publishing contributions from a diverse range of contributors a its continuing interest in the historical origins of the 'European tradition' (in the best and broadest sense) in international law.

[63] Hannah Arendt, *Vies politiques*,(. Paris Gallimard,1974) , p. 34-35
[64] M. Koskenniemi, , *supra* 1.,
[65] www. Ejil.com

The ever-increasing numbers of Western human rights centres that cooperate closely with the NGOs share the same vision. More and more jurists become now involved in the activity of international NGOs[66] and we believed that they should follow this tradition. However, these lawyers are not vocal enough on the European intellectual scene.

This intellectual vocation of the European jurist is now menaced by the managerial vocation of the contemporary organisations. As the universities are more subjected to and transformed by the management system, the bureaucratic structures in which the jurist becomes involved menace his/her intellectual vocation. As they are part of the "management structures", the jurists are less tempted to react to the events in his immediate surroundings. If we paraphrase the Italian polemics between Antonio Tabucchi and Umberto Eco, we may say that: if something important takes place in my town or in the wide world, the intellectual jurist will hurriedly participate to the events. The manager will say that unfortunately, he/she cannot participate, as he/she is just too busy organising a conference or preparing a new issue of a review. The most important quality of the intellectual, according to Tabucchi, is the Cartesian doubt. Undoubtedly, the manager-jurist will adopt the model of friendship, where friendship means utility. In this case, he/she will gear towards public relations and not towards authentic friendship.

Is the European jurist tempted to spread his own model, as Anne Orford rightly observed? And how can he/she escape this temptation? In order to find a solution for this, we believe that the acceptation of hospitality according to Derrida is a useful argument.

For Derrida hospitality is a flexible concept comparing with the tolerance which is always the reason of the strongest. If somebody thinks he's hospitable because he is tolerant it is because I want to limit myself, to retain power and maintain control. Tolerance is for Derrida conditional hospitality. By being tolerant one admits the other under its own conditions, such as authority, law, hospitality. "Pure and unconditional

[66] P, M, Dupuy. Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi, *EJIL*, vol.16(2005), no.1.

hospitality opens or is advance open to someone who is neither expected or invited [...] a new arrival non-identifiable and unforeseeable, in short wholly other. I would call this a hospitality of visitation rather that an invitation. The visit might be actually very dangerous and we must not ignore this fact, but hospitality without risk would not be true hospitality"[67].

Will the West be capable to relate to Eastern Europe otherwise than with "tolerance"? Will the European international lawyers will be able to think and relate to world outside Europe with all the risks of the "hospitality"?

[67] Derrida in Borradori, *supra* 2