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## PHENOMENOLOGY OF PEACE AND WAR: EXPERIENCE OF LAW AND EXPERIENCE OF LAWLESSNESS\*\*

### Introduction

The war undermines the basic structures of our experience, including the legal dimension of the latter. The scale of the actual violence is so huge that all our normative constructions are collapsing. By upsetting the shaky balance between normativity and factuality of our existence, the war imposes on us a different perspective of the world, which displaces all possible alternatives, including legal optics. Hence, *inter arma enim silent leges*. Death on the battlefield is no longer considered a murder or a violation of the right to life and international humanitarian law as the “law of war” seems to replace international human rights law as the “law of peace.” The question arises, does law still make any sense? And did law even make sense before if it was so easily ignored? It is noteworthy that it was with the shock produced by the unprecedented violence during the 20th century that Paul Ricoeur linked the large-scale crisis of the philosophy of law and law as such.<sup>1</sup>

At the same time, law remains the main (if not the only) alternative to war, and giving a voice to it is the least philosophy of law can and should do today. Moreover, war is a border situation when, against the background of the existential threat of law, the latter reveals its genuine nature. When all institutions are powerless and all conventions are destroyed, the aspect of human experience that we call the experience of law finally become visible.

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<sup>1</sup> Paul Ricoeur, *The Just*, trans. David Pellauer (Chicago: The University of Chicago Press, 2000), VII–VIII.

Perhaps the only way to restore the value of law in a world where violence rules is to think of law phenomenologically, that is, to see law not as an object of our knowledge or technical domination, but as something that happens to us in the world. The question is whether the experience of law is an integral part of human experience as such, or whether it is occasional. In legal and political philosophy, the first version is represented by the idea of natural law in the broadest sense, the second by the idea of a state of exception in the Schmittian sense, which implies the possibility of arbitrary suspension of law.<sup>2</sup>

The thoughts expressed in this essay came from an initial intuition about the deep connection between two challenges posed by war – the challenge to humanness and the challenge to law. I aim “to hear the voice of law among arms” by outlining a fundamental connection between law, a common world and peace, on the one hand, and lawlessness, the absence of a common world and war, on the other. In the first part of the essay I describe the experience of law as an aspect of our fundamental experience and a condition for the possibility of a common world and peace (I). Further, I discuss war as the absence of a common world, which causes the experience of lawlessness (II). Finally, the paradox of “law of war” is considered (III).

## I. World of Law

Phenomenologically, before any institutions, law as a component of our experience is related to overcoming the initial asymmetry between the Self and the Other and the constitution of certain common world. In terms of phenomenological hermeneutics, that is, in terms of meaning, it is about the recognition by people of each other as co-authors of a common world as a space of shared meanings. This initial gesture of unconditional recognition of the irreducible otherness of the Other makes possible experience as an experience of the world and the world as a world of experience. Politically, it makes a community possible.

At the same time, it is never guaranteed because the experience is not a fact but always is a possible experience. It can be assumed that it is this risky zone between recognition and non-recognition that is room for law, which promotes mutual recognition and thus maintains an unstable common world. It is the refusal to recognize or the threat of such a refusal that creates the claim for justice, and with that the experience that we usually consider the experience of law. And it is this non-guaranteedness of recognition that generates the institutions that we call legal and in which we attest each other's dignity.<sup>3</sup> While in traditional societies mutual public recognition, constituting community, is confirmed by the rituals

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<sup>2</sup> Developing Thomas Hobbes' famous thesis that *autoritas, non veritas facit legem*, Carl Schmitt establishes law solely in an act of violence, a willful decision: “authority proves that to produce law it need not be based on law” (Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago & London: The University of Chicago Press, 2005), 13).

<sup>3</sup> For more details about a connection between fundamental experience, public mutual recognition and established legal order see Natalia Satokhina, “A Hermeneutic Account of Normativity of Law,” *Etica & Politica/Ethics & Politics* XXIII (2) (2021): 309–19.

(for example, rituals of exchanging gifts known from ethnographic sources), in state-type societies it is guaranteed by law and a set of legal institutions that confirm the unconditional respect of each person.<sup>4</sup>

Thus, law makes possible a common world as a space of shared values, or, like Marcel Hénaff said, “a space of encounter <...> in which we recognize each other <...> a space where we meet to experience together *the honor of existing*.”<sup>5</sup> A feeling of legal certainty is, in a sense, a feeling of a community, or a feeling of the meaningful space that both unites us and establishes the fair distance between us. In turn, the feeling of a legal vacuum, or “silence of law” during the war is a feeling of loneliness in the face of violence, or a feeling of a destroyed common world. But is it possible to destroy the fundamental structures of experience? Is it possible to break the common world down to nothing? And what then enables law to revive even on the ashes of wars and genocides? After all, what are we dealing with in the absence of a common world?

## II. Worldlessness of War

Emmanuel Levinas describes the absence of a common world by the concept of totality. Explaining it, he contrasts the recognition of the infinite otherness (infinity) of the Other in the moral sphere (authentic human condition) with the total universalization of everything unique in the political realm. As a result of this universalization, the meaning of interchangeable individuals is derived from the totality, and they are invisible outside of it.<sup>6</sup> The quintessence of totality is war that “establishes an order from which no one can keep his distance; nothing henceforth is exterior.”<sup>7</sup> War does not recognize any exteriority, does not allow the other to exist as the other and reduces individuals to bearers of forces that command them unbeknown to themselves: “The unicity of each present is incessantly sacrificed to a future appealed to to bring forth its objective meaning. For the ultimate meaning alone counts; the last act alone changes beings into themselves. They are what they will appear to be in the already plastic forms of the epic.”<sup>8</sup>

Herewith the totality described by Levinas is not just another world united by another shared meanings, but rather the absence of the latter. Hannah Arendt calls this phenomenon “worldlessness” and links the disintegration of the common world with a radical

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<sup>4</sup> See Marcel Hénaff, *The Philosophers' Gift: Reexamining Reciprocity*, trans. Jean-Louis Morhange (New York: Fordham University Press, 2020), chapter 2, Epub.

<sup>5</sup> Marcel Hénaff, *The Price of Truth: Gift, Money, and Philosophy*, trans. Jean-Louis Morhange and Anne-Marie Feenberg-Dibon (Stanford: Stanford University Press, 2010), 402.

<sup>6</sup> Emmanuel Levinas, *Totality and Infinity. An Essay on Interiority*, 20th ed., trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 2007), 22.

<sup>7</sup> *Ibid.*, 21.

<sup>8</sup> *Ibid.*, 22. It is interesting that Levinas places law in the space of the political as a space of totality, opposing moral justice as respect for the individual and unique to impersonal justice of law as a source of universality. My understanding of law in this aspect is completely opposite. For more details, see Nataliia Satokhina, “Law and Gift: Phenomenology of Legal Experience,” *Filosofija prava i zahalna teorija prava* 1 (2022): 14–26.

transformation of human experience when the dialogical experience of thought and action is replaced by monologue practices of cognition and production, and instead of the interaction of many “others” there is a set of identical, but closed in its own subjectivity, elements of totality.<sup>9</sup> However, the authentic human experience is completely different, and therefore, according to Arendt, all totalitarian regimes are sooner or later doomed to failure. Arendt calls this experience “beginning” – the supreme capacity of man, politically identical with man’s freedom,<sup>10</sup> phenomenologically – let’s add – with initial openness to the Other.

Levinasian “infinity” and Arendtian “beginning” both refer to a fundamental human experience that carries with it the possibility of breaking the totality as the possibility of a signification without a context. It is the possibility of human dignity which law is meant to protect.

Because of human dignity, worldlessness is just a tendency, a model of reality that war tries to impose on us and which we resist. In this sense, no war can reduce the world to ashes, just as no claim to totality can be fully realized. Today, the main structures of experience that oppose this totality are expressed in the form of human rights and enshrined in international law.

However, if law and war are related to fundamentally different experiences, then how is law possible during war and how is the “law of war” possible?

### III. The Paradox of “Law of War”

To understand the paradox of “law of war,” one should pay attention to the gradual transformation of the relationship between international humanitarian law (“law of war”) and international human rights law in the direction of strengthening the latter. As Isabelle Trujillo emphasizes, the difficulty here lies in the fact that humanitarian law arose even in those times when war was not prohibited. Then it could be understood as the rules of warfare. But human rights originated as a tool to prevent wars, and in this sense human rights law is *jus contra bellum*.<sup>11</sup> It seems obvious that today, when war is a crime, humanitarian law is not an exception to the “law of peace” in case of war, but only an additional guarantee. Compliance with humanitarian law does not exclude responsibility for violations of human rights law, and violations of humanitarian law by the aggressor can only be considered as circumstances that aggravate responsibility for committing a crime of aggression and violations of human rights law. This position is expressed in the General Comment 36 on the Right to Life, adopted by the Human Rights Committee. It holds that states parties engaged

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<sup>9</sup> Hannah Arendt, *The Human Condition* (Chicago and London: The University of Chicago Press, 1998), 50–58; Hannah Arendt, *The Origins of Totalitarianism* (Cleveland and New York: Meridian Books, 1962), chapter 13.

<sup>10</sup> Arendt, *The Origins of Totalitarianism*, 479.

<sup>11</sup> Isabel Trujillo, “Human Rights, Peace, and the Concept of Law. The Story of an Incomplete Legal Revolution,” *Filosofia prava i zahalna teoriia prava* 1 (2019): 181.

in acts of aggression, resulting in deprivation of life, violate *ipso facto* article 6 of the International Covenant on Civil and Political Rights, enshrining the right to life.

Such an approach is also gradually being adopted by the European Court of Human Rights. For example, in March 2022, the Court granted the Ukrainian request regarding urgent interim measures against Russia. Unlike the position in the case *Georgia v. Russia (II)* a year earlier, here the Court held that the European Convention of Human Rights applies extraterritorially even during active hostilities. The next logical step would be to admit that the death in combat resulting from aggression is a violation of the right to life, enshrined by article 2 of the Convention, even if humanitarian law is not violated.<sup>12</sup> This would mean that the soldier is considered a person as a bearer of dignity, not just a component of a military machine.

## Conclusion

So, is law silent in times of war? If one understands law as a component of the fundamental experience that makes the existence of a common world possible, and legal institutions as those based on this experience, then no state of exception can suspend them, since the common world cannot be completely destroyed as long as human being remains human being.

Law, understood in this way, aims to maintain the normative dimension of experience and counteract the totality of war as the totality of facticity. Therefore, fighting the crime of aggression is at the same time a fight for law, preservation of the common world and a healthy human experience, that is, a fight for humaneness. And this fighting for law is inspired by the prospect of justice. Paraphrasing Levinas, the certitude of law (in the original – peace) dominates the evidence of war.<sup>13</sup>

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<sup>12</sup> For more on this see, for example: Eliav Liebllich, "Not Far Enough: The European Court of Human Rights' Interim Measures on Ukraine," *Just Security*, March 7, 2022, <https://www.justsecurity.org/80482/not-far-enough-the-european-court-of-human-rights-interim-measures-on-ukraine/>.

<sup>13</sup> Levinas, *Totality and Infinity*, 22.

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### **Наталія Сатохіна. Феноменологія миру і війни: досвід права і досвід безправності**

**Анотація.** Есей присвячено феноменологічному осмисленню права і війни, тобто осмисленню відповідних досвідів. Авторка ставить за мету "почути голос права серед зброї" через прояснення фундаментального зв'язку між спільним світом, миром і правом, з одного боку, і відсутністю спільного світу, війною та безправ'ям, з іншого.

Ключова ідея полягає в тому, що право є складовою нашого фундаментального досвіду, яка уможливає спільний світ і в такий спосіб протистоїть війні як безсвітості, що вона натомість пов'язана з радикальною трансформацією людського досвіду. Ця ідея розкривається у три кроки.

Спочатку авторка описує досвід права як аспект нашого фундаментального досвіду, пов'язаний з визнанням безкінечної інакшості іншої людини (визнанням її гідності), та умову можливості спільного світу як світу спільних цінностей, а отже, умову можливості миру.

У другій частині есея, спираючись на ідеї Емануеля Левінаса та Ханни Арендт, вона розглядає війну як відсутність спільного світу (безсвітність, тотальність), якій відповідає досвід безправ'я як досвід пониження гідності.

Насамкінець, розглядається парадокс "права війни" на прикладі поступової трансформації співвідношення права прав людини та гуманітарного права в напрямку зміцнення першого.

Право, таким чином, розуміється як таке, що прагне утвердити нормативний вимір нашого досвіду і протистоїть тотальності війни як тотальності фактичності.

**Ключові слова:** досвід права; досвід безправності; мир; війна; світ; безсвітність.

### **Nataliia Satokhina. Phenomenology of Peace and War: Experience of Law and Experience of Lawlessness**

**Abstract.** The essay aims "to hear the voice of law among arms" by outlining a fundamental connection between a common world, peace and law, on the one hand, and the absence of a common world, war and lawlessness, on the other.

The key assumption is that law is a component of our fundamental experience that makes a common world possible and thus counteracts war as worldlessness. This idea unfolds in three stages. In the first part of the essay the author describes the experience of law as an aspect of our fundamental experience and a condition for the possibility of a common world and peace. The next one is about war as the absence of a common world (worldlessness), which causes the experience of lawlessness. In the final part, the paradox of "law of war" is considered.

The author argues that law aims to maintain the normative dimension of experience and counteract the totality of war as the totality of facticity.

**Keywords:** experience of law; experience of lawlessness; peace; war; world; worldlessness.

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