

WHAT LAW “IS” POSSIBLE IN WARTIME?

During the peaceful time a law is silence. It is a silent background of the everyday life, where to give money means to receive goods, to buy a ticket – to reach your destination, to go out from home – a safety walk through the streets and parks. In such cases law is hidden behind the similar activity. It’s like an air or light, which exist in the space without self-presentation. And similar to the air and light as the part of our world law as the silent background of our everydayness makes the latter possible. Metaphorically say, law lets the whole social world to be – and lets us to be as the part of this world. It is A. Stifter’s “soft law” (“sanfte Gesetz”)¹ which brings us to the truth of our Being and gives possibility for us to be, who we are – purchases and sellers, neighbors, employers, pedestrians and drivers and so many other modes of being-as-someone (das Alsein, in terms of W. Maihofer), which are derived from the horizon of the social world.

In opposite, a war is loud. The sounds of shelling, rocket strikes or air bombardments are deafening the silence of the “soft law,” silence of the mute background which gives the word to the truth of our life with one another. In the similar case silence as the tissue of our common Being, which is woven by the law, is broken apart by the shelling, gun machine’s bursts or sirens of air-raid warnings. If in peaceful times we “inhale” the law or “light up” our lives by the law “in the background regime” then during the war we don’t have “enough air or light.” We try to “inhale breath of law” frantically or – during the discrete “flash of law” – to look, who we are, where we are and is there any world yet – common world of our Being-with-others – or the whole horizon of the social possibilities is closed already? In other words, in the war times the silence of law is broken and law does exist not as silent continual background, but only as discrete spark in the darkness of war. The world is closed by the war.

The similar metaphorical introduction strives to make visible the core of our questioning – does any law possible during the war and if “yes,” what means “to be” for the law at the wartimes? Then, firstly, I try to explicate, how law is rooted in the world being-historically

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¹ Erik Wolf, *Der Rechtsgedanke Adlabert Stifters* (Frankfurt-am-Main: Vittorio Klostermann, 1941), 64; Martin Heidegger, *Der Weg zur Sprache//Unterwegs zur Sprache* (Stuttgart: Klett-Gotta, 2007), 259.

(seinsgeschichtliche) as the common world order, which is not restricted by the state borders but makes them valid (I). Further my concern is to show, in what way law exists in our everydayness. The foundation of my view lies in Heidegger's philosophy (II). The third part of my article will be dedicated to the comprehension of war in the horizon of law and to reconsidering of that, what means for the law "to be" in the wartimes. It seems to me, that the similar attempt gives us the key to the sense of what is going on in Ukraine now (III).

I

From the metaphysical point of view law presents itself as ideal dimension of the "Ought" ("Sollen"), which is opposite to the world of Being ("Sein"). The similar tradition is traced in the thought of Plato and has lasted to present day. The concepts of law of legal positivists (H. Kelsen, J. Raz, E. Bulygin) as well as non-positivists or natural law philosophers (R. Alexy, J. Finnis) are rooted in the similar view. This approach as an attempt to organize Being in accordance with Ought is hostile in its core to every possible event.

At the same time paradoxically, the named reasoning of law itself is grounded in the being-historical event of the land delimitation, "der Nomos der Erde," as it called by German philosopher of law C. Schmitt. He emphasized: "the seizure of the land < ... > is the original type of the process, which constitutes the law. It generates the very radical legal ground, which is ever possible, "radical title" in the true sense of the word."²

The similar capture of the territory as the primary delimitation of the land is the ontological ground for domestic so as an international law. Schmitt says that

the seizure of the land establishes law in two directions, internal and external. In internal direction, as in the frame of the capturing group the original order of all relations of property is established through the primarily delimitation and distribution of the land < ... > In the external direction the capturing group confronts with the other similar groups or states as the owners of the land.³

Thereby, law as the silent background of the national legal order, so as the order of external affairs between the states, has its ontological ground in the land, in the territory. On the similar territory law regulates relations inside the society (domestic law) or between different states (international law). So, the original law is the unity of the order and localization, which is marked by Schmitt with the word "Nomos."⁴ As he says, this word – "Nomos" – received its common meaning as the Ought, that is opposite to Being – in the polemics between Socrates and sophists, as the opposition of Physis and Nomos.⁵

² Carl Schmitt, *Der Nomos der Erde im Voelkerrecht des Jus Publicum Europaeum* (Berlin: Duncker und Humblot, 1997), 17.

³ Ibid, 16.

⁴ Ibid, 36.

⁵ Ibid, 37–38.

At the same time, it is quite clear, that war destroys the homogeneity of the delimited territory through the creation of such its kinds like a deep rear, occupied territory and frontline as the heterogeneous and the ever-changed spaces.⁶ In other words if the law is unity of the order and localization, so the delocalization of law due to the occupation and liberation of the lands at war times makes legal order impossible. In the similar case we are not able to conceive the war in terms of the metaphysically interpreted law.

II

Taken into the account post-metaphysically, law is not the Ought, that is opposite to Being, but shows itself as the concrete and unique event, a singularity. The normativity of the similar law is not universal but depends on the concrete situation. Metaphorically speaking if the normativity of the metaphysical law looks like sunlight, then normativity of the post-metaphysical law likes a flash of lightning.⁷ The similar reasoning of law is rooted in the philosophy of Heidegger. As we know, he didn't pay much attention to the law. From all over his corpus of works we can extract only rare remarks about law – one page from “SuZ,” his “legal-philosophical aphorism” from the “Briefueber Humanismus” and passage about “das sanfte Gesetz” (“soft law”) of Stifter in “Der Weg zur Sprache.” Not so much. But what we can obtain from this?

Work/page	<i>Sein und Zeit</i> (Tuebingen: Max Niemeyer Verlag, 2001), 282.
Language	<i>Being and Time</i> (State University of NY Press, 1996), 260.
German original	Dieser vulgäre Bedeutungen von Schuldigsein als “Schulden haben bei ...” und “schuld haben an...” können zusammengehen und ein Verhalten bestimmen, das wir nennen “sich schuldig machen,” das heißt durch das Schuldhaben an einem Schuldenhaben ein Recht verletzen und sich strafbar machen ... Das geschieht nicht durch die Rechtsverletzung als solche, sondern dadurch, dass ich Schuld habe daran, dass der Andere in seiner Existenz gefährdet, irregeleitet oder gar gebrochen wird. Dieses Schuldigwerden an Anderen ist möglich ohne Verletzung des “öffentlichen” Gesetzes.
English Translation	This vulgar significations of being guilty as “having debts with...” and “being responsible for...” can go together and determine a kind of behavior

⁶ The content of the contemporary practice of European Court of Human Rights is so close to the named issues. For example, there is the question to define a defendant – what a state has to be defendant in the cases, concerned the human rights violation on so-called “contested territories,” such as North Cyprus, Crimean Peninsula, Transnistria and so on? Is it “juridical sovereign” of the territory, or the state-occupant, which holds the contested area under control in fact? More details about similar questions see: Marco Milanović and Tatyana Papić, “The Applicability of the ECHR in Contested Territories,” *International & Comparative Law Quarterly* vol. 67, issue 4 (October 2018): 779–800.

⁷ To see the grounding on the similar view on law more closely: Алексей Стовба, *Темпоральная онтология права* (Санкт-Петербург: Алеф-пресс, 2017).

	<p>which we call “making oneself responsible,” that is, by having the responsibility for having a debt, one may break a law and make oneself punishable. ... That does not occur by breaking a law as such, but through my having the responsibility for the other’s becoming jeopardized in his existence, led astray or even destroyed. This becoming responsible to others is possible without breaking the “official” law.</p>
<p>German original</p>	<p>Der formale Begriff des Schuldigseins im Sinne des Schuldiggewordenseins am Anderen lässt sich also bestimmen: Grundsein für einen Mangel im Dasein eines Anderen, so zwar, das dieses Grundsein selbst sich aus seinem Wofür als “mangelhaft” bestimmt. Diese Mangelhaftigkeit ist das Ungenügen gegenüber einer Forderung, die an das existierende Mitsein mit Anderen ergeht. Es bleibe dahingestellt, wie solche Forderungen entspringen, und in welcher Weise auf Grund dieses Ursprungs ihr Forderungs- und Gesetzescharakter begriffen werden muss.</p>
<p>English translation</p>	<p>The formal concept of being-responsible in the sense of having become responsible to other can be defined as being the ground for a lack the Dasein of another; in such a way that this “being-the-ground” itself is defined as “lacking” in terms of that for which it is the ground. This kind of lacking is a failure to satisfy some demand placed on one’s existing being-with with others. It remains a question how such demands arise and in what way their character of demands and law is to be conceived on the basis of this origin.</p>

<p>Work/page</p>	<p>“Brief über Humanismus,” <i>Wegmarken</i> (Frankfurt-am-Main: Vittorio Klostermann, 1976), 360–61.</p>
<p>Language</p>	<p>“Letter on Humanism,” <i>Pathways</i>.</p>
<p>German original</p>	<p>“Nur sofern der Mensch, in die Wahrheit des Seins ek-sistierend, diesem gehört, kann aus dem Sein selbst die Zuweisung derjenigen Weisungen kommen, die für den Menschen Gesetz und Regel werden müssen. Zuweisen heißt griechisch νέμειν. Der νόμος ist nicht nur Gesetz, sondern ursprünglicher die in der Schickung des Seins geborgene Zuweisung. Nur diese vermag es, den Menschen in das Sein zu verfügen. Nur solche Fügung vermag zu tragen und zu binden. Anders bleibt alles Gesetz nur das Gemächte menschlicher Vernunft. Wesentlicher als alle Aufstellung von Regeln ist, dass der Mensch zum Aufenthalt in die Wahrheit des Seins findet. Erst dieser Aufenthalt gewährt die Erfahrung des Haltbaren. Den Halt für alles Verhalten verschenkt die Wahrheit des Seins.”</p>
<p>English translation</p>	<p>Ek-sisting in the truth of being, only to the extent that man is part of this giving of be[-ing] can commendation of those directives that are bound to become laws and rules for man come from being itself. To commend in Greek is νέμειν. A νόμος is not merely a law, but <thought> in a more</p>

	original way, <it means> the restrained commendation <of directives> of what is becoming of be[-ing]. Only this makes it possible to instruct man in be[-ing]. Only such a dispensation <of directives> is able to <reach man> and obligate <him>. Otherwise, all law is only what has been made by human reason. More essential for man than all establishment of rules is finding his place in the truth of be[-ing]. The experience of what is lasting first furnishes this place. The truth of be[-ing] provides the support for all <ways of> behaving.
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Work/page Language	“Der Weg zur Sprache,” <i>Unterwegs zur Sprache</i> (Stuttgart: Klett-Gotta, 2007), 259. “Path to Language,” <i>On the Way to Language</i> .
German original	wir verstehen unter dem “Gesetz” die Versammlung dessen, was jegliches in seinem Eigenen Anwesen, in sein Gehöriges gehören lässt, dann ist das Ereignis das schlichteste und sanfteste aller Gesetze, sanfter noch denn jenes, das Adalbert Stifter als das “sanfte Gesetz” erkannt war. Das Ereignis ist freilich nicht Gesetz im Sinne einer Norm, die irgendwo über uns schwebt, ist keine Verordnung, die einen Verlauf ordnet und regelt. Das Ereignis ist das Gesetz, insofern es die Sterblichen in das Ereignis zu ihrem Wesen versammelt und darin hält.
English translation	We understand by the “law” the gathering of that, which gives [an opportunity] to everything to be on their own, to belong to their belonging itself, then event is very simple and soft law, softer than that Adalbert Stifter as “soft law” marked. Of course, event is not the “law” in the sense of certain norm that is flying over us somewhere and it’s not the regulation that arranges and regulates a process. The event is the law so far it gathers mortals in the appropriation of their own essence and keeps them in it.

As we can see, the interpretation of law by Heidegger has changed from one work to another. In the “Being and Time” he considers law as the anonymous demand (die Forderung) which is turned to the existing Being-with-one-another. In the “Letter on Humanism” law is the directive (die Weisung) of Being itself. But in “On the Way to Language” law turns into the event (das Ereignis) as the “soft law” for those, who are involved in the similar event. As we can see, eventually the law as event doesn’t have its ontological ground in the delimited space or territory but finds its embodiment in the human beings, which are involved in the similar event.⁸ In this case the human body is the certain horizon of the experience of law.⁹ The very special feature of the body as the similar horizon is *liminality* as the corporal ability to put the limits for the human beings’ deeds towards one

⁸ Стовба, *Темпоральная онтология права*, 284.

⁹ Oleksiy Stovba, “Experience of Law and Legal Experience,” in *The Experience of Law. Collection of Articles and Essays* (Kharkiv, IVR Library, 2019), 8 and further.

another. Instead of delimitation the certain territory in the similar case law delimitates the human Beings through their living corporal experience of liminality. But there is a question: does this delimitation possible in wartime, when the corporal human being itself is constantly under the threat of shelling and bombing and turns into the horizon of the *aggressive, unmotivated and anonymous violence*?

III

At first sight, war manifests itself as the “total event” (Levinas), which excludes all the rests of possible horizons. But in my opinion, it’s true about the *world war* only, which puts in question not the worlds of the war’s parties, but the world as such. All the others kinds of war remain in the frame of much higher order whether European or even worldwide. As Schmitt says:

The international law doesn’t able to exist without the original and most effective relationship. It’s not such relationship as that lies in the doubtful self-restraint of the sovereign states, but it manifests itself as the connective power of the Eurocentric order, which embraces all the sovereign states. The core of its Nomos consists in the delimitation of the European territory on the lands of the states with the stable borders.¹⁰

Thus, each aggressor, that begins European war, encroaches not on the territory of another state, but on the Nomos of whole Europe as the unity of European order and localization. As Schmitt underlines “the one, who begins European war, already knows that all European countries are interesting in its outcome. <... > the community, which is born by the space order, is much more important than the sovereignty and prohibitions on intervention.”¹¹

At the same time the similar order is not maintained by itself. War, as S. Geniusas marked in his “Horizon-article” is a senseless event.¹² In my opinion, to establish the sense of the similar event is able the human being (Dasein) as Being-with-one-another. It happens through the *putting limits* to one another in the common Being, as the things themselves make it in the famous “Spruch von Anaximander,” and by the way of similar establishing they bring sense into the event which they are involved in. In the event of war, we may be able to experience law in way that was not possible in peaceful time – not as the legal experience of contact with legislation and legal institutes, but as experience of liminality. In other words, under conditions of war the authority of the legal norms and rules is questionable and replaced by the law as the corporal experience of liminality. Of course, the “experience” means here any “internal” or “psychological” event. Rather “...to be an experience is to hold inner communication with the world, the body and other people, to be with them instead

¹⁰ Schmitt, *Der Nomos der Erde*, 120.

¹¹ *Ibid*, 161.

¹² Saulius Geniusas, “War as Phenomenological Theme: Methodological and Metaphysical Considerations,” *Horizon* 11 (1) (2022): 386 and further, <https://doi.org/10.21638/2226-5260-2022-11-379-401>.

of being beside them.”¹³ Equally from the similar point of view “liminality” is the “external feature” of the human body, which manifests itself as its ability to establish the limits for the other people, for their legal relevant actions toward one another. As J. Butler says, “the prohibitive law is not taken into the body, internalized or incorporated, but rather is written *on* the body, the structuring principle of its very shape, style, and exterior signification.”¹⁴ So, liminality as the sense of a living corporeal experience is the *embodiment of law* as the limit to the external physical intrusion. During wartime the similar embodiment is the only valid law and it substitutes an official norms and rules of legislation.

Conclusions

Thus, I think, it's possible to conceive the war in the horizon of law. The latter is not the metaphysical and continual field of the Ought. Rather the law presents itself as the syncretic integrity of its so-called “macro” and “micro” levels. The “macro” level of law is “Nomos of Earth” as the unity of order and localization. On the other hand, the “micro” level of law consists of the set of singular and discrete events of law. The mentioned above events find their embodiment in the experience of liminality, as the living corporal experience of human Beings involved in the similar event.

Let's take the current situation in Ukraine as an example of how law exists at the “macro” and “micro” levels.

At the “macro” level law is maintained as the so-called “soft law” and “hard law” by the means of establishing “Nomos” as the unity of order and localization.

The subjects of the application of the “soft law” are Europe and British Community (USA, Great Britain, Canada, Australia and so on). It consists of such means as “exile” (for example, exile of state-aggressor from G8, which turns to G7), sanctions (elimination from the trade and sports competitions, seizure of assets), blockade (air traffic ban, travel ban), and creation of the special court or tribunal and so on.¹⁵

The subject of the application of “hard law” is Ukraine. Its means are: armed self-defense (armed reaction on aggression),¹⁶ economical self-defense (confiscation of the assets and

¹³ Maurice Merleau-Ponty, *Phenomenology of Perception* (London, New-York: Routledge Classic, 2002), 111.

¹⁴ Judith Butler, “Foucault and the Paradox of Bodily Inscriptions,” in *Foucault and Law* (Surrey: Ashgate, 2010), 231.

¹⁵ In accordance with the legal assessment, which was requested by the European Parliament's Subcommittee on Human Rights, “the so-called Russian ‘special military operation’ launched on 24 February 2022 was an unprecedented act of aggression that would justify an unprecedented creation of an *ad hoc* tribunal.” More details see in: Olivier Corten and Vaious Coutroulis, “Tribunal for the Crime of Aggression against Ukraine – Legal Assessment,” *European Parliament's online database*, “Think Tank:” 3.

As we know, Parliament of the EU now considers the question about creation of special tribunal for the crime of aggression against Ukraine. Also, 17/03/2023 International Criminal Court issued arrest warrant against Putin.

¹⁶ As marked in the aforementioned legal assessment, “being the victim of an armed attack, Ukraine is entitled to exercise its right to self-defense in conformity with article 51 of the UN Charter. Basically,

reparations), and juridical self-defense (the criminal prosecution of the persons, who are blamed in the armed aggression, collaborationism and other war crimes).¹⁷

In its turn, law at the micro-level exists as the living corporal experience of liminality. Liminality is the constitutive feature of the corporal experience of Being-with-one-another. It means that the human body is an embodiment of the limits for the human beings' acts towards one another. The specificity of the experience of liminality in wartime is that the condition for such an experience is unmotivated anonymous aggression. The structure of the similar experience has to be revealed yet.

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Олексій Стовба. Яке право "є" можливим під час війни?

Анотація. У мирні часи право є тиша. Право є тихим підґрунтям повсякденності, коли сплатити гроші означає отримати товар, купити квитка – дістатися пункту призначення, а вийти з дому – здійснити безпечну прогулянку вулицями та парками. У подібних випадках право приховане за такими подіями. Воно схоже на повітря або світло, які існують у просторі

this right consists in military measures deployed on the Ukrainian soil and designed to put an end to the continuing attacks and persistent territorial occupation perpetrated by Russia." More details see in: Corten and Coutroulis, "Tribunal for the Crime of Aggression against Ukraine:" 33.

¹⁷ It is worth to mark, that on October 2022 in Ukraine there were investigated 39 551 war crime cases.

не показуючи себе. І так само як повітря та світло, які є частиною нашого світу, право як тихе підґрунтя повсякденності робить її можливою. Метафорично висловлюючись, право дає існувати соціальному світові в цілому – і дає бути також і нам як часткам цього світу. Це той “м’який закон” (“sanfte Gesetz”), про який згадував Адальберт Штифтер. Цей закон приводить нас до істини нашого буття і дає нам можливість бути тими, хто ми є – покупцями та продавцями, сусідами, роботодавцями, пішоходами і водіями і бути-з-Іншими (бути-як-хтось, словами В. Майхофера) всіма іншими різноманітними способами, які походять з горизонту соціального світу.

Війна, навпаки, є галас. Звуки обстрілів, ракетних ударів чи бомбардувань заглушають тишу “м’якого закону,” тишу мовчазного підґрунтя того, що дає слово правді нашого буття з Іншими. У подібних випадках тиша як тканина нашого спільного буття, яка сповита правом, розривається обстрілами, автоматними чергами чи звуками повітряної тривоги. Якщо за мирних часів ми “вдихаємо” право чи “освітлюємо” ним наше життя у “фоновому режимі,” то під час війни нам не вистачає “повітря або світла.” Ми прагнемо “вдихнути права” чи – протягом раптового його спалаху – побачити нарешті, хто ми є, де ми є – і чи існує досі який-небудь світ – спільний світ буття-з-Іншими чи горизонт спільних можливостей вже замкнено? Іншими словами, під час війни тиша права порушена і право існує не як мовчазний постійний фон, але як спалах у п’ятьмі війни. Світ є замкненим війною.

Ключові слова: право; війна; лімінальність; порядок; локалізація; тіло; втілення.

Oleksiy Stovba. What Law “Is” Possible in Wartime?

Abstract. During the peaceful time law is silence. It is a silent background of the everyday life, where to give money means to receive goods, to buy a ticket – to reach your destination, to go out from home means a safety walk through the streets and parks. In such cases law is hidden behind similar practice. It’s like an air or light, which exist in the space without self-presentation. And similar to the air and light as the part of our world law as the silent background of our everydayness makes the latter possible. Metaphorically say, law lets the whole social world to be – and lets us to be as the part of this world. It is Adalbert Stifter’s “soft law” (“sanfte Gesetz”) which brings us to the truth of our Being and gives possibility for us to be, who we are – purchases and sellers, neighbors, employers, pedestrians and drivers and so many other modes of being-as-someone (das Alsein, in terms of W. Maihofer), which are derived from the horizon of the social world.

In opposite, a war is loud. The sounds of shelling, rocket strikes or air bombardments are deafening the silence of the “soft law,” silence of the mute background which gives the word to the truth of our life with one another. In the similar case silence as the tissue of our common Being, which is woven by the law, is broken apart by the shelling, gun machine’s bursts or sirens of air-raid warnings. If in peaceful times we “inhale” the law or “light up” our lives by the law “in the background regime” then during the war we don’t have “enough air or light.” We try to “inhale breath of law” frantically or – during the discrete “flash of law” – to look, who we are, where we are and is there any world yet – common world of our Being-with-others or the whole horizon of the social possibilities is closed already? In other words, in the war times the silence of law is broken and law exists not as silent continual background, but only as discrete spark in the darkness of war. The world is closed by the war.

Keywords: law; war; liminality; order; localization; body; embodiment.

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