

The London School of Economics and Political Science

**From *Nomos* to *Hegung*:
War Captivity and International
Order**

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ABSTRACT

In World War II, millions of men found themselves at one time or another in war captivity. Their daily lives in captivity have been documented in memoirs and historical studies, but despite the abundance of detail, the experience of war captivity as an experience of exclusion remains un-theorised. Western POWs held by Germany in particular were excluded not only from further involvement in direct combat, but also from the states of exception associated with the foreign slave labour and the racial persecutions particular to Germany at the time. While all around them people were killed for a number of reasons, their lives were protected – and in the case of Jewish soldiers extraordinarily so – for no other reason than to keep them alive.

The first part of the thesis uses Carl Schmitt's work on sovereignty and *nomos* to situate the POW camp within the framework of an international order where war is bracketed – *gehegt*. This order reveals itself as an order of war, in which law takes the role of the sovereign in guaranteeing the order. The second part then turns to the exception to this order, the POW camp, analysing its juridico-political situation on the example of Jewish POWs from Western forces held by Germany in the Second World War. The third part of the thesis looks at the war-time experiences of Emmanuel Levinas, who spent five years as a POW in Germany. The struggle Levinas's work exhibits with the experience of captivity exemplifies this experience's ultimate meaninglessness, and raises questions about the possibility of subjectivity without engagement.

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1. Introduction

Contemporary literature on sovereignty treats the concentration camp as the spatial paradigm of the state of exception. In the camp, law as the protector of individual rights is suspended, while sovereign power reins unrestrainedly. Through the association with the concentration camp, the state of exception has become synonymous with the abuse of power and the decline of the rule of law. In this, it did not merely get a bad name; since Agamben's diagnosis that the state of exception has increasingly become the rule, characterising the 'political space of modernity' (Agamben, 1998, p. 174) and even constituting the '*nomos* of the modern' (p. 166), it has become the ground from which a more just political community must lift itself. Moreover, because it is law itself that, so Agamben argues, produces and depends on the exception for its establishment, revealing law not as the solution to the problems of political modernity, but as their cause, a simple return to the rule of law will not lead out of this political space. What is required, rather, is nothing less than a 'completely new politics' (Agamben 1998, p. 11). But what if Agamben's turn to a new politics were itself found to be merely symptomatic of a more prior need to escape something *already* other? What if, after the Second World War, those who returned from the war to rebuild the world returned from entirely *elsewhere*, beyond the law-exception complex?

In World War II, millions of men found themselves at one time or another in war captivity. Davis (1977, p. 162, footnotes omitted) provides indicative figures:

Estimates for the second world war are somewhat inflated, since that conflict ended with the collapse of the German state and the unconditional surrender of Japan. Therefore entire armies of the vanquished powers became prisoners of war during the last six months of 1945. These last-stage capitulators drive the highest estimate for the second world war up to 35,000,000. Although many of these were detained to work on postwar reconstruction projects, less than half that number could have been involved in the wartime economies as prisoners. On the other hand, Henri Michel's minimum estimate of 12,000,000 is probably

too conservative. Germany alone captured up to 8,000,000 prisoners; and the USSR took some 3,000,000 Germans and a few hundred thousand others by the end of the war. Great Britain took over 3,000,000 but brought only about a quarter of a million into the United Kingdom. France captured about 250,000 Germans in 1944 and 1945 and received another 700,000 from the British and Americans for postwar reconstruction. The United States accepted the surrender of about 4,000,000 enemy troops during the second world war and interned some 435,000 of them in the United States.

Despite these numbers, war captivity remains under-theorised in legal scholarship. This may partly be due to the embryonic state of broader historical scholarship on war captivity. Bischof et al. (2005, pp. 14-15), for example, note that despite significant progress in this respect over the last twenty years, historical scholarship from a global comparative perspective on war imprisonment in the Second World War is only in its beginning stages. And while there is much legal scholarship on the laws relating to POWs, most of it is narrow in focus, concentrating on specific norms and legal arrangements (Overmans, 1999, p. 487).

The reasons for this are only too clear: Even if one merely considers POWs captured by Germany in the Second World War, the treatment and consequent experience of captivity varied to such an extent as to make generalisations all but impossible. How, for example, could one liken the experiences of French officers like Fernand Braudel or Paul Ricoeur, who were teaching and researching at the ‘camp universities’ they helped set up during their stay in captivity,¹ with those of Soviet prisoners left to die of disease and starvation in open fields? Before even considering other factors, this divergence

¹ Ricoeur, for example, was not only able, with the help of a kindly guard, to borrow books from Greifswald university library while in captivity, but also started to translate Husserl’s *Ideen I* there (Ricoeur, 1998, pp. 16f). Braudel equally had access to an outside library for part of his time in captivity, during which he wrote his history of the Mediterranean, finding “the atmosphere of the camps conducive to his writing which rendered his mind ‘more lucid,’ and permitted him the time for ‘lengthy meditation on the subject’” (Dursteler, 2010, p. 65).

alone necessitates a historically narrow focus; there simply is no one ‘POW camp’ in the way in which one can speak of ‘the concentration camp.’²

However, despite this divergence of conditions in practice, there was a group of POWs whose position exemplifies like no other the place of war captivity in international order. This was the group of Western Jewish POWs held by Germany in the Second World War. Excluded from the hostilities of war as much as from racial persecutions, the politico-juridical situation of these POWs represents an almost complete mirror image to the situation of the concentration camp inmates that Agamben describes. Almost, because even though these POWs were exempted *by law from* the sovereign decisions of war, their experiences were by no means positive, even without taking into account the inevitable contraventions of the law by the detaining power.

This negative characteristic of war captivity, coupled with the fact that it is difficult to pinpoint the precise source of this negativity – POWs were no longer in battle, nor were they persecuted – is a surprising circumstance. If it is true that life in the concentration camp as a space of exception from law was a matter of “legal remainders or legal waste” (Zartaloudis, 2010, p. x), and that the process producing this waste was one of dehumanisation, then life in the POW camp as a space of exception from the death associated with war (which, like the concentration camp, represents a state of exception from legal order) should have been a humanising experience. The fact that this was not the case raises questions about the precise place and function of this space exception, which cannot merely have represented the exit of soldiers from combat and their re-inclusion under the rule of law. Apparently, the exception to the exception does not equate the rule. But if they were not part of legal order nor part of war as the exception to that order, where were they?

After the war that saw his involvement with National Socialism, Carl Schmitt wrote a book on international order that took him away from the concept

² In their introduction to a volume on POWs in Nazi Germany, Bischof et al. (2005, p. 9-10) accordingly state that in trying to understand the conditions for POWs at the time, “generalisations are of no help.” For example, the suffering inflicted on Soviet POWs has led to the call to include their ordeal under the umbrella notion of the Holocaust (Soleim, 2010, p. 1; also see Bischof et al., 2005, p. 14) and thus potentially within the concentration camp paradigm.

of sovereignty he had developed for the national context and that had served as the basis for subsequent accounts of the concentration camp as a space of exception. The juridico-political constellation described by Schmitt in *The Nomos of the Earth* is that of the *jus publicum Europaeum*, the order of sovereign nation states in place sometime between the 17th and 20th centuries. The particularity of the *jus publicum Europaeum* was that it did not present an order analogous to the legal order of the state, such as that envisaged by Habermas in his notion of cosmopolitan order, nor a ‘second-order state of nature,’ in which sovereign states confronted each other in the absence of law (Rasch, 1999-2000, p. 1670). Here, a unity of difference prevailed, secured by nothing but the laws of war, which Schmitt describes as effecting a bracketing or *Hegung* of war. This order did not only precede the Nazi period in history, but was also designed, as Schmitt explains, to prevent precisely the type of existential politics that led to the Holocaust. And it did prevent this politics successfully as far as Germany’s comportment to its enemies on the Western front was concerned, exemplified by the fact that POWs of these nations were treated broadly in accordance with the laws of war. It was these laws that excepted POWs from the ongoing war and governed their lives in the camp.

Emmanuel Levinas was one these POWs. Having emerged from German war captivity unharmed, he published a short book called *Existence and Existents*, which he had begun to write in captivity, sheltered from both the war and the persecutions around him. Levinas’s trajectory would soon lead him away from the subject matter of this early work, in which he seeks to escape from a state of pure being he terms the ‘there is’ (*il y a*), and to an ethics that, perhaps in some sense comparable to what Agamben has in mind, appears to respond to the events of the Holocaust. But for a moment, *Existence and Existents* and *The Nomos of the Earth*, when held next to each other, give a glimpse of a world and its foundations that would be lastingly destroyed by the events that followed.

This destruction was outlived, however, by those who returned from war captivity. The camps, having had no other purpose than to keep the POWs alive, now released them into a world that had moved on without them, and that would not recognise their suffering. Here, they faced the task of a new beginning. For these ex-prisoners, ‘escape’ represented liberation not from lawlessness, but from

a complete suspension of political existence. The experience of war captivity, then, stands for more than the fact that something took place in the camps, or that what took place there is the manifestation of a certain juridico-political constellation that pertains to this day;³ the point, rather, is that whatever took place there involved people, who in their survival carried the traces of their experience forward and into their lives after the war.

³ These are the two options Agamben (1998, p. 166) has in mind when outlining his methodology in *Homo Sacer*: “Instead of deducing the definition of the camp from the events that took place there, we will ask: What is a camp, what is its juridico-political structure, that such events could take place there? This will lead us to regard the camp not as a historical fact and an anomaly belonging to the past (even if still verifiable) but in some way as the hidden matrix and *nomos* of the political space in which we are still living.”

2. Sovereignty

In 1922, Schmitt (1985b, footnote omitted) had famously declared in relation to national order that “sovereign is he who decides on the [state of] exception.” When in 1950 he turned his mind to international order, one would assume that it was this concept of sovereignty against which any ordering element on the international level would have to measure up, and whose function it would need to replicate. But one searches Schmitt’s work *The Nomos of the Earth* in vain for an analysis of sovereignty that would match that provided in *Political Theology* (1922) and *The Concept of the Political* (1927). In fact, as Agamben (1998, p. 36) notes, Schmitt “makes no allusion to his own definition of sovereignty as the decision on the state of exception.” Perhaps Europe was simply not political in the sense that this was true for the nation state; perhaps it did not have political enemies against which it could distinguish itself, and therefore had no need for the sovereign decision on the exception. Even so, the question of order remains – not so much of what ordered Europe’s affairs, as what made of it *an* order, an entity with boundaries in the Kantian sense⁴ that could be called ‘Europe.’ For it is clear that Schmitt did not think of Europe as a realm akin to that of reason, characterised by its principal universality. It was precisely the concreteness of the European order that Schmitt emphasised; it had to be so if, like the state, it were to remain contingent and thus revisable, an attribute of order that Schmitt valued perhaps over all others.

After all, already in relation to national order, Schmitt’s critique had targeted a type of liberalism that “endorses *internal plurality* based on a nebulous, yet highly threatening, universal foundation” (Rasch, 2000, p. 158, emphasis added). Whether such a foundation is provided for directly by prescribing the good that citizens ought to pursue, or whether it appears indirectly through procedures for reaching consensus, it would mean closure – not practical closure, as in practice one always must decide one way or another,

⁴ “Boundaries (in extended things) always presuppose a space that is found outside a certain fixed location, and that encloses that location; limits require nothing of the kind, but are mere negations that affect a magnitude insofar as it does not possess absolute completeness” (Kant, 2004, p. 103-104, §57).

but the theoretical closure that manifests itself behind liberalism's faith in its own future. By contrast, Schmitt's own theory of sovereignty saw the unity of the state achieved through the sovereign decision; its contingency (the sovereign's continued capacity for decision-making and thus the potential for matters to be decided otherwise) safeguarded by an *external plurality*.

So when it came to international order, then, this plurality could not in turn be unified without threatening the sovereignty of the state, nor could Europe be described as a liberal order without comprising Schmitt's own earlier critique. And yet, Europe *was* both plural *and* an order. This presented a problem; a problem that Rasch (2000, p. 165) terms the paradox of pluralism:

. . . the *paradox* of . . . pluralism . . . [is that it requires] a structure that cannot itself be pluralistically relativized. Pluralism is not self-justifying; hence it requires allegiance. But to what is allegiance owed if pluralism is to flourish?

2.1. *Nomos*

One way in which the question of pluralism's allegiance, or in other words, sovereignty, has been answered, is by pointing to the role of *nomos* as concrete order. Schmitt had begun to revise his own brand of decisionism in his 1928 work *Constitutional Theory* with a discussion of the institutional guarantees of rights. In the 1934 preface to the 2nd edition of *Political Theology*, he then officially introduced a new type of legal thinking to his readership: 'institutional legal thinking' (Schmitt, 1985b, p. 2). With this concept, Schmitt hoped to capture the concretely 'stable content' (p. 3) of legal rules that could be generated neither by universal, unchanging laws (or bureaucratic processes that lack personal input), nor by arbitrary decisions. In the same year, and thus some time before turning to international order and its *nomos*, Schmitt expanded on this idea in *On the Three Types of Juristic Thought*, where he proposed 'concrete order thinking' as an account of the origin of law preferable to both normativism and decisionism.

Norms, Schmitt claimed in *On the Three Types of Juristic Thought* (as he had already done in *Political Theology* (1985b, p. 13) in relation to the sovereign's role), cannot exist without both a conception of what is normal and the concretely existing state of such normality, i.e., a concrete order in the form of institutions such as the estates or the family as well as the typical figures they produce (Schmitt, 2004, p. 55). On the contrary, norms only exist *because* they have been produced by and for concrete order and its presuppositions of what is normal:

A legal regulation presupposes concepts of what is normal, which develop so little from the legal regulation that the norming itself becomes so incomprehensible without them that one can no longer speak of a 'norm.' A general rule . . . elevates itself over the concrete situation only to a very limited extent, only in a completely defined sphere, and only to a certain modest level. If it exceeds this limit, it no longer affects or concerns the case which it is supposed to regulate. It becomes senseless and unconnected. . . . Even if a norm is as inviolable as one wants to make it, it controls a situation only so far as the

situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared (Schmitt, 2004, p. 56).

In relation to this, Schwab comments that in the continued aim to prove Kelsen wrong, Schmitt had turned from his earlier emphasis on the decision to concrete order. With his pure theory of law, Kelsen had attempted to purge law from all concrete social elements, first and foremost the political, and Schmitt's efforts therefore went into showing how law (*Recht*) could not be understood as norms alone. "Schmitt," Schwab (1970, p. 115, footnote omitted) writes, "realized as early as 1928 that his purely decisionist approach was insufficient [for this purpose], and therefore he began then to explore the possibilities of establishing a legal system based on concrete orders." In *On the Three Types of Juristic Thought*, Schmitt (2004, p. 51) then claimed that law could be shown as arising out of, rather than establishing, concrete social orders:

For a law cannot apply, administer, or enforce itself. It can neither interpret, nor define, nor sanction itself; it cannot – without ceasing to be a norm – even designate or appoint the concrete men who are supposed to interpret and administer it. Even the independent judge, subject only to the law, is not a normativistic but rather an order concept, indicating a competent authority and member of an order system of officials and authorities.

The argument against Kelsen Schmitt advanced under the rubric of concrete order was similar to the decisionist argument Schmitt had made previously. In the same way in which any legal order must be said to be subjective if it is regarded as dependent on the friend-enemy distinction drawn by the sovereign, it must be said to be particular – necessarily 'pluralist' (Schmitt, 2004, p. 49) in the sense that different orders would give rise to different rules, and different institutional affiliations to different entitlements – if it is seen as based on social orders. Anyone claiming the priority of objective, universal norms would therefore be proved wrong.⁵ The natural or organic conception of

⁵ The possibilities these claims presented for National Socialism, which sought to establish social and legal hierarchies on the basis of participation in certain institutions, is only too clear, as is the

the origin of law was here all but natural in the universal sense of natural law. Rather, Schmitt sought to unearth a historically and culturally contingent origin of law.

Unsurprisingly, therefore, as far as international order is concerned, it is the concept of *nomos* that on first sight appears most suitable to take the role of sovereign. To be sure, *nomos* is not the same type of concrete order that Schmitt discusses in *On the Three Types of Juristic Thought*. It denotes spatial order (*Raumordnung*) rather than an order of institutions. But it is possible to see *nomos* as a development from Schmitt's early conception of concrete order, not least because the two are linked through Schmitt's intervening concept of *Großraum*, which also denotes spatial order.⁶ Indeed, Schmitt already uses the term *nomos* in 1934, even if only to claim that in Pindar's fragment *Nomos Basileus*, it ought to be interpreted as concrete order and not merely as norm: "One can speak of a true *Nomos* as true king only if *Nomos* means precisely the concept of *Recht* encompassing a concrete order and *Gemeinschaft*" (Schmitt, 2004, pp. 50-51).

In *The Nomos of the Earth*, Schmitt (2003, pp. 336f) then continues this interpretative task, proposing his own vision of *nomos*. After recounting how European sovereign states acquired the status of personhood, Schmitt (2003, p. 147, translation modified) asks about the means and origin of international order: "How is an international legal order and a bracketing of war possible among such equal sovereigns?" It is clear that this question aims at the sovereign power behind the laws that make up the international legal order; who, in other words, draws up these laws and ensures that states comply with them? In answering this question, Schmitt writes that, rather than seeing states as free agents that enter into agreements with each other, one should take into account the binding forces of traditional (religious, economic) dependencies that arise out of the fact of belonging to a '*Eurocentric spatial order*' (p. 148):

effect of this understanding of legitimacy on its victims, who thereby lost the protection of the rule of law in its substantive meaning. See, for example, Schwab, 1970, pp. 116 and 124.

⁶ The link is established by the description of the basis of law as a '*völkisch* order of life and community.' See Schmitt, 2004, p. 93 and 2011, p. 102.

We must bear in mind that the binding power of an obligation of sovereign states in international law cannot depend on the problematic acquiescence of otherwise free sovereigns, but rather must be determined by common membership in a defined space, i.e., must be based on the comprehensive effect of a spatial order (Schmitt, 2003, pp. 224-225).

With this, Schmitt advances spatial order as a candidate for the power that ensures order. Indeed, Schmitt calls *nomos* a ruler (Schmitt, 2003, pp. 72f), something that has been taken up by various commentators.⁷

On closer examination, however, *nomos* emerges as not entirely suited to this role. Schmitt begins *The Nomos of the Earth* by stating that *nomos* refers to “an original, constitutive act of spatial ordering” (Schmitt, 2003, p.78). Land is taken, distributed and used for human production. Each epoch in world history, Schmitt claims, has a specific way of apportioning physical space on the basis of the land’s natural boundaries and the measure of its productive yield, whether through nomadic land usage or through the more permanent and visible divisions of land in settled communities. One imagines the traces left by grazing animals or by the cut of the shovel into the ground, and the delimitation of ownership parcels through fences, walls, and hedges. These processes of apportionment then give rise to an order from the ‘inner measure’ of which “all subsequent regulations of a written or unwritten kind derive their power” (Schmitt, 2003, p. 78).

The space that Schmitt has in mind when he writes of ‘spatial order’ is itself inseparable from *nomos*. Rather than an order established subsequently to space, *nomos* is constitutive of space. This becomes apparent from Schmitt’s phonetic analysis of the German word for ‘space’ (*Raum*), an analysis first published in 1951, one year after *The Nomos of the Earth*. The Old Norse root for *Raum*, Schmitt (1995c, p. 491) writes, meant a spot in the wilderness that had been cleared of trees and readied for human cultivation, a man-made clearing. With the word ‘*Raum*,’ Schmitt continues, the vowels reach from ‘a’ to ‘u,’

⁷ Hooker (2009, p. 25), for example, finds that *nomos* is the “‘solution’ to the problem of pluralism” on the international level parallel to the solution represented by the sovereign on the national level.

creating a ‘tension’ that forms a ‘world.’ The consonants that surround this world – ‘r’ and ‘m’ – mean that it begins with an ‘active approach’ and ends by ‘merging with the horizon.’ But despite this potential, no ‘world’ has been constituted until the word *Raum* is in fact pronounced: “[f]or it remains that a word acquires corporal and bodily reality only through its sound” (Schmitt, 1995c, p. 492).⁸

Space constitutes our world, and without spatial order, Schmitt (1995c, pp. 492-493) appears to say, there would be nothing: “*Space*” . . . is a *world*, and this world is not an empty space and is also not *in* an empty space, but our space is a world filled with the tension of diverse elements.” And further on, quoting Nietzsche: “With strong shoulders *space* stands against the *nothing*. Where there is space, there is *being*” (Schmitt, 1995c, pp. 494, n. 2). This constitutive aspect of *nomos* explains how it can be both process *and* order (which Schmitt (2003, p. 186) also calls ‘spatial structure’): The ‘original, constitutive act of spatial ordering,’ whether understood as the dispensation by nature of her goods or the taking and distribution of land by men, brings into a being a world structured by these acts.

Vismann (1997, p. 60) claims that this ordered world is of a material nature that is inferior to abstract order. She insists on the zonal, pre- or extra-legal characteristic of Schmitt’s *nomos* when compared to the lines drawn by legal order: “*Zone* and *line* are both border-notions. The line is either a purely legal notion, such as the papal demarcation line, or the effect of precise geography. A zonal order, however, comes from filling in, not from exclusion.” Although she points to an important aspect that is missing from Schmitt’s conception of *nomos*, namely that of border, Vismann arguably misunderstands what Schmitt is getting at.

As already mentioned, Schmitt does not regard space as something that precedes order, passively awaiting its imprint or ‘filling in,’ but thinks of space in a correlationist fashion as becoming part of one’s world only through order. Space, therefore, can never be neutral – on the contrary, space, even when it is

⁸ Schmitt (1950, p. 90-91) remarks in this context: “Wonderful is the space-power and the germination-power of the German language. It has achieved that *Wort* [word] and *Ort* [place] rhyme.”

said to be empty, is neither neutral nor indifferent, but a social product, which means that law cannot be regarded as that which draws lines onto a (politically, morally) blank canvas constituted by space. Already in 1939, Schmitt (2011, p. 80, footnote omitted) bemoans the use of ‘space theory’ by legal positivists: “In spite of its name, this assumed the opposite of a concrete conception of space and regarded country, soil, territory, and state territory as a ‘space’ in the sense of an empty dimension of planes and depths with linear borders.”

At the same time, Schmitt contrasts the view that law is made up of commands addressed only to human beings, relegating concrete spatial order to the role of “a contentless general form of cognition”⁹ (Schmitt, 1995d, p. 317), with his own view, namely that law arises from, implements, and serves to revise spatial order. He sees space neither as external to norms and commands issuing from reason partitioned off into a separate realm, nor as a merely formal component of law. Space, in Schmitt’s view, is part of the constitution of law, which in turn produces space on an on-going basis. Law’s substance is inseparable from real space itself, or in more general terms, norms cannot exist separately from concrete order. When Schmitt (2003, p. 98) quotes an ‘age-old maxim’ that “[a]ll law is law only in a particular location,” he thus means more than the fact that law needs to establish the sphere of its own applicability. Without order that is referable to a specific spatially-situated group, there is no law, as it would have been robbed of its constituent elements: “Law is bound to the earth and related to the earth” (Schmitt, 2003, p. 42). To claim the universality of law would merely mean the imposition of order that incorporates a local way of life on others – hegemony.

Furthermore, while it is useful to think about *nomos* as a zone in order to highlight its beginnings in practice rather than in contemplation, Vismann’s view that *nomos* is an order in which “[s]pace and necessity instead of law and definition are the coordinates” (Vismann, 1997, p. 60) would hardly find agreement in this radical form with Schmitt (1995b, p. 578), who regards the

⁹ Nunan (Schmitt, 2011, p. 121) translates this as “a universal form of knowledge and perception without any content.”

distinction between *nomos* and law¹⁰ as being in itself artificial and ideologically motivated. Rather than seeing *nomos* as historically preceding and eventually being overcome by political formations and legal rules, and thus as distinct from law conceived as positive norm or agreement, Schmitt regards all law, political as well as religious and social order, as reflecting the constitutive order of *nomos*: “*Nomos* is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity” (Schmitt, 2003, p. 70).

Schmitt, then, does not intend to outline an alternative to the ordering function of legal norms in his concept of *nomos*, but an alternative to the origin of these norms. It is a matter of being able to explain why definitions used in law go one way rather than another, and who or what decides on them; in other words, a matter of sovereignty. For Schmitt (2003, p. 73), *nomos* is neither abstract law nor “the arbitrary right of the stronger,” but “the full immediacy of a legal power not mediated by laws; . . . a constitutive historical event – an act of *legitimacy*, whereby the legality of a mere law first is made meaningful.”

In highlighting this constitutive origin of law, Schmitt follows the schema of his earlier critique of liberalism. He had found the latter forgetful of “human nature in its dangerousness and endangeredness” (Meier, 1995, pp. 30-35), as it entailed the false belief that the state of nature could be overcome through the social contract, whose alleged effect was to ban the dangers of the state of nature once and for all. Schmitt (1995b, pp. 577-578) saw this tendency of forgetting law’s legitimising measure once order had become secure and predictable (in the case of international order, this legitimising measure was law’s concrete earth-boundedness) as lying at the root of normativism and positivism. By contrast, he himself recognised the threat to life in the state of nature as always emergent and continuously motivating (and thus directly linked to) the establishment of legal order in the form of the sovereign decision.

¹⁰ This is usually expressed as the association of *nomos* as law with *logos*, aimed at signalling the rationality of law, and its distinction from *physis* as referring to all that is ‘natural,’ i.e., drives and passions.

It follows that by excavating the notion of *nomos*, Schmitt sought to establish not an order's necessity vis-à-vis the freedom of choice associated with norms residing in a metaphysical realm (a freedom which itself merely masks the compelling weight of the universal that lurks behind the belief in the possibility of a *right* choice¹¹), but the contingent origin of international law. Law thus conceived would both be grounded (in the international context, literally so) *and* unstable, as order would be practice-derived and could therefore always be otherwise. Thus, it is this order that is 'frail,' rather than, as Vismann (1997, p. 49) claims, order based on abstract rules. After all, it is the latter that rest on universal moral foundations.

Schmitt's *nomos*, therefore, is neither the pre-legal order established in a hypothetical state of nature under the duress of individual necessity, nor abstract law founded on absolute truth, but the spatial aspect of order, its 'inner measure' that always already points to space as its constituent element. In this, *nomos* is 'tangled' in the Latourian sense, constituting neither pure value nor pure fact.

Despite these indications of the sovereignty of *nomos*, the question of a boundary persists. For the fact alone that law is bound to the earth, to space, and thus to concrete order, or in the terms employed in *On the Three Types of Juristic Thought*, the fact that there cannot be norms without something that defines the normality that give these norms their meaning, does not make *an* order out of order. If *nomos* designates the normal, where is the exception, or to ask the same question differently: Who or what safeguards this normality from becoming *any other* normality; who draws the limit that for Schmitt (1985b, p. 13 and 1996, p. 46) is the function of sovereignty?

To be sure, Schmitt (Schmitt, 2003, p. 75) refers to *nomos* as a 'fence-word.' Not, however, because *nomos* fences something in, but because it denotes order made up of individual elements, it is the tension between two parcels of land; in other words, it stretches *across* a fence. The clearing was in Schmitt's view not a fixedly bounded space, "not a closed circle and not a zone" (Schmitt,

¹¹ Galli (1999-2000, pp. 1604-1605) writes that Schmitt did not see any rational basis for the political system of his time; he did not belong amongst the 'fundamentalist thinkers' for whom politics was grounded in "a kind of rationality – whether it is the single man or society, the market or the state or God."

1995c, pp. 492-493), but an order that had no “beginning and endpoints, no lines and demarcation lines” (Schmitt, 1995c, p. 492). A clearing is a type of ordering, not an order. For the latter to arise, it needs a delimited area ‘in which it is what it is’ (Schmitt, 2003, p. 75). Only then can one type of ordering (*nomos*) be distinguished from another.

In relation to institutions, Schmitt indeed identified this problem of the delimitation of order on two levels. On the state level, he wrote, “isolated institutional thinking leads to the pluralism characteristic of a feudal-corporate growth that is devoid of sovereignty” (Schmitt, 1985b, p. 3), i.e., the precise type of pluralism Schmitt was set against. On the institutional level, he thought that a leader figure was necessary to make *an* institution out of a hierarchical structure. Allegiance is and must be shown to the leader, as it is he who safeguards order by arbitrating conflicts according to the institution’s notion of normality.

This function, then, is what the concept of *nomos* cannot on its own provide. *Nomos* denotes an unresolved dialectic, a relation between self-sameness and difference that is not anything itself until it is referred to a third term. It is this third term that must assume the role of sovereign.

2.2. The constitutive outside

According to Schmitt, national law has the function of neutralising internal conflict that could endanger order. The sovereign also expels troublesome elements if these cannot be managed otherwise. For Schmitt, such an enforced peace has its drawbacks, as he sees human beings as naturally antagonistic, their subjectivity dependent on a process of self-distinction from what or who is other. The weakening of such subjectivity can, however, be mitigated by focussing the collective attention of citizens on the external enemy, most effectively so in war. While the transgression of order towards its outside brings instability, it also invigorates order and allows it to gain mastery over itself. Ungureanu (2008, p. 306) thus writes that “. . . for Schmitt, the moment at which ‘concrete individuality’ is realized, designates . . . the pure self-recognition of a homogenous grouping at the highest point of destructive conflict with another grouping.” For Schmitt, identity is therefore dependent on what Mouffe (2005, p. 15) terms, with reference to Henry Staten and Derrida, the ‘constitutive outside.’ Prozorov (2007) similarly describes the Schmittian subject as constituting itself through a continuous ‘act of distinction’ (p. 234) from the enemy or other, who presents an ‘irreducible excess’ (p. 224). “The consequence of this logic,” he writes, “is the rejection of any claim to the ‘self-immanence’ of the social order, of any possibility of a wholly self-sufficient system without an outside” (Prozorov, 2007, p. 224).

Perhaps, then, the sovereignty present in the European order can be traced through an outside or ‘other,’ from which Europe can be said to have distinguished itself. The obvious candidate here is the ‘New World,’ the “‘free’ soil of non-European princes and peoples open for European land-appropriations” (Schmitt, 2003, p. 148). Schmitt (2003, p. 148), for example, writes about the ‘important distinction’ that the difference in status between recognised European sovereign nation states and the rest of the world presented in international law.

The difference between Europe and the New World, however, was not the same kind of difference as between the in- and outside of the nation state, or

in other words, the difference *between* European nation states. It is therefore unlikely that it could have functioned in the same way in which the friend-enemy distinction functioned to delimit and define order on the state level. The reason for this is the effective status of the New World as the state of nature rather than an enemy. If the 'outside' is to function as constitutive, it needs to be someone or something rather than chaos; "[t]he political entity," Schmitt (1996, p. 53 emphasis added) writes, "presupposes the real existence of an *enemy* and therefore coexistence with another *political entity*." The friend-enemy distinction as "the founding event of a political community" (Prozorov, 2007, p. 223) is neither about a particular difference (e.g., in economic terms), nor about difference *per se*, but about alignments, co-operation, and expressions of intention, about 'union or separation,' 'association or disassociation' (Schmitt, 1996, p. 26), 'determined opposition, opposition itself' (Derrida, 1997, p. 85). It denotes the constellation of identifiable entities in relation to each other. Without an identifiable opponent, difference alone cannot be said to be political in Schmitt's sense: "It is an important part of a determinable political idea that a certain nation carries it and that it has a certain opponent in mind, through which this political idea gains the quality of the political" (Schmitt, 2011, p. 87, footnote omitted). War as the culmination of the friend-enemy distinction can take place only between two orders; a conflict between order and disorder is not war, but civil war (Schmitt, 2011, p. 105).

The problem thus emerges with some more clarity: Europe could be distinguished as an order from the rest of the world, but did not, *as Europe*, have identifiable friends or enemies. "Most essential and decisive for the following centuries," Schmitt, (2003, p. 87) writes, ". . . was the fact that the emerging new world did not appear as a new enemy, but as *free space*, as an area open to European occupation and expansion." Only through the identification of the enemy, who could be anyone, but must be *someone*, does the community define who it itself is (Derrida, 1997, p. 106). Europe, however, lacked both the figure of the enemy and of the sovereign who could declare such enmity. The New World effectively constituted the state of nature in which there were no equivalent entities to Europe – at least this is what Schmitt (2003, pp. 92f) suggests, referring to the New World as analogous to Hobbes's state of nature,

where “man is nothing but a wolf among other men, just as ‘beyond the line’ man confronts other men as a wild animal” (Schmitt, 2003, p. 95). In light of the dependence of subjectivity on reciprocal recognition, this, however, meant that even if Europe had wanted to engage with the rest of the world, it could not have done so *as Europe*.

In fact, the same reciprocity applied to the nation state; it also could only act as a state in relation to other states and not in relation to the New World. As Schmitt writes, beyond the line (European) man confronted other men ‘as a wild animal,’ meaning that European man conducted his affairs there not at all like he conducted his affairs in relation to other European states; in the New World, there were only wild animals.¹² And because only the European enemy could be the ‘constitutive outside’ needed for distinguishing the internal order, the subjectivity of European nation states was split into two: On the one hand, states were engaging with the New World in ways non-constitutive of a European, ‘civilised’ subjectivity, while on the other hand they carried out limited war with European enemies. Accordingly, Schmitt only considers the European enemy relevant for his definition of the political. Already in *The Concept of the Political*, the enemy is he who is recognised as legitimate opponent and encountered within the bracketed space of war: “Also the enemy is recognised in the war of the inter-state law of nations as a sovereign state on the same level. . . . Also the enemy has a status; he is not a criminal” (Schmitt, 1963, p. 11).¹³

The distinction between intra- and extra-European opponents may at first appear surprising, given that Schmitt also describes the relation with the (European) enemy in explicitly existential terms,¹⁴ which would place it in the

¹² This includes the European states in their relations with each other, as beyond the amity lines in the New World, Europeans were fighting not only non-Europeans outside the laws of war, but also other European states.

¹³ Therefore, while in war it is not a crime to kill, the enemy may not be treated like a criminal.

¹⁴ For example, in *The Concept of the Political*, Schmitt (1996, p. 27, emphasis added) writes about the enemy: “[I]t is sufficient for his nature that he is, in a specially intense way, *existentially* something different and alien, so that in the extreme case conflicts with him are possible.” In accordance with this definition of the enemy in existential terms, Schmitt then sets out his opposition to all justifications of war other than those referencing an existential threat: “[N]o program, no ideal, no norm, no expediency confers a right to dispose of the physical life of

state of nature equivalent to that assumed to prevail in the New World. Here, the necessity of survival, rather than law, determines all action; each one is their own judge of what necessity demands, all of which is right, as each one has the right to do whatever is necessary for their self-preservation.¹⁵ These characteristics of the state of nature appear to match those of European inter-state relations precisely, given that each state determined for itself the justness of its cause in war, all enemies being considered equally just. War thus mirrored the division between internal morals and external right. However, this would be to mistake the artificial construct of the European order for its opposite, as it was not only characterised by the absence of an overall framework of justice, but also by the limitation of war that ensured that states' existence itself was never threatened. By contrast to the "fight for existence, for life or death" associated with total war, the limited war of the *jus publicum Europeaeum* was "principally partial and measured" (Schmitt, 1995e, p. 389).¹⁶

Schmitt's use of the term 'existential' therefore cannot be taken as referring to existential wars in the state of nature. Its meaning, rather, emerges when considered in opposition to 'normative.' Rasch (2004, p. 12) in this context explains that Schmitt's dismissal of normative justifications should be seen in light of his opposition to attempts at the time to outlaw all war unless it could be

other human beings. To demand seriously of human beings that they kill others and be prepared to die themselves so that trade and industry may flourish for the survivors or that the purchasing power of grandchildren may grow is sinister and crazy. It is manifest fraud to condemn war as homicide and then demand of men that they wage war, kill and be killed, so that there will never again be war. War, the readiness of combatants to die, the physical killing of human beings who belong on the side of the enemy – all this has no normative meaning, but an existential meaning only, particularly in a real combat situation with a real enemy. There exists no rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified" (Schmitt, 1996, pp. 48-49).

¹⁵ Schmitt (1928, p. 143) therefore writes that in the state of nature, one has only rights, no duties.

¹⁶ If Strauss (1996, pp. 89f.) had commented on the *Nomos of the Earth* rather than on *The Concept of the Political*, he would have been less likely to have claimed so apodictically that Schmitt's notion of the political reflected the state of nature; after all, war in the European context could hardly be said to constitute Hobbes's 'war of all against all.'

justified on the basis of universally valid reasons, such as the protection of humanity, or peace. Such reasons would themselves be based on what was thought to be absolute values; values that necessitate action without allowing for an alternative vision of the good. It was the closure of decisions – the end of possible contestation that follows from the reference to a source of truth – that Schmitt wanted to avoid; “the loss of our ability to make political decisions once their contingency is masked by a facade of necessity” (Rasch, 1999-2000, p. 1682). Schmitt thought that war should only be justified by reference to the *concrete* situation that each individual state finds itself in.

The meaning of ‘existential’ as ‘pertaining to concrete existence,’ then, does not automatically entail that all action on the international level should be seen as driven by necessity in an assumed state of nature. On the contrary, in order to preserve an international situation in which no one value or vision of the good gained a predominance that would allow for wars to be seen once again as the enforcement of a (necessary) justice,¹⁷ wars of existence had to be avoided. If international order should be an order in which difference was allowed to persist rather than be sacrificed to shared values, war needed to be limited by laws that ensured that even the defeated state would continue to exist. The only necessity connected to European order, then, was the necessity to prevent necessity, whether in its existential or its truth forms, and it is from this framework that the term ‘enemy’ derives its meaning.

Given that there were no such enemies outside of the European spatial order, the difference between enmity within the nation state (neutralised) and enmity on the European level (*gehegt*) could not be replicated between intra- and extra-European enemies. Europe, although in one sense repeating the management of the intensity of conflict that took place on the national level by limiting wars that took place within it, had no enemies on its outside, and it is therefore not possible to speak in relation to the European order, as in relation to the nation state, of “the irreducible *excess* of order that is nonetheless indispensable for its emergence as its unfounded foundation” (Pozorov, 2007, p. 224). There was no transfer of enmity to a higher level via a sovereign who

¹⁷ This was the view adopted by medieval natural law theory, which regarded war as acts of (natural) law enforcement within an otherwise peaceful state of nature (Neff, 2005, p. 177).

would neutralise enmity within by focussing it on the external opponent, simply a different kind of warfare between the same opponents, now taking place outside of juridical order. In other words, there was no political connection between Europe and the New World other than through individual nation states. In a sense, from the perspective of the European order, the New World did not exist.

It is unlikely that Schmitt would have entirely agreed with this analysis; in fact, in *The Nomos of the World* he gives several alternative accounts of Europe's relation to the New World, which are difficult to present as a coherent story. Firstly, as already mentioned, he describes the New World as constituting the state of nature. Secondly, he appears to suggest that Europe *did* act as one entity when appropriating land in the New World, even if only in agreeing, "precisely *because* they [the nation states] lacked any common presupposition and authority . . . nor any principle of distribution other than the law of the stronger . . ." (Schmitt, 2003, p. 94, emphasis added), that the land 'beyond the line' was free for the taking. Schmitt (2003, p. 134) then proceeds to call this "the common land-appropriation of non-European territory by European powers."¹⁸ In fact, he criticises the opinion of jurists at the time, who regarded land appropriation in the New World as something in which individual European states competed with each other (Schmitt, 2003, p. 130). He objects to this view by stating that, because religious justifications were no longer available after the destruction of the medieval order of the *respublica Christiana*, the only legal basis for land appropriation in the New World was 'discovery,' which in turn could only give rise to legal title from the perspective of the European order as a whole (Schmitt, 2003, p. 131). Such title was only recognised in European international law, and had its legitimacy in the 'superior knowledge and consciousness' (p. 132) of European peoples, who expanded that knowledge through discovery. Schmitt (2003, p. 132) writes:

¹⁸ Presumably it is this that leads Minkinen (2011, pp. 14-15 and n. 37) to suggest that land appropriation played a role on the international level equivalent to the decision of the sovereign on the national level, thereby constituting the decisionist element of Schmitt's international thought.

European discovery of a new world in the 15th and 16th centuries thus did not occur by chance and was not simply one of many successful campaigns of conquest in world history. Neither was it a just war in any normative sense. Rather, it was an achievement of newly awakened Occidental rationalism . . . [that had become] a great historical power.

While this may explain a Euro-centric view of the New World, it is hard to see how such a ‘free’ and ‘empty’ space, waiting to be discovered by Europeans, could have been constitutive of legal order within Europe, even if one assumes there to have been a European agency.

Nevertheless, Schmitt (2003, pp. 97-98) thirdly claims that “[t]he designation of a conflict zone outside of Europe contributed . . . to the bracketing of European wars, which is its meaning and its justification in international law.” Schmitt here appears to suggest that the New World functioned as a pressure valve of sorts for the European order by providing the setting for an unencumbered contest of forces not permitted in this form within Europe itself. It was as if the order of limited war in Europe could only be maintained by externalising unlimited conflict to the space beyond the amity lines: “Everything that occurred ‘beyond the line’ remained outside the legal, moral, and political values recognized on this side of the line. This was a tremendous *exoneration* of the internal European problematic” (Schmitt, 2003, p. 94).

Although this may at first appear like a similar displacement of enmity as from the national to the international sphere, this is not in fact the case. Firstly, as already mentioned above, the European order was made up of the very same opponents that were also fighting each other outside of Europe over land in the New World, and not, as on the state level, of formerly internal opponents *united* against an external enemy. Secondly, if war in the New World stood in a similar relation to the European order as European stood to the nation state; if, in other words, the New World constituted a space of exception analogous to martial law¹⁹ as Schmitt (2003, pp. 98f.) maintains, then it would have needed to harbour

¹⁹ Schmitt (2003, p. 98, translation modified) in fact sees it the other way around, stating that martial law “is obviously based on an analogous conception of an excluded, free and empty space,” but this is of no significance here.

a threat to the European order on the basis of which such an exception would have been justified. In the European context, however, there was not only no sovereign who could make such a decision on behalf of Europe, but it is unclear whether the New World even presented a threat in relation to European order. This threat, surely, did not come from outside of Europe, but was present *within* it in the form of the hegemonic ambitions of nation states.

There are also the limiting characteristics of the state of exception that Schmitt himself points out, such as its temporal and physical limitations,²⁰ and these do not seem to have applied to the New World. Here, there was no law, and everything was therefore truly possible. Although Agamben maintains that it also was a characteristic of the concentration camp that within it everything was possible,²¹ which may have been correct historically speaking (Levinas (1996b, pp. 119-123) also associates with the Holocaust a time and space lacking any fixed points of moral orientation, where institutions no longer existed, nothing was ‘official’, nothing ‘objective’, and ‘all was permitted’), such unlimited possibilities do not characterise Schmitt’s state of exception. The latter does not simply signify a return to the state of nature, or even, as Agamben claims, the establishment of the state of nature in the first place,²² but a state that continues to derive its legitimacy from, and is responsible to, the legal order. The exception, then, must be regarded as belonging to the legal order, and not as something simply ‘abandoned outside.’²³ The New World, however, exhibits

²⁰ “. . . English martial law remained limited: a suspension of all law for a certain time and in a certain space. In terms of time, it began with the declaration of martial law and ended with an act of indemnity; in terms of space, the precise area in which the normal legal order was suspended was specified. Within this context, everything required by the situation was permitted” (Schmitt, 2003, pp. 98-99).

²¹ “It is only because the camps constitute a space of exception - a space in which the law is completely suspended - that everything is truly possible in them” (Agamben, 2000, p. 39).

²² As Rasch (2007, p. 102) explains, “[f]or Agamben, . . . the problem that Hobbes thinks he solves [through the social contract] is in reality the *product* of the political space he creates and the *consequence* of the sovereign ban.” See, for example, Agamben (1998, pp. 35-36).

²³ Although Agamben thinks that the state of exception is anchored *within* law, he conceives of this relation merely in a formal sense. He writes that, through its ‘self-presuppositional’ power (Agamben, 1998, p. 59), law gives rise to the exception by ‘withdrawing’ from it, ‘taking’ the exception ‘outside’ of its scope of application and ‘abandoning’ it there: “. . . [T]he rule,

none of these limitations; it is made up of everything ‘beyond the line,’ and law here is not merely temporarily suspended, but has simply never been applied. On Schmitt’s own account, the New World could therefore not have been an equivalent construction to that of the state of exception.

If the New World thus constituted neither the ‘enemy,’ i.e., Europe’s constitutive outside, nor a space of exception from the European legal order, it could perhaps be characterised as the environment to the system of Europe. In systems theory, the environment comes into being when the system makes its first and most fundamental distinction: that between itself and the environment (Schütz, 1997, p. 257). This distinction, however, does not distinguish pre-existing entities. It is a contingent distinction made by the system, or rather, by what will be the system once the distinction has been made (Luhmann, 1989, p. 18). What matters is control: Within its boundaries (i.e., on one side of the distinction between system and environment), the system is able to perform operations that simplify the complexity of the world, making it meaningful (Luhmann, 1989, p. 12). In this way the system delineates a space in which it can grow. It pulls itself out of the world and into existence (Luhmann, 1989, p. 16), creating at the same time that which in relation to it (and only to it) will be the environment. The environment as a meaningful entity is therefore a ‘self-made construction’ (Schütz, 1997, p. 259) of the system that – like all other systemic meaning – resides within the system. The environment ‘lives’ and ‘dies’ with the system, and cannot be ‘overcome’ by it: “there are precisely as many environments as there are systems” (Schütz, 1997, p. 259).

This could be a description of the relation between Europe and the New World if one assumed the relevant distinction to be that between limited and unlimited war, or in other words between law-governed war and war that takes place outside of any legal framework. But already problems arise, as there seems to be no link between the legal order of Europe and its outside other than that the latter was not included within; war in the New World was not criminal, not was it excepted, it simply took place outside of the European legal order altogether. If anything, the free spaces of the New World functioned to relieve the pressure of

suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule” (Agamben, 1998, p. 18).

the European order, turning on its head Luhmann's distinction between system and environment, in which the complexity of the environment presents for the system "a constant pressure to develop and refine strategies for the reduction of complexity" (Pottage, 1998, p. 3). The contingency of the European order did not arise as a result of "being forced to select" from what the environment presented to it (Luhmann, 1995, p. 25), but from the open nature of conflict within the European order, whose outcome was contingent in the way Luhmann (1995, p. 25) defines the term, namely as something that could always be otherwise and whose "best possible formation" was not guaranteed at any time: neither necessary nor impossible (Luhmann, 1998, p. 45).

It therefore offers itself to view the laws of war not as having put into effect a distinction, unifying one side of the distinction as against its outside, but as having guarded distinctions *already* in place, namely those between the juridical, political and moral systems of each nation state. The law functioned as 'ethics' in Luhmann's sense, namely "as a decision-making process, . . . in the need of social systems to protect themselves from the effects of morality" (Rasch, 2000, p. 148).

It then becomes apparent, that the New World did not play any role in the constitution of Europe at all, the process of which must instead be sought on its inside. In fact, European order presented a reversal of national order in a number of respects. For instance, the representation of Europe by Schmitt as "a sphere of peace and order *ruled by European public law*" (Schmitt, 2003, p. 97, emphasis added) is not entirely accurate, as in Europe, it was not the neutralisation of conflict by law that created order (that was then guaranteed by the sovereign), but conflict itself through which disputes were resolved, and whose protection became the task of law. By contrast to the nation state, which sought to establish internal peace and externalise political relations of war, Europe was protective of its internal conflict as war, and not as discussion or competition.²⁴ The outwards-

²⁴ Schmitt (1996, p. 33, translation amended) thus writes: "Just as the term enemy, the word combat, too, is to be understood in its original existential sense. It does not mean competition, nor the 'purely intellectual' combat of discussion, nor the symbolic 'wrestling' that every human being somehow always carries out, for it is a fact that the entire life of a human being is a

looking sovereign actor that was the *result* of ordering processes on the national level (i.e., internal depoliticisation) was the *precondition* for international order in which enemies confronted each other. What the nation state had on its (European) outside, Europe had within, namely a coexisting unassimilated multiplicity of sovereigns engaging each other in war as a political process. Schmitt's (1938, p. 74) statement that "[t]he state has its order [i.e., unity] within itself, not on its outside" therefore did not apply to Europe, as the latter was made up precisely of the 'difference and otherness' that Ungureanu (2008, p. 306) finds lacking in what he calls Schmitt's 'identity thinking' on the state level.

If this inversion is indeed the case, then European sovereignty would not, like on the national level, need to unify internal order and distinguish itself from the outside; its sole purpose would be to safeguard the difference that already existed within, this difference constituting the sole basis of its unity. In Europe, states clearly found themselves within a balance, but this was not the sort of "balance of opposing forces from which truth will emerge automatically as an equilibrium" that Schmitt (1985, p. 36) ascribes to liberal rationalism's demand for a division of powers. There was no consensus, no reason or truth that would ultimately, even if perhaps only in an imagined future, guarantee unity. Sovereignty did not stand for the creation of order through the neutralisation of conflict, but for its encouragement; not for unity, but for difference. 'Peace' (in the sense of order) *was* conflict.²⁵

If the sovereignty founding this order of war were to be sought in a place analogous to the place in which the sovereignty that founds legal order resides, namely in the middle between the legal and the criminal – Lindahl (2009, p. 59), for example, writes that acts which found the legal order "do not fall on either side of the master distinction between *selfhood* and *alterity*. To the contrary, they introduce the cleavage, both 'othering' and 'selfing' at one fell swoop," and accordingly terms these acts 'alegal' –, and if this distinction at the foundation of the European order is not to be sought somewhere between Europe and its

'combat' and every human being a 'combatant.' The friend, enemy, and combat concepts receive their real meaning especially because they refer to the real possibility of physical killing."

²⁵ Because with enemies, peace as a relation other than a self-relation was possible: "It takes two to make peace" (Stengers, 2005, p. 1003).

outside, but on its inside, then it lies perhaps in the middle between the sovereign states confronting each other in war. After all, the defining aspect of the European order was that all enemies were regarded as just, if not from the national standpoint (nation states would still regard their own cause as just (Schmitt, 2003, p. 157), indeed they had to make a distinction between friend and enemy if they were to be states at all²⁶), then at least as a matter of European law: “The principle of the juridical equality of states made it impossible to discriminate between a state that pursues a just war and one that pursues an unjust war. This would make one sovereign a judge over another, and that would contradict the legal equality of sovereigns” (Schmitt, 2003, p. 167).

While the nation state pushed what it regarded as criminal outside of its remit, thus establishing its sphere of sovereignty, a closed sphere headed by the sovereign and above him, God; a sphere in which justice was always already determined and merely needed to be implemented (a just war, like a trial, is one where the only objective is to correct a transgression of justice), the European order protected these same spheres of sovereignty as its sphere of sovereignty, and did so not by substantively extending the scope of the legal or just, but “by eliminating the question of *justa causa*” (Schmitt, 2003, p. 165), keeping the question of justice open until the outcome of the conflict would determine it one way or another. The function of sovereignty on the European level was therefore one of establishing a closed (procedurally guaranteed to be just) order that at the

²⁶ This had consequences for the understanding of neutrality. According to Schmitt (2003, p. 157), being neutral does not involve a decision: “The *aequalitas* of ‘just enemies’ leads third parties to neutrality. There can be only a decisionist answer: each sovereign state-person decides autonomously concerning *justa causa*. The state that does not decide remains neutral and, vice versa, the neutral state abstains from deciding the justice or injustice of the belligerent states.” Derrida (1997, pp. 126-127), however, picks up on the impossibility of true neutrality understood as the absence of decision: “The very concept of neutrality, as we shall see, is swept away by its own possibility; it contradicts itself and is destroyed in itself. There is a neutrality of the neutral, but it cannot be found politically. One would be friend or enemy, friend and enemy before all possible neutrality, yet that would not keep neutrality from being possible. How is this; how could this be possible?” Perhaps what Schmitt means is that the neutral state does not decide on this particular conflict, as he acknowledges Bynkershoek for having drawn the conclusion that “[t]he neutral party . . . remains a *friend of both* belligerent parties and is obligated to *aequalitas amicitiae* with both (Schmitt, 2003, p. 165).

same time remained substantively open,²⁷ and remained so not onto the ‘other’ but onto itself.

This substantive openness had been known from Hobbes’s state of nature, where everything necessary for one’s own survival and advancement was also said to be just. Now, the state of nature had been exited in favour of an order, without, however, thereby instituting an overarching sovereign who determined what was just and thus sacrificing the order’s openness.

Rather, it was justice itself that was banned. But how does one ‘ban justice?’ Agamben uses the term ‘ban’ to denote the process of excluding someone from the legal order, who thereby finds himself in a negative relation with that order; law applies to that person in no longer applying (“holds him in its ban in abandoning him outside itself” (Agamben, 1998, p. 34)). A ban is a measure of identity and peace used by the sovereign to expel internal enemies, a measure that determines the identity of the legal order by deciding who may be protected by it, and who may not.²⁸ The ban constitutes a movement of exclusion issuing from the sovereign, closing the circle by pointing away from it and moving something to its outside, and through this *abandonment* Agamben

²⁷ Žižek (1999, pp. 18-19) claims that this same openness or, as he calls it, formalism, was already part of Schmitt’s concept of national sovereignty: “This is the main feature of modern conservatism which sharply distinguishes it from every kind of traditionalism: modern conservatism, even more than liberalism, assumes the lesson of the dissolution of the traditional set of values and / or authorities – there is no longer any positive content which could be presupposed as the universally accepted frame of reference. (Hobbes was the first explicitly to posit this distinction between the principle of order and any concrete order.) The paradox thus lies in the fact that the only way to oppose legal normative formalism is to revert to decisionist formalism – there is no way of escaping formalism within the horizon of modernity.” However, the difference to the international level would be that here it is not merely a matter of assuming a *theoretical* distance from the concrete order that the sovereign establishes – after all, Strauss (1996, p. 105) had already made the similar point, but had made it clear that the neutrality occurred at the level of “he who affirms the political” and not the political itself, which always has content –, but that *in practice* no such order is established. On the international level, order was no longer achieved through hierarchy, not even *any* hierarchy, but through the horizontal limitation of different elements.

²⁸ “‘To ban’ someone is to say that anyone may harm him,” Agamben (1998, pp. 104-5) quotes Cavalca.

distinguishes the ban from other forms of punishment that take place within the community (Laclau, 2007, p. 13). In the European order, what was moved ‘outside’ was the parties’ feeling of righteousness, of having justice on their side. This was accomplished not through an eradication of such righteousness as such, but only where it presented itself on the European level, i.e., as part of the limitations placed on war and thus as part of the borders of Europe. Where prisoners of war were taken, the righteousness of either party was suspended by not allowing the prisoners’ punishment, nor allowing the prisoners to re-join the war effort in order to continue fighting for their cause.

The European inter-state order, therefore, “did not,” as Odysseos and Petito (2007, p. 7, emphasis added) write, “seek to end war as such, to abolish or *banish* it from its international relations,” but banned justice or right. It was this banishment by which Europe constituted and defined itself as an order, here that its ‘ethical work’ took place, “those practices in which the subject engages in order to constitute herself” (Pozorov, 207, p. 233), which are also political practices in Schmitt’s sense.

The justness of the order, then, consisted in its banishment of any particular notion of justice, and an injustice would have been committed if one of the states tried to disturb this order by imposing its own conception of what was just or right. It was the limit or fence around the conflict that eliminated the question of *justa causa* on the European level,²⁹ resulting in an order in which no single state could realise its vision of justice and ambition for domination by annihilating the other. The European order depended on this limit, *Hegung*, the bracketing of war.

The fence around order, which, in the national context, had produced the latter through a decision – the excluded middle between the realm of the legal and the illegal, self and other, friend and enemy, inside and outside – in the international context became the legal distinction between war and peace. This distinction guarded both war and peace as separate realms, assuring that one

²⁹ And not, as Schmitt (2003, p. 165) claims, the other way round: “The non-discriminatory concept of war essential to the construction of the international law of the interstate European spatial order and to the bracketing of European war was possible only by eliminating the question of *justa causa*.”

could not become the other without ending itself first. War, in other words, became limited to a specific time (between the declaration of war and the declaration of peace) and to specific parties and participants.

From this, one could be led to conclude that sovereignty in the European order was to be found in the neutrality of states that did not want to participate in any given conflict. Rasch (2004, p. 36), for example, writes that, “. . . unlike the decision made within the state, on the international scene the conflict caused by a plurality of decisions cannot be resolved by a reigning sovereign. If a conflict arises between two sovereign entities, others line up as friends or enemies. Whoever remains neutral becomes the excluded middle . . .” But this would be to mistake the middle between friend and enemy, i.e., the sphere of potentiality for a sovereign decision by a *nation* (at any time, the neutral can declare himself to be taking sides) for the excluded middle that appears from an *international* point of view. Here, the laws of neutrality may exclude neutral states from war, and through that exclusion, may render neutral states symbolic (Schmitt, 2003, p. 297) of an order of limited war in which it is possible to remain neutral (which would not be the case in just wars), but all that happens is that they are thereby assigned to the realm of peace. Given that the relevant distinction on the international level is not the one between friend and enemy, legal and illegal, but between war and peace, neutral states, which do not join wars, invariably find themselves on one side of the distinction rather than in the middle. The areas they make up are “excluded . . . from becoming possible theaters of war” (Schmitt, 2003, p. 248). Hence, the picture Strauss (1996, p. 106) evokes in the context of Schmitt’s critique of liberalism also holds here:

The battle occurs only between mortal enemies: with total disdain . . . they shove aside the ‘neutral’ who seeks to mediate, to maneuver, between them. . . .; they do not deign to notice the neutral; each looks intently at his enemy; in order to gain a free line of fire, with a sweep of the hand they wave aside – without looking at – the neutral who lingers in the middle, interrupting the view of the enemy.

The neutral, once he is pushed out of the way, returns, however, to protect the real excluded middle, the space between war and peace constituted by the laws of war, under which POW camps are situated, its inhabitants in a state of suspension between the war from which they come and the peace to which they will eventually be liberated. In the course of the Second World War, Switzerland and Sweden thus increasingly took on the role of ‘independent, impartial authorities’ as they were often acting as the neutral protecting power for the POWs of both parties (Overmans, 2005, p. 840). In this, they did not, however, become arbitrators of the conflict, nor did they stand between *the parties* to the conflict as such. Rather, by policing the limits of combat, they assured the middle between *war and peace*. It is in this sense that one should understand Schmitt (2011, p. 106) when he writes that strong neutral powers were “the real guarantors and guardians of international law.” Guardians, not because they guaranteed international order like the sovereign guarantees the legal order of the state, but because they guaranteed an international law that *itself* took on the role of the sovereign in the international sphere, governing nation states through war and drawing a limit around war so as to safeguard the European order. Accordingly, Schmitt (2003, p. 74, translation modified) writes that it was the bracketing of war which played a vital role in establishing international order: “[L]aw and peace originally rested on *enclosures [Hegungen]* in the spatial sense. In particular, it was not the abolition of war, but rather its bracketing [*Hegung*] that has been the great, core problem of every legal order.”

Before looking closer at what is involved in the process of *Hegung*, there is, however, one further source of order that needs to be considered, as it, rather than the bracketing of war, is often regarded as the real guarantee and limit of international order: mutual recognition of their status by sovereign nation states.

2.3. Sovereign nation states and recognition

The emergence of the secular nation state in Europe had brought in its wake the decline of religion as the yardstick by which acts of war could be judged. Rising above confessional differences and turning itself into the focal point of external enmity, the state enabled the dissociation of the enemy concept from religious notions of justice, eventually ending confessional wars. The opposing parties in a conflict were now states,³⁰ and with justice no longer being determined in a realm of irrefutable truth, it was up to sovereigns to decide, without the need to have regard to higher law,³¹ when to enter into conflict: “Only the actual participants can correctly recognize, understand, and judge the concrete situation and settle the extreme case of conflict” (Schmitt, 1996, p. 27). This possibility of focussing external enmity on itself was the essence of the state’s political existence (Schmitt, 1996, p. 49).

Given that the state’s ability to determine its friends and enemies autonomously was a function of its ability to secure peace internally, any higher-level sovereignty neutralising inter-European conflict would have curtailed this ability and would thus have directly affected the continued existence of the state as a sovereign entity (Schmitt, 1996, p. 49). The form of the nation state thus also in part determined the form of a pluralist international order. While for Hobbes the religious neutrality of the state had functioned to pacify only relations within

³⁰ This type of state war became known as ‘public’ and could as such be distinguished from other types of conflict: “Everything that can be said about the justice of state wars lay in this new concept of ‘state.’ A non-public war is a non-state war. Not only was it unjust; it was no longer war in the sense of the new international law. It could be anything else – rebellion, mutiny, breach of the peace, barbarism, and piracy – but not war in the sense of the new European international war” (Schmitt, 2003, p. 158, translation modified).

³¹ Indeed, Neff (2005, p. 90) describes the ethos of the period between 1600 and 1815 as having been “relentlessly utilitarian, with little place for sentiment, moralism or ideology”. Sovereigns acted on the smallest pretext for starting a war if it was in their interests; “. . . it was a depressingly materialistic time, with no ideological divides, no great causes, no spirit of heroic self-sacrifice.”

the state, for Schmitt its function extended to inter-state relations, where it prevented just wars (Rumpf, 1972, p. 82):

On the European continent, this new order was created by the state. . . . First, it created clear internal jurisdictions by placing feudal, territorial, estate, and church rights under the centralized legislation, administration and judiciary of a territorial ruler. Second, it ended the European civil war of churches and religious parties, and thereby neutralized creedal conflicts within the state through a centralized political unity. . . . Third, on the basis of the internal political unity the state achieved vis-à-vis other political unities, it constituted within and of itself a closed area with fixed borders, allowing a specific type of foreign relations with other similarly organized territorial orders (Schmitt (2003, pp. 128-129).

According to this view, it is state sovereignty in its decisionist form that is “the linchpin that holds together both the ‘top-down’ homogeneity of the state and the heterogeneity of a structured plurality of states that guarantees the space of legitimate politics” (Rasch, 2004, p. 37). Or in the words of Schmitt, the state was the sole *agency* of order:

[T]he sovereign, European, territorial state . . . constituted the only ordering institution at this time . . . the state was the spatially concrete, historical, organizational form of this epoch, which, at least on European soil, had become the agency of progress in the sense of increasing the rationalization and the bracketing of war (Schmitt, 2003, pp. 148-149).

The argument here is that the mutually recognised right of sovereign states to decide on their cause for war prevented the establishment (or, in the case of religion, the continued authority) of a higher-order sovereignty, and that the laws of war were only effective in limiting wars because they were based on (and re-enforced) this pre-existing *nomos*. With this, political relations between nation states became the ‘guarantee for the lack of unity’ in the European order (Rasch, 2004, p. 41), an order that was a ‘self-organising structure’ dependent on ‘the logic of autonomy and differentiation’ (Rasch, 2004, p. 37).

For Schmitt, mutual recognition of the status of states as enemies indeed constituted the basis for the limitation of warfare: “The removal and avoidance of wars of destruction is possible only when a form for the gauging of forces is found. This is possible only when the opponent is recognized as an enemy on the same level – as a *justus hostis*. This is the given foundation for a bracketing of war” (Schmitt, 2003, p. 187, translation modified).

This coincides with the way in which the relation between mutual recognition and the laws of war is commonly portrayed, namely as one whereby the application of law is directly dependent on the recognition of the equal standing of the opponent.³² In part, this application of law to equals is referable to the professionalisation of violence, which, according to Neff (2005, pp. 87-88), is linked to both a separation of war from other fields of occupation (bringing about, for example, a uniformity in dress that sets the particular occupation of soldier apart from others, with war becoming the exclusive affair of military men marked as such) and to increasing costs for states associated with maintaining large standing armies. Both these factors contribute to the bracketing of war (Oeter, 1999, pp. 45-46); but perhaps most decisive in this respect is the assessment of the enemy’s desert in benefiting from restraint, hidden beneath an ‘objective’ judgement on the latter’s equality.

Schmitt (2003, p. 166) passes such a judgment when he justifies the subordination of Poland by saying that, by the late 18th century, Poland had not yet reached the threshold of statehood. Apparently, because Poland had not yet ‘overcome the stage of feudalism,’ it was not a proper state and could be divided amongst those that were. But then Schmitt also provides a different version of recognition, one that resembles Latour’s description of how reality is established in the laboratory, where a successive number of experiments incrementally reveals the ‘competences’ (Latour, 1987, p. 89) of the tested material. “[R]eality,” Latour (1987, p. 93), writes, “as the latin word *res* indicates, is what

³² See, for example, Stacey, 1994, p. 39. Interestingly, the relation between similarity and the application of laws of war appears to have been subject to circularity early on. Neff (2005, p. 24), for example, quotes Cicero as voicing the opinion that the difference between enemies and ‘piratical savages’ (this difference presumably justifying the harsher treatment of the latter), was that the former respected each other’s religion and customs, while the latter did not.

resists. What does it resist? *Trials of strength*.” Schmitt similarly sees Poland as unworthy of the badge of statehood not simply because it does not have certain easily-recognisable characteristics, but because it did not withstand *the trial* that would prove it had those characteristics: Poland “did not have the power to launch a defensive state war to prevent the divisions and land-appropriations of Polish soil by neighbouring states” (Schmitt, 2003, p. 166). According to this view of recognition, Schmitt regarded only those states as equal that were able to resist the others’ attempts to overpower them: “Each [state] was the equal of the other, because each constituted a component of the system of equilibrium” Schmitt (2003, p. 168).

There is, however, confusion here about what ‘the thing’ in question is that needs to be discovered through a trial of strength. In the context of European wars, there were, on the one hand, the states involved in war, which were subject to recognition. Then there was, on the other hand, the subject matter of the war itself.³³ It is the latter whose identity was revealed through a trial of strength, as victory established a right or truth that could not be established by any other means. The status of the states themselves, however, was not a subject for truth-finding, but for politics, and politics or recognition involves a struggle not for knowledge, but for inclusion, not discovery, but boundary-drawing. The one precedes the other, as in order to have a fight about a subject matter (whose outcome may be determined by resistance), one must first have an opponent with whom to have that fight.

It is, then, surprising that Schmitt (1938, p. 74) draws an analogy between inter-European war and the institution of the duel:

As in a legal order that recognises the duel as a legal institution such a duel has its internal legal guarantees in the fact that certain qualities are presupposed for each duellist, in other words that they are men capable of rendering ‘satisfaction’ who are duelling each other, and that therefore every real duel cannot as such be called just or unjust, so it is equally impossible to speak in

³³ The 12th and 13th century commentators on Roman law translated *causa*, *concilium*, *conventus*, *curia*, *ius*, *mallum* and *negotium* with *Ding* (‘thing’) (Kaufmann, 1971, col. 742-744).

international law of just or unjust war between states, as long as this law is essentially a law 'valid between states.'

As he himself states, the duel works on the basis of a presupposed equality, which, although in practice tied to a certain class of person, does so as a matter of definition rather than of natural traits. After all, the purpose of the duel is to institute formal fairness precisely in order to render any consideration of the actual inequality between the parties redundant. Schmitt appears not to recognise that, if the duel analogy is to hold, the definition of statehood is of no real significance, as it could be moved one way or the other without affecting the nature of the conflict as such. In fact, he himself points to the fact that limited war is possible not because the opponents *are* equal, but because they have equal *rights*:

The justice of war is no longer based on conformity with certain content of theological, moral, or juridical norms, but rather on the institutional and structural quality of political forms, which pursue war against each other on one and the same level, each side viewing the other not as traitors and criminals, but as *justi hostes*. In other words, the right of war is based exclusively on the quality of the belligerent agents of the *jus belli*, and this quality was based on the fact that sovereigns *holding equal rights* pursued war against each other (Schmitt, 2003, pp. 142-143, translation modified).³⁴

If it is true that the distribution of rights formed the basis for the application of law, then, rather than taking the distinction between state and non-state entities as given in defining the threshold of the European order within which the laws of war were applied, one should ask about the process that led to the view that a political entity was or was not included in the definition in the first place. In other words, not where, but *how* was the border around Europe drawn?

As with the social contract (in relation to which Schmitt already in 1914 (p. 107) observed that it presupposes a legal order), recognition as the basis for

³⁴ See also, for example, Schmitt, 2003, p. 167

participation in the political process appears to presuppose a prior political process. Rasch (2004, p. 21) writes:

Conflict is possible as a structure of difference, and such a structure is only possible as a differentiation of unities, a differentiation, that is, of bundled differences. Thus, the specific nature of politics is determined by the specific constitution of opposed unities, making the origin of politics already political, already a battle about what constitutes a politically legitimate unity.³⁵

That the recognition of state sovereignty was a process rather than an acknowledgment of facts, should have been obvious to Schmitt, for whom states were only then sovereign states if they made their own political decisions, i.e., decisions as to who their friends and enemies were. This presupposed that there were other states already in existence, who themselves would need to distinguish themselves from other states in turn, each depending for their own identity and their outward display of statehood on the existence of like states. To each state, recognition by others was vital if it were to exist as such, namely as a state that was sovereign in relation to its internal affairs and could act as a state externally. In this sense, the inside of a state was existentially dependent on its status on the outside. Paradoxically, therefore, independence could only be achieved in dependence on others, a fact that had already underpinned Hegel's account of recognition as achieved through struggle. "And it is thus clear that his [Hegel's] ethical thought means to appeal at bottom to an inescapable, binding form of human dependence which when properly (or normatively) acknowledged

³⁵ In addition to this external struggle for recognition, there is also the internal politics of each state to consider. This is what Žižek (1999, pp. 28f) criticises about Schmitt's notion of the political, namely that Schmitt disregards the internal struggle involved in the formation of a political entity even before this entity can itself act politically: "The clearest indication of this Schmittian disavowal of the political is the primacy of external politics (relations between sovereign states) over internal politics (inner social antagonisms) on which he insists: is not the relationship to an external Other as the enemy a way of disavowing the *internal* struggle which traverses the social body" (Žižek, 1999, p. 29)?

becomes itself the means for the achievement of a collective form of independence” (Pippin, 2008, p. 196).

For Hegel, recognition must ultimately be mutual because the subject is only then truly the subject of its deeds when it can think itself as independent of the natural world, rather than as given up to it in dependence. This necessitates, firstly, that the subject no longer be objectified by the other, but be recognised by him as free. Such recognition overcomes the contradiction between the subject as internally free (“what they [the subjects] essentially are in themselves or according to their Notion” (Hegel, 1971, p. 171, §431)) and externally unfree, i.e., treated by the other as an object. But it also necessitates, secondly, that the other be recognised by the subject as free in return. This is necessary because a treatment of the other in strategic terms as an object implies dependence on him; although objects can be destroyed or assimilated, in which case they either become nothing or one with the subject, they cannot, having no inner life, orientate themselves towards the subject in the way that another consciousness can, and are thus unable to remain outside while *also* being appropriated. The freely directed attention of the other onto the subject in recognition, on the other hand, allows the subject to integrate the *outside* world within its consciousness and think itself central to, and containing, the world:

Only in such a manner is true freedom realized; for since this consists in my identity with the other, I am only truly free when the other is also free and is recognized by me as free. This freedom of one in the other unites men in an inward manner, whereas needs and necessity bring them together only externally. Therefore, men must will to find themselves again in one another (Hegel, 1971, p. 171, §431).

The point in taking the other into servitude rather than killing him in battle, is therefore to prevent his death, which would collapse the tension that constitutes the link between the victor and the vanquished, having arisen out of the fact that each one was thinking himself to be free but treating the other in strategic terms. When one is dead, “. . . the two do not reciprocally give and receive one another back from each other consciously, but leave each other free

only indifferently, like things” (Hegel, 1977. p. 114, §188). Hence the need to prevent the death of the opponent: “For the dead man is no longer anything more than an unconscious thing, from which the living man turns away in indifference, since he can no longer expect anything from it for himself” (Kojève, 1980, p. 14).

However, the submission of the other into a bondsman similarly falls short of the freedom gained through mutual recognition, as the lord “still does not consider [the bondsman] as his equal or as a rational being. . . . [The bondsman] is only an animal, an instrument to satisfy his desires” (Beiser, 2005, p. 188). Until lord and bondsman mutually recognise each other as free, neither has achieved freedom. Or, to transfer this to the area of war between European nation states, until states applied laws of war that prohibited wars of destruction, i.e., laws by which the defeated army could neither be killed nor enslaved, it would not have been possible to speak of mutual recognition of each other as autonomous sovereign states. In the same way in which on the national level law needs the sovereign, on the international level this same sovereign is dependent on law, a law that puts in place a structure that allows for mutual recognition. Recognition, then, is no longer about the acknowledgement of commonality between two otherwise independent entities, an acknowledgement that may then lead to the strategic limitation of each party’s actions, but about the acknowledgement of an essential inter-dependence that prevents independence unless certain limiting rules are applied.

The friend-enemy distinction, which is also the recognition of the enemy as one to which the laws of war apply, is therefore not that which cuts the knot of inter-dependence in the way described by, for example, Prozorov (2007, p. 234), who suggests that it brings into being self and other in one stroke, or by Lindhal, who terms it ‘one fell swoop,’ but the result of a process of recognition through which inter-dependence is resolved into independence only through an acknowledgement of the former. Sovereignty may lie in a distinction, but this distinction itself is dependent on a process of struggle that limits the two emerging entities, thereby uniting them at the same time that they gain their independence.

This is why Schmitt can maintain, in what amounts to ‘a Hegelian exercise’ (Derrida, 1997, p. 162), that the enemy is both “existentially something different and alien” (Schmitt, 1996, p. 27) *and* that he can be ‘only I myself or my brother.’

Who can ever be my enemy? And in such a way, that I recognise [*anerkenne*] him as an enemy, even have to recognise that he recognises me as an enemy. In this mutual recognition of recognition lies the grandeur of the concept. . . .

Who can I ever recognise as my enemy? Obviously only he who can put me into question. By recognising him as an enemy I recognise that he can put me into question. And who can really put me into question? Only I myself. Or my brother. That’s it. The other is my brother. The other reveals himself as my brother, and the brother reveals himself as my enemy (Schmitt, 1950, p. 89).

In this emergence of the enemy as brother through the process of recognition – “by recognising him as an enemy I recognise that he can put me into question” – lies the essence of the European order as a family of states. Recognition of enmity, however, was itself a process of war: “The question [by which the other puts me into question] is no longer a theoretical question, a question of knowledge or of recognition, but first of all, like recognition in Hegel, a calling into question, an act of war” (Derrida, 1997, p. 162).

The laws bracketing European war played a vital role in the process by which states negotiated their sovereign status, rather than being merely a result of its achievement. The ‘legal status of sovereign equality’ was not ‘a fact,’ as Hooker (2009, p. 20) claims³⁶, although he is right in saying that it was ‘not a norm.’ There was no European overarching sovereign who could have decided on the application of such a norm; and yet, this status was true only *within a certain sphere, a bracketed (gehegter) space*, established through the reciprocal application of the laws of war. This space was not a space of reason, characterised by universal law and limited merely as to its current extent, but a space constituted by the participation of concrete entities in limited war. Stepping into this space had a two-way effect: On the one hand, *within* the sphere of

³⁶ “The exercise of sovereignty *is* the international status of the state.”

bracketed war, the parties to a conflict would agree to apply certain limits in fighting each other. On the other hand, by entering the sphere as enemies (rather than foes), the opponents would presuppose themselves (i.e., recognise themselves in their existence *outside* the sphere) as otherwise peacefully co-existing neighbours, whose conflict constituted an exception to that peace. It was, then, not the equality of states within a pre-defined space that provided the basis for the application of the laws of war within Europe, but the application of the laws of war that led to Europe, a space defined by the equality of states.

2.4. *Hegung*

The necessary supplement of *nomos* (concrete order) with that of *Hegung* (the limiting of the relation between the elements of that order) is not a new idea. In the cosmology of Anaximander, formless, indefinite substance was separated into the elements (earth, water, air, fire) at the beginning of the world, each of them acquiring their own region:

The separation of the elements into their several regions was caused by the ‘eternal motion’ – which perhaps we should conceive as a ‘whirling’ motion (*δίῳνη*) of the whole universe, which sifts out the opposites from the primary, indiscriminate or ‘limitless’ mixture, in which they will again be all merged and confused when they perish into that from which they arose” (Cornford, 1957, p. 9, footnote omitted).

The resulting order was thought to be a juridical order in the sense that the disturbance of the ‘equal balance’ (*δίκη* or ‘justice’ (Burnet, 1930, p. 54, n. 1)) between the opposing elements, the ‘predominance of one element over another’ (Burnet, 1930, p. 54) was perceived as an injustice: “The warm commits ‘injustice’ in summer, the cold in winter . . . (Burnet, 1930, pp. 57-58). How, then, was it proposed that these elements would be kept from merging with each other, especially if, as Cornford (1957, p. 9) writes, they were “at perpetual war with one another, each seeking to encroach upon the domain of its antagonist?”

In this respect, it is notable that the characteristic of war did not only determine the relation between elements after they had been separated, but was already part of the ‘whirling motion’ that created and placed the elements within a certain order in the first place. Thus, what was ‘eternal motion’ for Anaximander had previously been conceived of as a process of “division, repulsion, ‘strive”” (Cornford, 1957, p. 18). From the beginning, this war must have been of such nature as to allow the emergence of separate elements; it must have been *limited*. Accordingly, the answer adopted by Anaximander to the question of how the elements would be kept from merging with one another is that in the ongoing process of separation from the infinite substance (Burnet,

1957, p. 58), they each underwent a limitation, as their infinity would have meant the expansion of one at the expense of all the others (Burnet, 1930, p. 53).

Cornford (1957, p. 12) traces this limitation to the term *moira* in Homer and Hesiod. *Moira* first denoted one's part or allotted portion (Cornford, 1957, p. 16), before then becoming the representation of Fate. The latter was not a personified power with a purpose and will, she was "the blind, automatic force which leaves their [men's, the Gods'] purposes and wills free play within their own legitimate spheres, but recoils in certain vengeance upon them the moment that they cross her boundaries" (Cornford, 1957, pp. 20-21). She maintains order, but does not judge; she is natural law in the sense that what she ordains is both necessary and just, but brings into being neither a realm of necessity (she ensures that no one element overpowers the others) nor one that reflects a substantive vision of justice (within each sphere, there is freedom).

Nor is the limitation of each element to its own sphere absolute. After all, 'things' exist that are made up of several elements, to which they eventually return (Cornford, 1957, p. 8). These things can be seen as the wars in which European nation states came together. As Heidegger (1975, p. 177) would later claim in his essay *The Thing (Das Ding)*, things 'gather' or 'bring near' to each other the four elements of the world. In coming together, the elements represent the world, they dance a 'round dance' that joins them into unity *as* world: "The round dance is the ring that joins while it plays as mirroring [the world]" (p. 180). Heidegger then more explicitly implies the restriction placed on the elements in the enclosure, where each one is limited and yet, in Hegelian fashion, gains a new freedom. He remarks that none of the four elements that the assembly, the thing or *Ding*, assembles, "insists on its own separate particularity" (Heidegger, 1975, p. 179). On entering into relation with the other elements, an 'expropriation' happens at the same time as an 'appropriation,' a new 'belonging to one another,' while each one is nevertheless released 'into its own being' (p. 179).

To return to the ancient Greeks, when the process of dividing and dispensing the universe was later attributed to a personal God, a sovereign, it turned into legislating. *Moira* became *nomos* (Cornford, 1957, p. 28). As law, *nomos*, however, did not lose the spatial connotations of *moira* as an order of

spheres, in which each element had its proper place. Derivatives of *nomos*, for example, denote the shepherd's allotted pasture, as well as 'dwelling place,' 'quarters' and 'range;' the term 'law-abiding' "has the older sense of 'quartered' or 'dwelling' in a country, which is, as it were, the legitimate range of its inhabitants" (Cornford, 1957, p. 30, footnote omitted).³⁷ *Nomos* thus became associated with that which is proper to a certain place, with "*normal behaviour* prescribed and enjoined within a given province, and so *custom*" (Cornford, 1957, p. 34); as order it was "dynamic and incline[d] to the positive" (p. 34), while *moira* became that which was 'limiting and forbidding' restricting the regions and thus guaranteeing the order as a whole. *Moira* was "always static, a system rather than a force, [and] lean[ed] toward the negative" (p. 34).

But despite this later distinction between *nomos* and *moira*, it is difficult to entirely separate these two ordering elements, their entanglement foreshadowing the paradoxes that would come to characterise the relation between law and sovereignty. Schmitt recognised this, and even though it is commonly held that his conception of sovereignty in the state of exception would leave the sovereign free to act as he wishes,³⁸ Schmitt in fact describes the role of the sovereign as substantively tied to the legal order. The sovereign is not he who *takes his leave* of the legal order, but he who protects it, *gathering it up* both by guaranteeing its elements and by suspending legal order in an emergency. As a 'border concept,'³⁹ a concept "pertaining to the outermost sphere" (Schmitt, 1985b, p. 5), sovereignty in this sense is not only that which limits order; it provides the condition for its possibility and therefore is a "limit (in the double sense of end and principle) of the juridical order" (Agamben, 1998, p. 15).

This orientation of the sovereign towards the order he delimits becomes apparent in two situations. In times of normal legal order, the sovereign protects

³⁷ When an enemy force 'gives no quarter,' this accordingly does not only mean that no mercy is shown to captured soldiers, exemplifying itself in the fact that they are killed rather than imprisoned (assigned quarters, or a place to stay), but that the existing order of divisions (quarters), in which each party has its proper place, is not upheld. It is a war in which not merely matters of concern, but existence itself is at stake.

³⁸ See, for example, Agamben, 1998 or Gross, 1999-2000.

³⁹ 'Borderline concept' in Schwab's translation, '*Grenzbegriff*' in the German original (Schmitt, 2004, p. 13).

the order – *nomos* – of the political community by neutralising internal conflict (Schmitt, 1995b, p. 581). Zarmanian, (2006, p. 45) writes:

This is the point where the political and the juridical converge. In order to neutralize internal political conflicts, obtaining that they give up armed conflict, the sovereign's decision must guarantee all parties. This guarantee function is the essence of legal order as a concrete order . . . By taking a decision that can avoid a conflict within the group . . . the sovereign respects the asset of power and interest which is necessarily pre-existent in the political unit, but gives it a legal form. That is, the sovereign renders conflicts capable of mediation and non-violent adjudication. The particular shape of a legal order, in which the lawfulness of the sovereign's decision lies, consists, therefore, in its respecting (or establishing) such a concrete order (Zarmanian, 2006, pp. 52-53).

Schmitt (1938), who regarded himself as an heir of Hobbes, thus reads the *Leviathan* not as proposing an absolute right for the sovereign to legislate truth, but as a right to suspend truth claims between citizens in return for the guarantee of their physical safety. In *The Concept of the Political*, Schmitt (1996, p. 46, emphasis added) writes that “the endeavor of a normal state consists *above all* in assuring total peace within the state and its territory.” Even if Schmitt does not follow Hobbes in establishing a right of citizens to make their obedience conditional on the successful protection of their lives by the sovereign (Strauss, 1996, pp. 90f), it is clear that the function of the state is tied to the successful guardianship of order. It is therefore unsurprising that Schmitt finds that it is the *responsibility* for the protection of the order that defines sovereignty, setting the ‘direct’ power of the state apart from the ‘indirect’ power of religious and social associations, which assume no such responsibility (Schmitt, 1938, pp. 116-117).

In times of emergency, the sovereign is similarly bound to order. In Schmitt's account of dictatorship, for example, both the commissarial and the sovereign dictator are constrained in their actions. The commissarial dictator, Schwab (1970, pp. 32) explains, is appointed by the sovereign under the constitution (as *pouvoir constitué*) for a limited period of time and for a specific purpose (e.g., in order to restore normality internally or to fight a war), but ultimately in order to preserve the existing legal order. The sovereign dictator, on

the other hand, is appointed directly by the people (as *pouvoir constituant*) in order to bring about (revolutionary) changes to the existing legal order. In both cases, the orders of the dictator are not expressions of an arbitrary will as in the state of nature (Schmitt, 1914, p. 21), but constitute ‘norms of the realisation of law’ (*Normen der Rechtsverwirklichung*). They are the means to protect, i.e., ‘realise,’ certain ‘norms of law’ (*Normen des Rechts*) (Schmitt, 1928, p. VIII). And of the latter, not any random norm may be suspended by the dictator:

That every dictatorship comprises the exception from a norm does not mean the random negation of any norm whatsoever. The inner dialectic of the concept lies in the negation of that particular norm whose rule is to be safeguarded through the dictatorship in the historico-political reality (Schmitt, 1928, p. VIII).

Norms of the realisation of law thus receive their legitimacy from the legal order they aim to protect. Even the sovereign dictator, in Schmitt’s (1928, p. X) view, “remains a commissary, but due to the particular nature of the non-constituted, but constituent power of the people, a direct people-commissary, a dictator, who also dictates who commissions him, without ceasing to legitimate himself through the latter.” He is sovereign, but only until the conditions are created in which the constituent power of the people ‘can become actual’ (Schmitt, 1928, p. 146). As with the commissarial dictator, this legitimacy represents a legal [*rechtlich*] (Schmitt, 1928, p. 137, 139) bond that prevents the dictator from being completely free. His decrees, therefore, also constitute norms of the realisation of law, even if this is a law that is of the future,⁴⁰ whether in a political, positive-constitutional or historico-philosophical sense (Schmitt, 1928, p. VII).⁴¹

⁴⁰ Cf. in this respect DeCaroli’s (2007, pp. 55) description of the practice of banishment in Aristotle, who writes about it not in relation to those who have committed crimes, but in relation to those outstanding individuals who threaten the established legal order by commanding the respect of others, and who are a law unto themselves.

⁴¹ The problem is that such a sense of commission is not only difficult to enforce in practice, but that by commissioning someone who is not himself bound by law, can just as convincingly be interpreted as the wilful destruction of the legal order by *opening it up* to arbitrariness and individual opportunism, as it can be interpreted as the safeguarding or *closing* of the legal order

Against this background, it makes sense to look for international sovereignty not amongst its outward-looking elements (such as Europe's engagement with the New World, if that in fact existed), but amongst elements protective or *turned towards* the European order, such as the laws that bracket war, the process Schmitt terms *Hegung*.

The term *Hegung* itself – still reflected by the current German phrase *hegen und pflegen*, perhaps best translated as 'to hold and cherish' – refers to the delimitation or containment of something, initially space, in order to protect it from outside influences. The word is still mainly used in its verbal form *hegen*, of which the English form is given in the Grimms' dictionary as the verb 'hedge' (vol. 10, col. 777). Primarily, therefore, *Hegung* refers to a *process* of containing something, not the container or enclosure itself. Gönnerwein and Weizsäcker (1953-1960, pp. 557-558) accordingly list the verbal meaning of *Hegung* before its meaning as the bracketed space itself, i.e., the space won *through* the erection of fencing that is *Hegung*.

From the aim of protection in *Hegung* follows that it is employed as a mechanism in relation to something that is vulnerable, if not precious, and therefore warrants such protection; in forestry, for example, it is young trees that become the object of *Hegung*, and in hunting terms *Hegezeit* means closed season, the time in which animals breed or for other reasons need protection from hunters (Grimm and Grimm, vol. 10, col. 784).

by providing an individual with the powers to defend, invigorate, or develop it (for a defence of the latter view, see, for example, Bendersky, 1983 and 2004; for a defence of the former, see McCormick, 1997 or Scheuerman, 1999). All that stands between Schmitt the Nazi and Schmitt the conservative in this respect is an orientation in the intention of the dictator. In Schmitt's view, it is dictatorship that does *not* orient itself towards the law that would need to be situated in the state of nature: "A dictatorship that does not make itself dependent on a normatively imagined but concretely achieved success, and that hence does not have the purpose of making itself redundant, is arbitrary despotism" (Schmitt, 1928, p. VIII). Although intentions had already in Vattel's time distinguished legitimately necessary actions from illegitimate ones ("[d]evastations and destructions and seizures motivated by 'hatred and passion' however are clearly unnecessary and wrong" (Best, 1980, p. 65, paraphrasing Vattel)), Schwab (1970, p. 36) writes that one thing Schmitt gave to political philosophy was a way of analysing "the types of rule by the intentions of the power holder as reflected in his actions."

Schmitt uses the term *Hegung* to mean the bracketing of intra-European war through the laws of war, *die Hegung des Krieges*. This corresponds to a brief entry in Grimms' dictionary, where *Hegung* is given as the spatial delimitation and *Einfriedung* of the knightly battlefield (vol. 10, col. 777). If *Einfriedung* (or *Befriedung*) means the protection of a space from assaults by the enemy and thus its pacification (Grimm and Grimm, vol. 1, col. 1274), from what would the battle itself need to be protected, given it takes place *with* the enemy? How would the delimitation of the battlefield achieve pacification, other than in the obvious sense of a conflict coming to an end there (the Grimms appropriately refer to the *Friedhof* ('graveyard') as a *gehegter* place (vol. 10, col. 777)?⁴² What, in other words, so deserves care and protection in war, and why should Schmitt claim that 'law and peace originally rested on enclosures [*Hegungen*] in the spatial sense,' or in other words, that order depended on care bestowed on precisely such enmity as it reveals itself in war?

A possible answer to these questions emerges under the rubric of 'containment.' Perhaps it is not war that is to be protected, but the rest of society that is to be protected *from* war. After all, in the national context, it is the sovereign who protects the order from its internal and external enemies. In this respect one could point to another word that developed from the verb *hegen*, namely the adjective *heikel*, which meant and still means 'sensitive.' At first *heikel* was used in the sense of a person being brought up in a careful manner (as in *häckel*), being 'delicate,' 'fastidious' (Grimm and Grimm, vol. 10, col. 101 and 815) and 'thorough' (Kluge, 1975, p. 298), but today it has the sense of a delicate matter that demands handling with care, a matter which, if handled in the wrong way, could lead to potentially uncontrollable and in any case undesired consequences. Here, what can be observed is the transition in language from something that is delicate because it is *protected* (cut off from the outside world) to something that is delicate because of its *connections* to many points, thereby warranting such cutting off. *Hegung* would then refer to the mechanism by which a matter is addressed in such a way as to avoid its escalation. It is in this latter sense that Schmitt's use of the term to denote war's limitation or bracketing

⁴² For the view that war can only lead to permanent peace through the annihilation of the parties, see Kant's joking explanation for the title of his essay *Perpetual Peace: A Philosophical Sketch*.

through the laws of war could be understood. In other words, if *moira* is the limitation of elements to prevent them from engulfing each other, *Hegung* might be the limitation of war to protect order from escalating conflict.

The containment of conflict certainly appears to be one of the aims in the bracketing of war, of which Schmitt (2003, p. 100) says that it leads to war's 'rationalisation, humanisation and legalisation.' Law, in this sense, would serve the limitation of conflict by confining war to a certain sphere of an otherwise peaceful and stable order.

In the European spatial order, containment was in fact achieved on a number of levels. Not only was war aimed at military victory rather than the annihilation of an entire people,⁴³ exempting civilians from combat, but the involvement of third states was also managed, namely on the basis of friend-enemy groupings and the laws of neutrality, which assured that third states were not unnecessarily drawn into the conflict. Soldiers, having attained a new status as representatives of the state, were, furthermore, included in the scope of laws relating to prisoners of war that had previously only applied to a privileged few, and by virtue of which they became, if not excluded from war altogether, at least excluded from further combat once they surrendered. Taken together, these elements of containment meant that conflict could be kept to the minimum necessary to achieve its aims. War was made finite, as potentially open-ended action such as that which may spring from a belief in truth or the desire for revenge was disallowed. Conflict was now restricted to the military establishment and its technical concerns, so that the energies of war were

⁴³ As an early commentator (inconveniently named Schmidt) on Schmitt's *Nomos* remarked: "The war between states only wants to decide on territorial change in favour of one or the other state; it does not want to influence the *nomos*, the sense of ownership culture within the conquered area" (Schmidt, 1963, p. 104). Schmidt (1963, p. 96) explains in this respect that each state was reliant on an existing domestic *nomos* – which he defines, amongst other things, as "the relation of general power *and* concrete place of man in space" (p. 92) – that determined the means and resources the state had available for war. If a state were to challenge not only just the territorial borders of another state, but also that state's *nomos* by declaring total war upon it, not only the balance of the European spatial order as a whole, but each state's own *nomos* would be altered, as the states would need to have recourse to a wider range of powers and make use of more resources than required for limited war.

effectively channelled to a particular sphere within the spatial order, whose ‘rupturing’ (Schmitt, 2003, p. 187) as a whole was thereby prevented. Schmitt (2003, p. 187) thus concludes:

Such wars are the opposite of disorder. They represent the highest form of order within the scope of human power. They are the only protection against a circle of increasing reprisals, i.e., against nihilistic hatred and reactions whose meaningless goal lies in mutual destruction. The removal and avoidance of wars of destruction is possible only when a form for the gauging of forces is found.

However, finding ‘a form for the gauging of forces’ in society in order to protect it from uncontrollable and interminable conflict, and delimiting the sphere of combat accordingly, does not account for the internally-oriented, protective aspect in the meaning of *Hegung*, which primarily protects what it delimits and not its outside. In its dictionary meaning, the encircling movement of *Hegung* is oriented towards that which is encircled, an enclosure for the sake of the enclosed. Something is *gehegt* not so that it may be neutralised, extinguished or expelled, but so that it may grow and be protected. Containment, then, takes on precisely the opposite meaning to that first suggested. Rather than containing war for the benefit of peaceful society, the laws of war protect war, containing society for its benefit.

Schmitt followed Hobbes in regarding human nature as essentially fallible, and the state of nature as that state in which this fallibility can play out without containment in the form of unlimited violence (the war of all against all). Taking the state of nature as a starting point, limited war becomes the realm of the political “in which the effects of fallibility are contained and minimized;” “in which this violence can be contained, limited and redirected, but never abolished” (Rasch, 2004, p. 97 and 99). Paradoxically, therefore, the containment of war contained society, which was not at all peaceful, but threatening in its violence. The ‘fence’ represented by the laws of war would need to be imagined as erected from the inside of war as against its outside.⁴⁴

⁴⁴ This becomes especially apparent when considering that until the 20th century, protections for civilians were limited. Best (1980, p. 145) writes about the period from 1860 to 1910:

The protective aspect of *Hegung* appears clearly when it is considered in the meaning it took in the juridico-political sphere, where from the very beginnings of German legal history up into the 19th century, it came to denote “the formal procedure of opening (court) assemblies” (Köbler, 1978, col. 36). According to Köbler (1978), this procedure entailed, firstly, the spatial delimitation of an area in which the dispute was to be heard, using branches or pegs around which rope was wound. For this, hazel branches were often used, as it was believed that they had magical powers that would protect from lightening and poisonous snakes, and grant fertility and virility (Schmidt-Wiegand, 1971, col. 2013-2015). Secondly, the procedure entailed the question by the person presiding over the assembly whether it were now *Dingtime*. *Ding* (‘thing’) was the term for the case brought or the matter of concern. As with *Hegung*, the word *Ding*, having originally been itself a *Hegewort*, i.e., a word that brackets or encloses – it meant ‘time’ in its Indo-Germanic form of origin and only through an association with the time for assembly came to denote first the assembly and later the dispute itself (Kaufmann, 1971, col. 742-744) – performs a movement from the process of bracketing space to the bracketed space itself and finally its contents.

Thirdly, the procedure entailed the president’s demand for silence or peace. Such a demand is also part of the concept of ‘ban,’ the German word for which, *Bann*, is related to *Hegung*. If one disregards for a moment the meaning of *Bann* in modern (secular) language as “the authoritative [*obrichkeitliche*] order or prohibition issued under threat of punishment” (Kaufmann, 1971b, col. 308), a meaning that can also be found in the verb *verbannen* (‘to banish, send into exile’) that Agamben (1998, p. 58) links to the state of exception, then what emerges is a meaning in which *Bann* is inclusive rather than exclusive, gathering

“Humanitarians who worried more about civilians – and there were some who did – found that there was a larger sympathetic response to the wartime sufferings of combatants; which was not surprising, in a Europe where universal conscription for military service became the rule for all European great powers but one, and national resistance to hostile invasion the realistic expectation of all the lesser ones. In promoting and applauding developments of that part of the law which protected combatants, the manhood of the ‘civilised countries’ was in a strikingly real sense attending to its own interests, and the womanhood was looking after its menfolk’s.”

rather than expelling. In its original form, *Bann* meant either ‘emphatic, ceremonial speech’ or ‘to give a sign.’ As Kaufmann (1971b, col. 308) explains, the word *bannen* (‘to ban’) in its Proto-Germanic meaning as the formal proclamation of peace (*Dingfriede*) at the beginning of an assembly. Here, ceremonial speech acted as a sign, a sign that, even though it was set up against a certain type of enmity (in the same way in which the hazel was used to keep poisonous snakes away), served primarily as a threshold for an order *within*. In this order, it was not he who banned who took the place of the sovereign, but the ban itself.⁴⁵

The demand for silence or peace thus in particular relates to the protective aspect of *Hegung*. The necessity of such a demand, Köbler (1978, pp. 36-37) writes, should be regarded as self-evident for a time when the resolution of disputes was not yet undertaken by judges in court and depended on the ceasing of direct hostilities between the parties thus brought together. Before any conflict could be articulated, which involved its heightening, its bringing-to-the-point, it first had to be suspended. This was not an ordinary peace such as would prevail after the resolution of the conflict, but a forced silencing of the opposing parties. From the point of view of the latter crossing over the threshold, it constituted a limit between endemic war outside and limited war within. Once the conflict was resolved, however, the parties crossed this threshold from limited war within to peace outside. The threshold thus appeared to swap the descriptions of the two realms; what had been (unlimited) war now became a realm of peace, while what had been (relative) peace from the perspective of unlimited war, namely the limited war that took place within the threshold, appeared as an exception from peace in the first place.

⁴⁵ However, even where ‘ban’ was connected to a sovereign, its inclusive aspects are apparent, such as in the sovereign banner (*Banner*), which was used to communicate commands to soldiers in battle where voices could no longer be heard, thus gathering them together in concerted action, the phrase *in seinen Bann ziehen* (‘to cast a spell on someone,’ or more literally, ‘to pull someone into one’s ban’) and in legal compounds of the word, such as *Burgbann* (‘castle ban’), which denoted the radius within which in Ottonian times inhabitants near a castle had both the right to flee into the castle when in danger and the duty to aid its construction (Kroeschell, 1971, col. 315-316).

This explains how this threshold, which was nothing other than the laws of war that also governed prisoners of war, acted as a three-way threshold between unlimited war (persecution), limited war and peace. In fact, war and peace were always contained *within* the threshold in the first place, which brought into being a new order that replaced the distinction between limited and unlimited war with one between limited war and peace. That this order could also be exited, crossing the threshold between limited and unlimited war, was exemplified by Germany in the Second World War, which conducted its war to the West as limited, while at the same time engaging in unlimited war to the East.

For now, however, it is interesting to note how from the point of view of this very threshold of silence, both sides began to look ambiguous – was outside the war that one had left, or the peace one was going to? Was the enemy whom one was meeting on the threshold, he with whom peace was the more primary, more natural, relation, or was he one's eternal foe? Was one still confronting anyone at all if one could no longer tell whether he was a friend, enemy, or foe?

Crossing the threshold meant engaging in limited war. War was now no longer an attribute of an action that could occur at any time, even at the same time as peaceful action, but a distinct, *declared*, and normalised⁴⁶ state that was reached by proceeding through the silence of the threshold. War was separate from peace, also a declared state, and both states were exclusive of each other. In limiting war, the parties, despite their declared hostility, guaranteed each other's continued existence, and thus presupposed that it was at least *possible* to exist side by side, even if perhaps not before the current, and any following, disputes had been successfully resolved.

Peace thus began to appear as the more natural relation, to which war as a distinct dispute about certain matters of concern formed an exception. Limited war thus had the effect of asserting society's essential state as peaceful even and

⁴⁶ Rasch (2004, p. 37, emphasis added) thus writes: "During the hiatus or transition period from universal Catholicism to universal (secularized) Protestantism – and Schmitt dates this period precisely, from 1713 to 1914 – a legal and diplomatic system develops which *normalizes* war, thereby limiting it, and *normalizes* the friend/enemy distinction, calibrating clearly defined friends and clearly defined enemies with clearly defined states of war and peace."

especially when a dispute arose, which then appeared as a secondary matter.⁴⁷ Regarded from a different angle, one could say that by treating disputes as secondary, i.e., by bracketing them, peaceful, civilised society came into being – not as a consequence, but as a presumed point of origin. The process of bracketing war and thus protecting it *from* society,⁴⁸ reached back and behind this society to establish it as peaceful.

War, therefore, became the primary agent of order, which is why Schmitt (2003, p. 187) calls it ‘the opposite of disorder,’ representing ‘the highest form of order within the scope of human power.’ By entering into limited war, the parties would show their allegiance to the principle that war should be limited, thus confirming an order in which a plurality of states could co-exist without the danger of mutual annihilation. This is also the answer that Rasch (2000, p. 167) gives to his own question about the allegiance that ought to be owed if pluralism is to flourish – “[i]t would seem, then, that the structure to which advocates of pluralism should show allegiance, if allegiance must be shown, would be the structure of modernity itself, modernity as pluralist differentiation.”

Schmitt explains in *Die Raumrevolution* why peace was only possible as a result of this order. Having already made a similar argument in relation to the possibility of neutrality if war were to be criminalised,⁴⁹ Schmitt (1995e, pp.

⁴⁷ Neff (2005, p. 138, emphasis added), for example, writes that the contractual school of thought on the laws of war held that “[r]elations during war were determined by the agreement made by the parties *to lay aside their peaceful relations* and resort to arms instead.” Best (1980, p. 129) writes: “The European law of war, it may once again be remarked, had its origins in a religious-based philosophy which exalted peace as the highest and most ‘natural’ condition of humankind and reluctantly accepted war as no more than an occasional, unwelcome and discreditable incident of mortal frailty and wickedness.”

⁴⁸ Best (1980, p. 156), for example, writes that, “[s]o far as prisoners of war were concerned, its [the law’s] language indicates both a keen awareness that among the law’s classical purposes was the prevention of things being done in war which might hinder the return to peace, and an awareness that popular passions were actually pressing for the execution of such drastic and severer war measures as were sure to do that.”

⁴⁹ Schmitt (1996, p. 35) writes: “As with every political concept, the neutrality concept too is subject to the ultimate presupposition of a real possibility of a friend-and-enemy grouping. . . . The politics of avoiding war terminates, as does all politics, whenever the possibility of fighting disappears.”

389-390) here sets out the difference between the possibility of peace in the *jus publicum Europaeum* and in times of total war. He finds that the state between two wars “could rightly be regarded as peace” (p. 389)⁵⁰ only where wars were limited and threatened neither the existence of the opponent nor of the order as a whole. In an era of total war, however, where states seek to annihilate each other, war is neither limited in time nor scope, nor as to its participants; it does *not* assume a prior state of peace, seeking instead to revolutionise the order (hence Schmitt’s title *Raumrevolution*). It may flare up at any time, its all-engulfing nature eradicating the very pre-condition of peace, namely the existence of two (rather than just one) parties. Thus, as long as the prospect of total war persists, the state of nature prevails, in which war is endemic.⁵¹

If international order was shaped by conflict rather than law, this was conflict that was bracketed through the laws of war. Like sovereignty on the national level, the process of bracketing war “was simultaneously the vehicle for peace and war, for life and death” (Kahn, 2013, p. 204). It protected war, but in protecting it, also created the possibility of peace on its other side. In this, Schmitt corrects Hobbes, who thought that only a carefully constructed *legal* order could lead out of the state of nature. At the same time, Schmitt breaks away from the just war tradition, in which peace is assumed to be the normal condition of international relations, with war forming an exception necessary for the purpose of law enforcement. Peace, for Schmitt, is only ever the fragile outcome of pervasive antagonistic relations, even at a time when wars increasingly become the exception to the norm (Schmitt, 1996, p. 35).

It was thus membership of the bracketed space of war, whether directly as one of the warring parties or indirectly as a neutral state or witness, which became the determining factor in deciding on the boundaries of the European

⁵⁰ Although strictly speaking, in Schmitt’s sense of war as order, even the state of war could be regarded as peace, as war effected incremental changes to the order without changing the order as such. It therefore matters little that Neff (2005, p. 90, footnote omitted), for example, points out that the period 1600 to 1815 “. . . was nothing resembling an era of peace. On the contrary, the major European powers oscillated into and out of war with one another, in various ever-shifting combinations, with monotonous regularity.”

⁵¹ In ancient times, for example, the relation with those designated as barbarians was seen as one of ‘endemic conflict’ (Neff, 2005, pp. 25 and 29).

spatial order. If the European spatial order only came into being through the process of bracketing war, the ‘threshold’ of *Hegung*, despite having been described as that, is not to be understood as something that was established and then overstepped in passing from an outside to an inside, but as a process of collection by which the European spatial order as a political collectivity emerged.

This process of collection has been described by Jost Trier, a German linguist contemporary to Schmitt, on whom Schmitt relies for tracing the origins of the word *Hegung* to cultic and religious ceremonies. Trier explains the function and meaning of *Hegung* with the example of the bracketing [*hegende*] character of dance in such ceremonies. When dancers formed a ring and moved in a circle, in this way delimiting an encircled space, the enclosing circle itself [*der hegende Ring*] formed by the dancers constituted “a primeval form of cultic, legal, military and political communal life, all of which belonged together undifferentiable in the old time” (Trier, 1943, p. 233). Ultimately, Trier writes, words denoting and belonging to *Hegung* made up the basis for the word ‘people’ and even for the name of the Germanic people as the “the people of our enclosure [*Hegung*], of our thing [*unseres Dings*]” (p. 244).

Heidegger (1975) similarly views the relation between the elements of the world (states within the European space) and things (wars) as one of gathering. The thing gathers or assembles the elements, bringing the world as a whole into nearness; things are thus seen to ‘inhabit nearness’ (p. 181). However, Heidegger then clarifies that “[t]he thing is not ‘in’ nearness, ‘in’ proximity, as if nearness were a container. Nearness is at work in bringing near, as the thinging of the thing” (p. 178). War did not take place *in* Europe, it *made* Europe.

When, as Trier writes, the collectivity defined itself as the collectivity of the *Ding* or the enclosure, or Europe emerged as space of limited war, this was equally not a matter of relation (as if the ‘we’ existed independently of the enclosure), but of belonging in a constitutive sense. The movement that had led from an initial circle towards its centre was reversed; the bracketing circle enclosed space and at the same time exceeded itself to include, and found on the basis of its own foundations, a larger space engulfing its outside. As Prozorov (2007, p. 223) writes of the friend-enemy distinction, the bracketing circle can be seen as “the founding event of a political community that subsequently recedes to

its borderline as both exterior to its existence and indispensable for its formation.”

In this sense, Europe came to be defined by and as *Hegung*. This explains why Schmitt (2003) writes both about the single instance of war in Europe as “a regulated contest of forces gauged by witnesses in a bracketed space [*in einem gehegten Raum*]” (p. 187, translation modified) and of Europe *as a whole* as this bracketed space: “In a certain sense, European soil became the theatre of war (*theatrum belli*), the enclosed space [*der umhegte Raum*] in which politically authorized and militarily organized states could test their strength against one another under the watchful eyes of all European sovereigns” (p. 142). In another context, Schmitt (2003, p. 55) writes about the ‘*orbis* of the same empire’ as that which determines the law applicable between its members, and this can be understood both as the ‘world’ created by spatial order and the ‘ring’ or ‘circle’ necessary to draw that order together into *an* order. The laws of war in the *jus publicum Europaeum* as the procedure of establishing a bracketed space of war, the ‘theatre of war,’ were therefore not laws emanating *from* what Zarmanian (2006, p. 61) in the European context calls ‘a collective sovereign decision,’ but established this collectivity in the first place.

The way in which the circle was formed was furthermore key to the type of collectivity produced. A circle as a space – and in this case, the collectivity as a whole – only emerges through the distances, linkages and movements of its participating members in relation to each other. European war, both in the imagination and in actuality, was something circling and encircled. Circling, in that the opponents in war, which was now conceived in analogy to a duel, could, despite their on-going concrete situation, theoretically swap sides, as their causes were now seen as equally just.⁵² European war was encircled, in that a circle was drawn around the action, severing it from its connection to truth, separating legitimate targets of violence from illegitimate ones, and distinguishing those who were participating from those who were merely witnessing.

⁵² Stengers (2005, p. 995) writes that the ‘interchangeability of positions’ depends on ‘a common measure,’ which here is the equal justice of the parties. However, as justice becomes meaningless when both parties are said to be equally just, the interchangeability of positions may perhaps also be seen to depend on an *absence* of a common measure.

Both aspects of the circle taken together had the effect of lifting war out of its spatial and moral embeddedness as if onto a stage, even though it remained real war with real territorial consequences (by contrast to debate or theatre, whereby the antagonistic aspect of the encounter is either simulated or subordinated to an assumed possible consensus). Here, war was staged before a European audience of states surrounding it on all sides, an audience turned towards the conflict. The bracketed space of war thus assembled the parties to the conflict, its witnesses, and those who were excluded, forming the centre and focal point of the collectivity.

Every new war re-enforced the existing order, which was fixed to concrete spatial co-ordinates. Schmitt put forward culturally conservative, if not outright racist justifications as to why the laws of war were *not* universal.⁵³ But he also rejected universalism for another reason, which could be termed the possibility of revision: While universal concepts function as facts, and no responsibility is therefore involved in their application, concretely determined concepts can always be determined differently, burdening those who determine their parameters with responsibility for their decisions.

⁵³ For example, in 1939 he contrasts “the universalism of the powers of the liberal-democratic, nation-assimilating West and the universalism of the Bolshevik, globally revolutionary East” with the German *Reich*, which “has the honor of defending a non-universalistic, *völkisch* order of life with respect for the nation” (Schmitt, 2011, p. 102). For a critical analysis of Schmitt’s concept of space and concrete order in this respect, see Vismann, 1997. Bendersky (2004, p. 25) observes that Schmitt’s language during the Nazi period “. . . could be read either way. Traditional cultural conservatives could see in Schmitt’s ideas an attempt to rejuvenate a distinctly German culture and nationality whose identity and homogeneity had been dangerously diluted within modern liberal bourgeois society or by foreign cultural influences. . . . Nazis could perceive his ideas as articulating a variant of the National Socialist racial principle of *Blut und Boden* (blood and soil) as the basis of a unique German nature and identity.” Böckenförde (1984) accordingly observes that Schmitt’s notion of concrete order has attracted criticism from Marxists for being both fascist and bourgeois-conservative: Fascist, because it was appropriated by the Nazis for their purposes, bourgeois-conservative, because, as a way of thinking about law, concrete order thinking stresses the importance of existing institutions as against the establishment of a new social order through the passing of new laws that do not originate from such institutions.

Change was produced through war, which incrementally altered the constellation of states but did not “jeopardize the comprehensive spatial order as a whole” (Schmitt, 2003, p. 186). The time of change itself was circular, being represented by successive calibrating turns of the collectivity. Limited war, repetitively conducted in front of an audience of states, was therefore essential both to the development and the stability of the European order, which was neither spatial nor united by a sovereign person or body, but an order in which the common element was the limitation of war.

It thus becomes clear that the role of the sovereign on the national level was mirrored by the laws of war on the international level. Here, law acted as the neutraliser not of enmity (difference) in accordance with a conception of justice (identity), but of justice in accordance with a conception of difference. As Galli (1999-2000, p. 1605, footnote omitted) writes, “[s]ubstance persists in the modern age not as a legitimizing foundation of politics, but only in a plural sense, as substances fighting one another, where substance persists only as the struggle of enemy substances (that is, nation, parties, ideologies, civilizations, or races).” One question, however, remains: If sovereign is he who decides on the state of exception, where was such a state to be found on the European level?

3. The exception

Until about the middle of the sixteenth century, judicial duels in France took place under authorisation from the king, who, on application by the parties, granted them ‘a closed field’ in which to conduct the fight (Billacois, 1990, p. 18). Such a field, which did not have to be a field as such, but tended to be “roped or fenced off, or even delimited with large stones or a wall of snow” (p. 10), marked a space which the king, even though he was himself in attendance to witness the duel, “in some sense abstracted . . . from his jurisdiction” (p. 13). After all, it was not the king who decided the outcome of the disagreement; he was merely “a guarantor content with ratifying a decision – the victory – which was not his” (p. 13). Later, when the duel had to take place in secret, away from the eyes of the law; when it was no longer excepted *from* law but a crime *under* law, the significance of the duelling ground as one in which the application of law was suspended persisted in language. A second assisting one of the duellists might, for example, “‘take his man off the ground’ – the phrase favoured on these occasions” (Kiernan, 1988, p. 148), rather than agreeing to another shot, thus ending the duel. The duellists would also enforce the space of the duel in other ways, for instance by protecting each other from the reach of the law: “[I]t was proper for each man to do his quixotic best to shield the other from prosecution. They had after all joined in a conspiracy to flout the law” (Kiernan, 1988, p. 149). Kiernan (1988, pp. 145-146) furthermore notes that the codification of the rules and forms of the duel developed parallel to those governing international wars: “The two things were evolving side by side, with men from the same classes taking the lead in both. . . . Monarchs embodied the cosmopolitanism of the upper classes. They might detest and attack one another, but they addressed one another as ‘my brother.’”

For Schmitt, European war as a duel certainly took place in a state of exception from each national order. As Derrida (1997, p. 131) summarises, from the national point of view war is to be understood “as an extremity, as the extreme limit of a state of exception, as ‘extreme eventuality’ (*als extreme*

Eventualität).”⁵⁴ In the state of exception, the legal order is suspended and the sovereign’s decision – he has a ‘monopoly to decide’ (Schmitt, 1985b, p. 13) – acquires legal force. The decision, in other words, becomes the exception to the rule of law.⁵⁵ It is from such sovereign decisions, the ‘double possibility’ (Schmitt, 1996, p. 46) of the state to demand the sacrifice of their lives from its members and to kill (but also to spare) the enemy, that the state of exception *from the international point of view* must take its leave.⁵⁶

Schmitt himself, however, did not comment on the state of exception in relation to international order. Agamben, who comes to regard spaces of exception as an essential component of *nomos*,⁵⁷ explains this omission as follows:

⁵⁴ For support of the view that soldiers generally fight in a state of exception, see Norris, 2005, pp. 269-270.

⁵⁵ The exception making up the state of exception is not so much the exceptional circumstance, but the fact that action is governed by the decision of the sovereign rather than by law. In *Die Diktatur*, Schmitt (1928, p. VI) accordingly identifies the normal to which the state of exception presents an exception as the rule of law, and writes that “every dictatorship comprises the exception from a norm” (p. VIII). In *Political Theology*, Schmitt (1985b, p. 12) again refers to ‘extraordinary or police emergency measures’ and ‘emergency decrees’ when discussing the state of exception (‘exception’ in the English translation, ‘state of exception’ (*Ausnahmezustand*) in the German original (Schmitt, 2004, p. 18)), and not to the factual bases giving rise to them.

⁵⁶ This ‘exception from the exception’ is thus analogous to what Schmitt (1928, p. IX) calls “the other case of a concrete exception” in addition to dictatorship, namely amnesty. The latter is an exception made from the sovereign’s right to violence, itself a remnant from the state of nature that now forms an exception from law within law.

⁵⁷ Agamben aims to add to Schmitt’s notion of *nomos*, which he understands as the combination of localisation (*Ortung*) and order (*Ordnung*), another necessary, although until now unnoticed, component, namely the suspension of order (the state of exception), localised in the form of the camp. He writes: “The link between localization (*Ortung*) and ordering (*Ordnung*) constitutive of the ‘*nomos* of the earth’ (Schmitt, *Das Nomos*, p. 48) is therefore even more complex than Schmitt maintains and, at its center, contains a fundamental ambiguity, an unlocalizable zone of indistinction or exception that, in the last analysis, necessarily acts against it as a principle of its infinite dislocation. . . . The camp . . . is the space that corresponds to this originary structure of the *nomos*” (Agamben, 1998, pp. 19-20).

What Schmitt wishes to establish above all is the superiority of the sovereign *nomos* as the constitutive event of law with respect to every positivistic conception of law as simple position and convention (*Gesetz*). This is why Schmitt must leave the essential proximity between *nomos* and the state of exception in obscurity, even though he speaks of ‘sovereign *nomos*’” (Agamben, 1998, p. 36).

Like Schmitt, Agamben focuses in his analysis of spaces of exception on the national order, without more than repeating Schmitt’s remarks on the resemblance between the free spaces of the New World and martial law, the state of nature and the state of exception. Agamben’s main claim is that without the state of exception, or at least the possibility thereof, a juridical order linked to a territory cannot be established,⁵⁸ and that, paradoxically, the state of exception can make such an order possible only through a ‘dislocation’ (Agamben, 1998, p. 175), dissolving the connection between people, land, and order. He sees the appearance of concentration camps in the late 19th century as a manifestation of an overly strong reliance on, and thus pervasiveness of, the state of exception: “*The camp is the space that opens up when the state of exception starts to become the rule*” (Agamben, 2000, p. 38). However, it is difficult to apply this insight directly to international order for the following reason.

In the order of the *jus publicum Europaeum*, and thus before the time for which Agamben diagnoses the rise of the exception, the exception *as war* had already established itself as the rule of a new international order.⁵⁹ Here, order

⁵⁸ “The banishment of sacred life [to the space of exception] is the sovereign *nomos* that conditions every rule, the originary spatialization that governs and makes possible every localization and every territorialization” (Agamben, 1998, p. 111).

⁵⁹ When Rasch (2003, p. 37) writes that, given there is no higher level sovereignty on the international level that unites and thus homogenises states under a common order, no “meta-sovereign [that] exists to settle disputes,” “conflict becomes the *functional equivalent* of sovereignty, the mechanism by which decisions are made in the extreme or exceptional case,” he is suggesting that war forms the exception to international order. War, however, is not exceptional to international order; on the contrary, it constitutes the agent for change *within* the order, the way in which decisions are made not in the exceptional, but in the normal case. War is the functional equivalent of law, and can therefore not itself occupy the position of the sovereign who decides when this order of war is to be suspended.

itself was made up of exceptionality and disconnection, as to enter war meant to enter a space in which one was no longer subject to the law of the land on which one fought. While in this space, the combatant was subject only to the sovereign decision, the military order, the space was neither a prison like the concentration camp, nor open like the state of nature. It was bracketed – *gehegt* – by the laws of war and thus became an order in its own right. This means that order and dislocation are not by necessity opposed concepts.

But this international order also had itself a state of exception, its spatial form being the POW camp. Like the sovereign on the national level, who was employing the device of *Schutzhaft* ('protective custody') ostensibly for the protection of the individual, but in fact for the protection of the legal order, law on the international level was interning soldiers in POW camps not primarily for their own protection, but for the protection of war. As on the national level, where it was the sovereign who decided (or rather: whoever decided was sovereign) on whether to declare the state of exception that was itself governed only by sovereign decisions, on the international level it was law that drew the distinction that created a space governed only by law.⁶⁰ It follows that the exception is not by necessity associated with an absence of law, but more generally with the absence of the ordering element, which in this case is war.

Viewed at the time of the Second World War, when the *jus publicum Europaeum* was already in a state of dissolution, although its order continued to function between Germany and its enemies on the Western front, what emerges is a surprising picture: At the same time that Agamben's new political order came to prevalence, exemplified by the rise of concentration camps set up to end the lives of millions of people, many more times that number passed through prisoner-of-war camps, the sole purpose of which was to keep them *alive* – and only alive. While the concentration camp was filled by sovereign power,⁶¹ nothing but law reigned in the POW camp.

⁶⁰ On both levels, therefore, the distinction between rule and exception relies itself on one side of the distinction.

⁶¹ Because of Agamben's focus on law's self-suspending force in creating the exception, his analysis loses view of the fact that within spaces of exception, there is an intensification of the relationship with sovereignty. Agamben's analogy with the sovereign ban is unhelpful in this

In both camps, therefore, ‘naked’ or ‘bare’ life, as Agamben variously calls it, was at issue, even if for inverse purposes. While in the concentration camp “*power confronts nothing other than pure biological life without any mediation*” (Agamben, 2000, p. 40), in the POW camp prisoners encountered only said mediation, being excluded from the engagement with and by others, whether in the form of war, persecution, or civilian life.

respect, as it describes merely how what is banned is ‘pushed out’ (Agamben, 1998, p. 18) of the order’s perimeter, rather than captured and killed. Perhaps it is for this reason that DeCaroli chooses the ‘voluntary’ (induced through acts of exclusion from the community) abjuring of citizenship in Roman times as an example of Agamben’s notion of banishment from the legal order over that of imprisonment, pointing to the intensification of the sovereign-subject relation that accompanies incarceration. DeCaroli (2007, p. 63) writes: “Whereas the removal of liberty requires either incarceration or bondage, and consequently an intensification of the relation between the individual and the state, the loss of citizenship alone does just the opposite.” DeCaroli here tries to better exemplify Agamben’s state of exception as ban, not realising that it is precisely the intensification of the relation with the sovereign that characterises the state of exception. Agamben (1998, p. 110, emphasis added) approaches this most closely when he writes that “[w]hat has been banned is delivered over to its own separateness and, *at the same time*, consigned to the mercy of the one who abandons it – at once excluded and included, removed and at the same time captured.” *Ex-capere*, then, as ‘captured outside’ (Agamben, 2000, p. 39) by the sovereign rather than ‘taken outside’ (Agamben, 1998, p. 18) by law.

3.1. Jewish POWs in Nazi Germany

In 1940, the order of the *jus publicum Europaeum* that Schmitt describes in *The Nomos of the Earth* was at the brink of its final dissolution. Dismissing the possibility that the acceptance of Switzerland's neutrality in 1938 by the League of Nations had revived the order's life forces (Schmitt, 2003, p. 250), Schmitt himself did not believe it to have survived into the Second World War, which right from its beginning exceeded the spatial and motivational scope associated with war as a limited contest of forces between European states. Although initially Schmitt had seen Germany's efforts in the Second World War as aiming at its own establishment as the hegemonic power presiding over a European *Großraum*, he soon found to his disappointment that Germany was fighting "a war of racial annihilation in the East and a worldwide sea war in the West" (Schmitt, quoted in Balakrishnan, 2000, p. 240, footnote omitted). When France, which Schmitt had credited more than any other nation with the successes of the sovereign nation state – he regarded it as "the classical political achievement of French spirit" (Schmitt, 1995, p. 198) – surrendered in 1940, this marked for Schmitt the end of an era (Balakrishnan, 2000, p. 236).

And yet, the reciprocal treatment of prisoners of war in accordance with the laws of war both by Germany and its enemies to the West suggest that in this area at least, the old European order had not yet been wholly dissolved. Best (1980, p. 218) gives this account:

[T]he German military (one must distinguish them, so far as facts permit, from the more direct agencies of Nazi rule) seem to have conducted their *Blitzkriegs* of 1940 with much professional propriety, and the desert wars of 1941-3, like the battle of Britain in 1940, are looked back upon by some as fine late flowerings of old-fashioned gentlemanly warfare, each side taking pride in its respect for the rules and the opponent, thankful that there were no wretched civilians or amateurs to get in the way. Right to the end of the second great war, proprieties continued, however unpredictably, to receive some respect in the fighting between Germans and their foes on the European western side.

Not only were the laws of war applied, they were regarded as valid only in relation to those states who had ratified the Geneva Convention. Here, in other words, was a regime that was spatially limited and had not yet, despite the aspirations in this respect of the Convention and the Red Cross symbol, made the transition to universality it would undergo after the Second World War. Although Schmitt regarded the Kellogg-Briand Pact of 1928, which represented the American initiative to criminalise and abolish war, as an important step towards the dissolution of the old European spatial order, particularly together with Soviet attempts to define aggression and aggressor,⁶² its ultimate failure can be seen as contributing to the fact that the European concept of war continued its function of limiting warfare at least in some areas.

Thus, the question whether Germany did in fact comply with the requirements of the Geneva Convention in relation to POWs from the Western front is invariably answered affirmatively. Overmans (1999b, p.14), for example, cites the low mortality rate of both Western allied POWs in German hands and German POWs held in the West in support of his assessment that, “despite great differences according to the detaining power and nationality, . . . *cum grano salis* . . . treatment . . . must have broadly accorded with the laws of war.”

Such compliance is most readily certified for Germany’s relation to Anglo-American prisoners. French POWs were in a slightly different position, as the particular relation between France and Germany after 1940 meant that Germany was able to disregard some of the requirements, compliance therefore being merely partial. Durand (1999, p. 72), who conducted a considerable amount of research on French POWs held by Germany, nevertheless concludes that the German military kept to its obligations under the Convention, even though he also mentions exceptions, such as the use of French POWs to clear the mines of the Maginot Line in 1940.⁶³ He states that apart from these exceptions,

⁶² “Thus, the axis of power that had created the concept of war in European international law became unhinged, as power in the East and in the West came to dominate European states no longer certain of themselves” (Schmitt, 2003, p. 280).

⁶³ Although the relevance of this is not entirely clear, most commentators mention at this point that this breach was reciprocated by the use of German POWs to clear mines on the French Atlantic coast in 1945.

abuses happened only in single cases where individuals acted on their own initiative or where guards lacked confidence and reacted overly strictly to transgressions in order to ensure future compliance with their orders. Examples of such abuses, however, are not hard to come by: Hoch (1992, pp. 232-233) lists various cases of clear harassment and breaches of the Convention, such as the denial of the use of bomb shelters to POWs, while Bories-Sawala (1996, pp. 225f) mentions the employment of French POWs in the arms industry, also in contravention of the Convention. Overmans (2005, p. 763 and 772) adds to this list that provisions and accommodation were, “if not unbearable, at least insufficient,” but nevertheless concludes that, although the fate of the French was a difficult one, their “treatment could not have generally been in breach of the laws of war.”

What is more difficult to determine is why exactly the provisions of the Convention were observed in the case of POWs from the Western front when they were so easily set aside in relation to those from the East.⁶⁴ The technical legal question whether and to whom the law applied – the Geneva Convention of 1929 was binding only between signatories, and the Soviet Union was not amongst them; Poland was, but Germany no longer regarded it as a separate state – would here obscure the fact that there was no arbitrator that could have enforced compliance, and that Germany had a choice in deciding whether or not it would declare itself bound by the Convention.

While reasons to do with reciprocity, propaganda and the need, at least in relation to France, for an atmosphere in which collaboration remained possible certainly played a role, they cannot be said to have been overriding. Hitler clearly had no qualms about endangering the lives of German soldiers in foreign captivity by mistreating foreign POWs held by Germany, as both the Soviet example and various proposals that would have breached the Geneva Convention

⁶⁴ Beyond this duality, Overmans (2005, 876) finds no tendency towards a ‘barbarisation’ in the Second World War. Neither, however, was there an equally high level compliance with the laws of war: “It is rather that after a first unspectacular phase from 1939 to 1941, one can observe a tendency of radicalisation until 1943 – based on the different kind of warfare of the Wehrmacht and the Red Army in the Eastern theatre of war –, which was, however, followed by a regressive development until 1945.”

show.⁶⁵ Indeed, Nazi Germany only completed the ratification of the Convention in 1934 (until then it had not been internationally binding on Germany) for superficial, propaganda reasons (Overmans, 2005, pp. 729f).⁶⁶

Compliance with the Convention out of a belief in its intrinsic value can therefore be to a certain extent discounted, at least in relation to the higher echelons of the Nazi hierarchy. A more likely explanation for the difference in treatment of the various POW groups would be the national-socialist racial ideology, in which Nordic and Western European peoples were situated above those from Russia and Eastern Europe. Soviets were branded ‘subhuman,’ and their army was declared to exhibit a complete lack of the professionalism that was said to characterise Western armies. From the beginning, Hitler had regarded the war on the Eastern front, not as “a formal battle between two states, to be waged in accordance with the rules of International Law, but as a conflict between two philosophies” (MacKenzie, 1994, p. 505, quoting from Field Marshall Wilhelm Keitel’s Nuremberg testimony).⁶⁷ It was not so much a question of finding a reason for *exempting* Soviet prisoners from the application of law – Germany’s claim that it was not obliged to provide for these prisoners under the Geneva Convention because it had not been signed by Russia can

⁶⁵ Overmans (2005, p. 730 and 865) lists a number of examples, such as Hitler’s idea to shoot all air force officers of the Western allies after the bombing of Dresden.

⁶⁶ And in relation to the Hague Conventions of 1899 and 1907, Overmans (2005, p. 729) cites Hermann Göring as having remarked in front of the International Military Court in Nuremberg in 1946 that “if he had been conscious of what kind of fetters the German Reich had bound itself with through the signing of the Hague Conventions, he would have advised Hitler to break with them even before the beginning of the war.”

⁶⁷ Rosas (1976, p. 78, footnote omitted) cites the following response made by General Keitel, Chief of the German High Command, when he was challenged by a subordinate on the explicit order to disregard international law when it came to Soviet POWs: “The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.” As Spoerer (2005, p. 506) writes, “[t]he legal status of Polish, Yugoslav and Soviet prisoners of war . . . was therefore from the point of view of the national socialist regime not bound to the law of nations, but could be determined at its discretion.”

therefore be considered a mere pretext (Stelzl-Marx, 2000, p. 46)⁶⁸ –, but of calibrating their treatment to the prevalent ideology.

However, although this ideology underpinned most national-socialist policies and would therefore also have been a contributing factor in relation to the treatment of all POWs, it does not explain the discrepancy in treatment of POWs from countries whose populations were equally ranked in racial terms, such as France and Italy.

Overmans (2005, p. 732 and pp. 870-871) therefore prefers a motivation he calls ‘national-conservative.’ In this light, the enemies Germany was facing in the Second World War were ranked and treated according to the constellations prevalent in the First World War. These were both cultural and political; while Western European nations were regarded as ‘cultured,’ “Russians,” Overmans (2005, p. 871) writes, “had already in the First World War been rated as culturally backward and were already then discriminated against.” The French, although they had been Germany’s enemy in the First World War, ‘had known how to fight,’ and were therefore more highly regarded than the Italians, who were looked down on as traitors (p. 732). In comparison to some of the other Western European states, however, French POWs received much worse treatment,⁶⁹ which Overmans (2005, p. 760) in turn attributes to Hitler’s wish to make up for the humiliation of Germany by France in 1918. Taken together, these factors meant that Germany’s attitude towards France was one whereby “[t]he French were to learn to regard Germany as victorious power that no one could stop, but that could also be generous vis-à-vis those subjugated” (Overmans, 2005. p. 761).

This explanation suggests not only historical continuity generally, but continuity with the previous war specifically and thus the process of *Hegung*. This connection is in danger of being disregarded when only the racial aspects of German policies during the Second World War are treated as relevant. Looked at

⁶⁸ This view is also supported by Spoerer (2005, p. 503), who in this respect points out that the Soviet Union offered to confirm to Germany even in July 1941 its signing of the Hague Convention of 1907, which was, however, ignored by Germany.

⁶⁹ MacKenzie (1994, p. 499) writes of disciplinary action against the French that was sometimes ‘draconian in the extreme.’

from a different angle, the racial hierarchy cannot itself be separated from historical, cultural and political determinants,⁷⁰ and it is perhaps for this reason that it was never stated in a 'pure form' (Bories-Sawala, 1996b, p. 94). If previous honourable conduct determined the current treatment of POWs,⁷¹ then the relation of Germany to both France and Italy was one still thought of within the old regime of European warfare, even if it would mean that Italy, in German eyes undeserving of the recognition due to European states under that regime, would be excluded from its limitations.

Indeed, the Geneva Convention of 1929 harks back itself to the laws of war in the late Middle Ages, the 'Age of Chivalry.' Here, captivity in war was governed by the chivalrous code of honour. The surrendering knight was bound by honour to the oath that accompanied the contract he concluded with the victor on the battlefield, where the victor had saved his life. The prisoner would now have to pay the ransom agreed: "In the language of the law, the captor's actionable interest in the contract was acquired by the service he performed in saving his captive's life; the prisoner's body, in turn, became the pledge for his ransom" (Stacey, 1994, p. 37).

When the laws of war were first codified in 1907, the function of honour explained their brevity: For officers of largely aristocratic background, who saw themselves bound by a code of honour, the need to comply with the rules that were now drawn up appeared self-evident (Oeter, 1999, p. 50). In 1929, the Geneva Convention did not only make explicit reference to the prisoner's honour,⁷² but also prohibited the employment of prisoners in work directly connected to the operations of war, a provision that mirrors the chivalrous

⁷⁰ In late 1942, the French were categorised by the Chief Security Office of the Reich (*Reichsicherheitshauptamt*) together with Slovaks, Croats, Rumanians, Bulgarians, Hungarians and the Spanish as "non-Germanic peoples, with whom we are allied or with whom we are connected on account of their cultural or pan-European significance" (cited by Bories-Sawala, 1996b, p. 95).

⁷¹ More basically, Overmans (2005, p. 869) claims that the releases/detainments of POWs by Germany in the first place followed the constellations of the First World War: "The then-enemies of Germany were imprisoned, but the soldiers of previous allies or friendly-neutrally minded states were released."

⁷² See, for example, article 3, paragraph 1.

requirement that the captor ought to respect the prisoner's status as a man of honour by refraining from asking him to fight against his liege lord. The Convention also provided that officers should receive their full salary from the detaining power so that they could secure their own food and clothes. Behind this provision, Overmans (2005, p. 736 and 840) explains, was "the image of a captured officer who is not confined in a POW camp, but stays in private accommodation on his word of honour not to flee."⁷³ Officers were, in other words, still treated as if they were the members of the aristocracy they had been when national armies were first established and officer positions were not open to other social classes (Rosas, 1976, p. 49). However, different rules applied to officers also for other, if related, reasons. They were, for example, not only *not* forced to work because this would have contravened the Geneva Convention, but because it was feared that their resistance, due to their presumed education and political awareness, would have constituted a threat to internal security.⁷⁴

Similarly, other factors at times overrode the requirement for honourable treatment in relation to normal soldiers. Bories-Sawala (1996, pp. 218-219 and 276f.), for example, points to German calculations about the use-value of prisoners for work. The French were supposed to be good workers and thus worth treating well, and this was to inform their treatment rather than any misplaced notions of 'excessive chivalry.' But the fact alone that German officials sought to discourage such chivalry shows the framework in which relations were set. Indeed, the notion of honour in relation to the treatment of POWs was of particular relevance to French POWs, due to the personal significance that First World War relations with France held for Hitler. Without

⁷³ Given the fact that officers were detained in POW camps in the Second World War and needed to be provided with food and clothing by the detaining power, this provision was not applied in practice.

⁷⁴ Incidentally, the same did not apply to Soviet and Italian officers; not because they had (or where thought to have) no such education or awareness, but because the lack of protection afforded to them under the Geneva Convention meant they could be oppressed with measures the Germans "did not dare to use against other groups of POWs" (Spoerer, 2005, p. 553). Overmans (2005, pp. 763-764) mentions that French officers were pressured to volunteer for work (for more on this in relation to French NCOs, see section 3.2 below), but that only 5-10% did so, and that they were subsequently looked on as traitors by their colleagues.

any apparent necessity, the latter, for example, personally ordered the release of 60,000 French First World War veterans held captive (Overmans, 2005, pp. 765 and 772), and in 1942 claimed that the escape of General Henri Giraud from the POW camp Festung Königstein, which in Hitler's view constituted an "unworthy answer to the chivalrous treatment [of the French] by the German Wehrmacht," had 'deeply hurt' him (Overmans, 2005, pp. 766-777). Overmans (2005, p. 869 and 871) thus concludes that economic factors did not become primary in determining the release or detention of POWs until 1943, when the need for workers became overriding.

Broadly speaking, then, and while recognising that there were a multiplicity of motivations and considerations behind the treatment of POWs that were sometimes able to exist side-by-side, but sometimes also conflicted with one another, one can distinguish two 'regimes:' One in which the treatment of prisoners was determined, if not by actual compliance with the laws of war, then by the extent in which the laws of war were said to apply, i.e., in which the laws of war were used as the main mechanism by which the relation to the enemy was framed and calibrated. This regime included both those states in relation to which the Geneva Convention was almost fully complied with, such as the United States and Britain, and those in relation to which it was set aside for some reason or other, but whose treatment was still conceived to be justified by some notion of legality, which was the case to some extent for France, and more so for Italy.

The other regime was one in which the laws of war had no purchase whatsoever; where, in other words, considerations of legality played no part in determining how the enemy would be treated, rendering it a relation wholly outside the bracketed space of war. This was most obviously the case for Germany's relation to the Soviet Union, whose captured soldiers were either killed or left to die until the spring of 1942, at which point more than two million had already died. When it dawned on Germany that no quick victory would be achieved in Russia, and that therefore the men deployed at the Russian front were unlikely to return to their civilian jobs in the foreseeable future (Speckler, p. 177), the economic need for the labour of Soviet POWs took precedence over military aims, and it was determined to keep the Soviet prisoners alive (Herbert, 1997, p. 141). However, this did not substantially change the nature of their

treatment, as outright killing was merely substituted with slavery. Living and working conditions for Soviet POWs were dismal, and in the mining industry so bad that Herbert (1997, p. 391) writes of “a continuation of the war of extermination by other means.”

Against this background, it comes as a surprise that Jewish members of the Western armed forces received the protection due to them under the Geneva Convention, thus being included in the first, rather than the second, regime. It seems almost astonishing that Jews, who formed the bottom tier of the German racial hierarchy and were being persecuted with such diligence and such a wide and imaginative variety of means across Germany and the occupied territories, should have been able to openly declare their faith to their captors and on this account receive no more than a certain amount of discrimination. This was due to a number of factors.

Generally speaking, the persecution of Jews as a racial policy constituted an aim that was pursued by Hitler independently of any military objectives and at times even collided with their achievement (Herbert, 1991).⁷⁵ This independence manifested itself in the choice of armed forces that were tasked with the oversight and administration of POW and concentration camps; broadly speaking, it was the SS who supplied the administration and guards for concentration camps, while POW camps were run by the military.

This separation, however, did not remain unchallenged, as the different agencies competed for access to, and control over, the 10m POWs Germany held in total during the war. Overmans (2005, p. 852) writes in this respect that Hitler frequently meddled in the POW administration, but that he was by no means the only one who attempted to do so:

. . . despite the actually required focus on the war effort, the POW administration, too, by no means remained untouched by the power struggles

⁷⁵ An example of the sometimes counterproductive separation of racial from military policies is Hitler’s order to keep starving Soviet prisoners in improvised enclosures in the occupied territories rather than transfer them into Germany and employ them there, so as not to ‘contaminate’ Germany with their presence, even though the Wehrmacht had already constructed camps to receive them (Davis, 1977, p. 627).

that characterised the national socialist system. Whether out of functional necessity or with the intention to enlarge their sphere of influence: the Ministry for Nutrition [*Reichsernährungsministerium*], the Foreign Office [*Auswärtiges Amt*], the organisations concerned with labour deployment – the job centres, the Chief Representative for Labour Deployment [*Generalbevollmächtigter für den Arbeitseinsatz*] or Albert Speer –, but also the security apparatus under Heinrich Himmler, the party, as well as, last but not least, the Ministry for Propaganda [*Reichspropagandaministerium*]; they all tried to take influence on the POW administration (Overmans, 2005, p. 853).

This struggle for power over prisoners of war meant that the Wehrmacht had increasingly less control over their fate. To the extent that other agencies were able to show more success in, for example, catching escapees, and were able to argue on this basis in front of Hitler that they were more competent than the Wehrmacht when it came to the administration of POWs, the Wehrmacht had to tolerate these agencies' involvement (Overmans, 2005, pp. 852f). This puts any claim that the Wehrmacht acted out of purely moral motivations when it defended the POW administration against encroachment by other agencies into perspective – power and influence were often fought over for their own sake.

And yet, it is the treatment of Jews in particular, or rather, the difference in treatment that opened up between Jews held in concentration camps and those who were POWs of Western forces, which, according to Durand (1999, p. 73), is the best example for the fact “that the German armed forces by no means followed national socialist principles in this case, but complied with the general rules of the laws of war.” Indeed, the general lack of co-ordination between Hitler's racial policies and his military aims to some extent allowed the military to concentrate on its own interests and priorities, which precluded the adoption of the motives and actions of the paramilitary organisations of Nazi Germany. Even when the Wehrmacht was willing to support a war of annihilation, as it did on the Eastern front, it thought it counterproductive from the perspective of discipline and morale to let its soldiers kill outside of combat (Overmans, 2005, p. 858). Such interests were not necessarily morally honourable; for example, the resistance of the Wehrmacht most often related merely to having to do the ‘dirty work’ of murder itself, and it sometimes achieved this objective of non-

involvement (when it could, which was not always the case) by trading in control over part of its area of competence to the security forces, with well-known disastrous consequences (Overmans, 2005, pp. 858-859).⁷⁶ Nevertheless, these interests fell squarely within the organisation and limitation of war thought to be conducted for tangible military aims set out in advance. As Best (1980, pp. 23-24) writes:

Few bodies of trained men are more intensively trained to do what they are told to do, and *not* to do what they have been told *not* to do, than professional soldiers. And they are thus instructed, not only because it is a condition of their success in their particular business, but also because it is a condition of their so conducting that business as not to mar the end for which that business was undertaken. . . . Nations call armed forces into being to become their experts in violence, indeed; but it is controlled violence, directed to politically-determined ends . . .

In other words, the mind-set needed for compliance with the laws of war could not easily be combined with a racial ideology that would do away with all aims and limits, whereby the killing of the opponent in war could no longer be distinguished from the killing of the opponent in peace, as all rules were now sovereign decisions. For military commanders, the freedom to kill in war was only thought to be possible because it was limited to combat, i.e., because laws forbade the killing outside of combat, and to continue to kill, for example, Jewish POWs once combat was over would have meant not only the eradication of this limit, but also the dissolution of the category of war as they knew it. The Wehrmacht did proceed some way along the path of transition from one type of war to the other on the Eastern front, but in the West, a limited war continued to be fought and fought for.

⁷⁶ There are a few examples one could mention here, the perhaps best known being the activities of the *Einsatzgruppen* at the Eastern front.

Within this framework of limited war, concerns around reciprocity⁷⁷ played a prominent role particularly in the department responsible for POW administration. This department's remit included both foreign POWs in German hands and German POWs in the hands of Germany's enemies, and it was therefore the department in the Wehrmacht that most often made itself strong for a compliance with the laws of war (Overmans, 2005, p. 867).⁷⁸ Conscious attempts were made to observe the requirements of the Convention and resist orders for maltreatment of POWs that would have come to the attention of those nations (MacKenzie, 1994, p. 504-505). Such attention would have been likely, given that the bureaucratic mechanisms of the Convention entailed the notification of each prisoner's presence in German hands to the International Committee of the Red Cross and the protecting power, rendering the deportation of Jewish prisoners to extermination camps difficult without anyone's noticing. Although this rationale appears least convincing for France, which was holding no German POWs in the first years of the war,⁷⁹ it was as a Western state included in Germany's general attitude of compliance with the Convention; its soldiers had been recognised as being of equal status and therefore attracted the professional solidarity of German army personnel. Durand (1982, p. 324 and 354) thus writes of an 'effective respect of the quality of Jewish soldiers' by the German *Wehrmacht* despite the occasional bullying of Jewish POWs.

In summary, one can say that the actions of the Wehrmacht reached from a protection of POWs in line with the Convention in the West to an active involvement in extra-legal killings in the East, via the in-between steps of allowing the security forces free reign in deciding on the fate of POWs and

⁷⁷ Lador-Lederer (1980, p. 72) indeed holds the view that "only in those rare cases of Jewish prisoners of war of the nationality of a belligerent who had the power to enforce such treaty protection, were Jews given the protection provided by international law."

⁷⁸ Overmans (2005, p. 867) writes that by contrast to the department responsible for the administration of war imprisonment, decision makers in the Chief Command (*Oberkommando*) of the Wehrmacht were supporting, if not even propagating, some of the regime's criminal policies, and that it was only in the end phase of the war that the generals persuaded Hitler not to follow through some of his most radical ideas as to the use of Western POWs.

⁷⁹ This changed, however, once the free France began to hold German POWs in 1943 (Overmans, 2005, pp. 841-842).

effectively handing Jewish POWs over to the SS.⁸⁰ But looking only at the treatment of Western POWs, the distinction between limited war and the various wars of persecution and annihilation is clear: The Wehrmacht looked after the POWs, and this included their protection, including Jews, from the security forces.

Admittedly, Hitler transferred the command over all POWs on 1 October 1944 from the jurisdiction of the military to that of the SS,⁸¹ which appears to blur this division of their respective competences. The claim made in this respect in a party circular from late 1943 was that the military had been too lenient in the treatment of the POWs, that it had even developed into their ‘protectors’ and ‘carers’ (cited by Bories-Sawala, 1996b, pp. 108-109, n. 61). This allowed new persons and institutions to take part in policy making regarding POWs, leading to a radicalisation of, if not the actually carried out policies, then at least the policy proposals (Overmans, 2005, p. 864-865). However, this in itself is thought not to have worsened the situation of POWs significantly (Spoerer, 2005, pp. 508-509). POW camps continued to be guarded by the Wehrmacht and remained an institution of the army.⁸²

Against all expectations, some of the orders issued under the new command even raised the living conditions for some of the worse-off prisoners (Overmans, 2005, pp. 863-864), providing little support for the views of those who, like Karner (1999, pp. 388f), claim on the basis of this transfer of responsibilities that the legal framework governing POW camps ultimately failed to substantively distinguish them from concentration camps. On the contrary, it

⁸⁰ For example, over 60,000 Polish Jewish POWs were transferred to concentration camps by the SS after their release from war imprisonment. Only a few hundred survived (Spoerer, 2005, pp. 504-505).

⁸¹ This was an effective rather than a formal transfer, as Germany did not want to risk objections to such a change by the allies (Overmans, 2005, pp. 862-863).

⁸² Ricoeur (1998, pp. 19-20) remarks quite categorically that “. . . the German army had always succeeded, against the SS, in retaining control of the prisoner-of-war camps. The SS never commanded these camps, and for this reason it was possible for [Roger] Ikor and Levinas not to have to worry. I know that a certain number of Jews were sent into separate camps, sometimes with prisoners reputed to be subversive; but I have not read that these Jewish prisoners who were moved were made to suffer harsh treatment.”

was precisely the legal framework, understood not only as the legal, but also historical space in which actors thought themselves as operating, that determined the difference between life and death. To recognise this, one only needs to consider the prospects of survival associated with each type of prisoner: 2-3%⁸³ mortality rate for those protected by the Geneva Convention (including Jews), 10% for Italians (who were not classified as POWs and were therefore unprotected), over 60% for Soviet POWs (also unprotected) (Overmans, 1999b, p.14), and almost certain death for all Jews in concentration camps.

In addition to the role the Wehrmacht played in the protection of Jewish POWs, political factors may also have played a certain role. For example, France's resistance when it came to the deportation of French Jews from its territory to concentration camps (Hilberg, 1985, 2:654) may have contributed to the protection of French Jewish POWs in German hands. Hilberg (1985, 2:627) accordingly finds that it was for political reasons that Western POWs of the Jewish faith largely escaped persecution.⁸⁴

This does not mean, however, that Jewish POWs were not subjected to particular discrimination and harassment.⁸⁵ Durand (1999, p. 73), for example, writes:

For sure, the Jews were particularly harassed. In most cases they were assigned to those barracks or special commandos in the camps that had to carry out the

⁸³ As Overmans (2005, p. 772) points out, most of these deaths occurred in the beginning and end phases of captivity; at the beginning, due to those dying who had entered captivity already wounded or sick; at the end; due to allied bombardments and the final battles that took place in Germany itself. Bories-Sawala (1996b, p. 110) writes that the conversion of conditions for POWs and foreign workers in the end phase of the war was due to the German exclusive focus on productivity at that time, if necessary to be achieved through force, combined with increasingly inadequate accommodation and the allied bombardments.

⁸⁴ Those who had joined a Western army after emigrating from the Reich were an exception, and so were foreign Jews that had volunteered for the French army; the former, on falling into German hands, were killed on the spot, while the latter were transferred to the camp at Burg Hohenfels or into concentration camps (Bories-Sawala, 1996, p. 241).

⁸⁵ Although in this, they were not alone. Bories-Sawala (1996, pp. 383-384), for instance, describes the harassment of French catholic priests due to a 'profound distrust' of them by the German authorities.

most humiliating work. Nevertheless, it is most astonishing that French Jewish POWs, who were during the entire length of their imprisonment put up in the heart of the Third *Reich*, escaped the Holocaust, while their families remaining in France lost their lives. . . . This is certainly one of the most surprising paradoxes in the way the NS-regime functioned and in the behaviour patterns of the population or the decision makers that were subjected to this regime.

There are also accounts that Jewish inmates were tasked with looking after those that had fallen ill in epidemics without receiving prior vaccinations (Stelzl-Marx, 2000, p. 77, Durand, 1982, p. 354, Berg, 1990, p. 201), and that the special work units or ‘commandos’ to which Jews were assigned were ‘in most cases’ disciplinary in nature (Berg, 1990, p. 201), or that Jews simply had to carry out especially strenuous work (Durand, 1982, p. 354). Levie (1977, p. 175 n. 324, reference omitted) states that “Germany attempted . . . to separate Jewish prisoners of war from the other prisoners of war of the same nationality, with the admonition that ‘in all other respects’ they were to receive treatment identical to that received by their fellow nationals.” As an exception to this, Levie (1977, p. 299, n. 163) notes only one instance of discrimination, in which the prison command refused to deal with a prisoners’ representative once they found out that he was Jewish. Bories-Sawala (1996, pp. 239f) concludes from a survey of the materials available to her that it is not possible to speak of an equal treatment of non-Jewish and Jewish POWs, even if in the main, the German Wehrmacht did respect the rights of Jewish prisoners. One of the ways in which Jews were discriminated against was by not allowing their release, as happened, for example, with Jewish doctors during the *Relève des médecins* in 1943, although any benefits of such a release would have been doubtful given the treatment of civilian Jews in France (Bories-Sawala, 1996, p. 241 and n. 95). Indeed, the majority of undisclosed Jewish POWs from the Alsace and Moselle preferred continued war imprisonment to the repatriation offered to them in 1940; not a surprising choice given that the return to civilian life and subsequent discovery as Jews would have meant their certain deportation to concentration camps under Nazi racial laws (Durand, 1982, pp. 353-354).

In summary, it is fair to assume that most Jews were held separately from the rest of their fellow countrymen, and that, where they were required to work, they were often subjected to discrimination and harassment. Jewish officers who were not required to work, however, appear to have provided less opportunity for such harassment,⁸⁶ and for officers, NCOs and soldiers alike the Geneva Convention can be said to have been complied with overall.⁸⁷ This had the consequence that, as Lador-Lederer (1980, p. 71) expresses it, “for the Jewish prisoner of war of a Western country who benefited from the provisions of the Geneva Convention of 1929, his sufferings measured against yardsticks of Jewish martyrology, were a matter *de minimis*.”

Jewish POWs therefore found themselves part of a legal and historical space that differed from the other camp spaces present in Germany at that time.⁸⁸ Although they shared this characteristic with other Western POWs, the protection they experienced took on a special significance in the face of the ideologically motivated persecution of Jews all around them. They thus were excluded from two exceptions of national order: the war and racial persecution.

⁸⁶ For accounts of Jewish officers’ war imprisonment experience, see, for example, Berg, 1990, pp. 204-206.

⁸⁷ This is also the conclusion Overmans (1999, p. 503) reaches, who writes that while Jews in German war imprisonment were discriminated against, they were not in danger of their life.

⁸⁸ And of these there existed an astonishing amount, governed by a complex bureaucracy. Apart from POW camps for members of Western and Eastern armed forces, of which alone there were almost 250 by the end of the war, each with countless satellite work camps, in total numbering in their thousands (Overmans, 2005, p. 853), there were prisons, concentration camps (*Konzentrationslager*), special camps (*Sonderlager*), workers educational camps (*Arbeitserziehungslager*), security camps (*Sicherheitslager*), penal or punishment camps (*Straflager*, *Strafgefangenenlager*), work camps (*Arbeitslager*), civilian workers camps (*Gemeinschaftslager*), housing units (*Wohnlager*) and civil internment camps (*Internierungslager*), each of them further subdivided by the gender, nationality and offences of their inmates, the law governing the internment and its expected duration or permanence, and many of them with associated smaller work camps (for details, see Weinmann, 1990). The categories of those interned in all of these camps far exceeded this list, making for a confusing array of people, regulations and spaces. Just the category of ‘foreign worker’ had so many subcategories, the rules underlying some of which were so complicated, that they were barely understood at the time and – in the case of *Ostarbeiter* (‘worker from the East’) – cause confusion until today (Spoerer, 2005, pp. 497-498).

3.2. Work

One of the main features that can be said to have distinguished Western POWs from other camp inmates in Germany at the time was that they were to be repatriated after the war and in themselves played no further part in Germany's future. The POW camps were holding camps with the simple function of keeping prisoners alive until the end of the hostilities. However, this is not to say that holding prisoners of war was of no use to Germany. Apart from their use as hostages – both for influencing the enemy's treatment of one's own captured soldiers⁸⁹ and for influencing the enemy's actions generally⁹⁰ – Davis (1977, p. 624) notes the following benefits of capturing enemy prisoners:

Capturing prisoners prevents them from inflicting damage on the captor and reduces the total fund of manpower and skills available to the enemy. Prisoner counts are also useful for calculating one's military success, for gauging the morale of enemy forces, and of course for deciding on promotions to higher ranks. POWs produce a high yield of military intelligence.⁹¹

⁸⁹ Davis (1977, pp. 624-625), for example, writes, "POWs are by nature hostages, even though international agreements forbid reprisals against them. The captor state may nevertheless modulate its benevolence according to enemy treatment of their prisoners." However, this meaning of hostage should not be confused with another, whereby people who may or may not be POWs are moved by a state to a certain place where their presence is thought to prevent the enemy from attacking (see Scheidl, 1943, pp. 234f.).

⁹⁰ This applied particularly to French POWs, whom Germany used in order to influence actions by France in its favour. Bories-Sawala, 1996, p. 242) thus describes French POWs as 'hostages' (*Geisel*) and Durand (1982, p. 315) as 'security' (*gage*). At the end of the Second World War, allied POWs generally were one of the last bargaining chips left to the Germans when the allies were closing in on them (Overmans, 2005, p. 865). Overmans (1999, p. 495) also refers to the importance of adequate documentation about prisoners as a bargaining tool in peace negotiations. In the peace negotiations after WW1, Germany had been in a disadvantaged position due to the lack of documentation relating to prisoners of war that could have supported its claims with evidence. At the 1929 Geneva conference it was attempted to decouple the repatriation of POWs from the agreement of peace treaties, but this was not achieved (Overmans, 2005, p. 735).

⁹¹ One could also consider the use of prisoners as recipients of propaganda. But while there was a certain amount of propaganda that prisoners, depending on their nationality and political affiliation, were subjected to by the detaining powers, this seems to have met with limited

But in all these uses, it is not the prisoner as a person that the detaining power takes an interest in, but merely his category, and only to the extent that it is of significance to others. For example, in the Second World War POWs were neither supposed to attract punishment for having taken part in the war on the enemy's side – this had been prohibited by the Geneva Convention –, nor were they in fact subjected to concerted efforts for ideological or other re-education on the part of Germany, as was the case for normal prisoners and foreign labourers if they transgressed the law, *nor* were their lives 'worked' upon for the benefit of the social body in the radical way in which this took place in concentration or extermination camps intended for Germany's internal and external foes; the camps Levi (1989, p. 47) calls 'drainage sites.'

In this, POW camps formed their own category of camp that was neither like the various spaces of detention in which the state would punish, reform, or treat those sent there under law, i.e., those spaces and disciplinary regimes that Agamben for the purposes of his own argument explicitly distinguishes from spaces of exception (see, for example, Agamben, 2000, p. 37), nor like the concentration camps set up for similar purposes outside the law. If the concentration camp is the paradigm of a mechanism by which a part of the social body is excluded from the protection of the law in order to concentrate upon it an effort aimed at its transformation (in its widest sense), and through this, aimed at the transformation of the social body as a whole, resulting in an intensification of the relation between prisoners and the sovereign, then the POW camp constitutes its opposite in a number of respects: While here, also, a part of the population (of combatants) is excluded *from* war for the ultimate benefit (protection) *of* war, this exclusion is not effected for the purpose of working on the prisoners, but for abstaining from any 'work;' POWs are protected by law from precisely the kind

success, at least in relation to German propaganda directed at French POWs (Overmans, 2005, p. 761 and 854). The role that prisoners themselves could play *in* propaganda (their armies typically proclaiming that they were mistreated, while their captors were denying such claims (Davis, 1977, p. 625)) generally appears to have been more useful than their subjection to it. The French, however, constitute an exception to this, due to their massive subjection to *French* propaganda (see below).

of sovereign acts concentration camp inmates are subjected to.⁹² They experience intensification in their relation with law, rather than the sovereign power.

In its most radical form, the protection of POWs under law resulted in their waiting, sometimes for years, for their release, without either being maltreated – in fact, ‘treated’ at all in the sense of *engaged* by their captors –, or having any structure to their days other than that which they themselves would establish. This group of POWs consisted in the main of officers from Western armed forces, who could not be required to work under the Geneva Convention. The same, however, did not apply to other soldiers, whom Germany required to work. Despite such work being provided for under the Convention, its status deserves further elaboration, not least in order to establish whether this work took prisoners, particular Jewish ones, out of the realm of war imprisonment and into the realm of punishment and reform (as the term ‘hard labour’ or ‘labour camp’ might suggest), legal discrimination (as in ‘foreign slave labour’) or persecution (as in ‘extermination by other means’). All of these ‘work regimes’ existed side by side in Nazi Germany, organised according to the different categories in which foreign workers were divided.

Indeed, Herbert (1997, p. 96) writes of a large-scale influx of foreign workers into Nazi Germany, organised with the specific purpose of supporting the German war effort by relieving the acute shortage of labour caused by the rising needs of a war economy that was losing workers to the front. The building of a foreign workforce was pursued at first by means of recruitment, then by means of deportations from the occupied territories and the increasing utilisation of POWs. Such utilisation had become economically justifiable during the two world wars not only because of the large number of POWs the wars generated, but also because of the progressive involvement of large parts of civil society in the war effort (Rosas, 1976, p. 75).

⁹² In fact, not precisely the same, as the concentration camp went beyond the limited purposes of the state of exception that Schmitt outlines, and in which bracketed war is also situated. For Schmitt, arbitrary killing that is no longer related to the order it is supposed to protect belongs in the state of nature. This does not come out in Agamben’s analysis, who accordingly views the state of exception and the state of nature as interchangeable (see footnote 22 above.)

Levinas was one of the many POWs transferred into a POW camp in Germany for work purposes. He had served as a translator with non-commissioned officer (NCO) status in the French army before being captured together with hundreds of thousands of others by German forces at Rennes in June 1940. He was one of up to 55,000⁹³ Jewish members of the French forces that fell into German hands, out of a total of 1.9m⁹⁴ French POWs.

Most of these POWs initially remained in *Frontstalgs* (holding camps for POWs established at the front) in France. To the extent that the already overcrowded POW camps in Germany could be cleared by distributing prisoners to work commandos, (Overmans 2005, p. 765), 1.6m prisoners were gradually transferred to Germany, of which 1m remained in Germany until the end of the war. Levinas, too, was transported to Germany after an initial detention first at Rennes and Laval, then at Vesoul (Caygill, 2010, p. 27). He became interned at the POW camp Stalag XI B at Fallingbommel near Hanover, a large *Stammlager*⁹⁵ for POWs of different nationalities. Here, he remained until 1945, being employed – fittingly in the context of *Hegung* – in a forestry commando for Jewish POWs.

The strategy of importing foreign workers into Germany, including POWs that were known to be Jewish, may from today's perspective appear counterproductive for a country that was not only fighting a war on the basis of a racial ideology that subordinated the populations of those same countries on whose workers it now came to rely, especially those of Eastern Europe, but was

⁹³ Wieviorka (2001, p. 106) gives a figure of 10,000 to 15,000; Spoerer (2005, p. 505) of 55,000.

⁹⁴ This and the following figures are approximates based on the number provided by Durand, 1987, p. 11 and 1999, p. 71. Other authors cite slightly different figures, depending on their sources. Overmans (2005, p. 760), for example, writes that there were approximately 1.8m French soldiers in German hands.

⁹⁵ Stalags, short for *Stammlager* or *Mannschaftsstammlager*, held soldiers and NCOs, and can in this respect be distinguished from Oflags, short for *Offizierslager*, which were smaller POW camps reserved for officers. As officers could not be required to work under the Convention, Oflags afforded prisoners better living conditions and a generally better experience of war imprisonment than Stalags. It is also Oflags that feature in many popular films and books about war captivity in the Second World War, written mainly by American and English air force officers recalling their war-time experiences.

also actively endeavouring to expel and kill its Jewish population. However, this strategy was made possible by the fact that the racial ideology underlying the war itself could be safeguarded through a legal treatment of foreign workers appropriate to their proclaimed inferiority (Herbert, 1997). Discrimination and oppression thus ensured that foreign workers were subordinated – and seen to be subordinate – to Germans in every respect, while also contributing to a successful management of the power imbalance in those locations where male foreign workers began to outnumber the German male population.⁹⁶

Western POWs were, however, excluded from this targeted discrimination. Although POWs were from the beginning subject to a system of control and repression not initially applied to civilian foreign workers when these were still employed on a voluntary basis (Herbert, 1997, p. 384), this system of control came to protect the POWs when an equivalent system was eventually established for civilian workers. POWs' status entailed the obvious hardships of confinement, discipline, deprivation and hard labour, but did not amount to the direct and absolute control that other foreign workers were subject to under the penal code.

In this respect, forced labourers in particular suffered the most. They soon made up the largest group of foreign workers in Germany, comprising civilian foreign workers either forcibly deported to Germany or no longer permitted to return home,⁹⁷ concentration camp inmates, and POWs employed in contravention of the Convention (Ruggenthaler, 2010, pp. 51-52). Within the group of forced labourers, Jewish concentration camp inmates formed a subgroup. Exploited in conditions akin to slavery, many died in concentration camps under the 1942-instituted policy of 'extermination through labour,' i.e., the hyper-intensive work demanded by an industry that had especially been set up for this purpose around the concentration camps (Herbert, 1991).

⁹⁶ At its peak at the end of 1944, there were 8.2m foreign workers (including POWs) and 700,000 concentration camp inmates in Germany, compared to about 23.2m German workers (Spoerer, 2005, p. 494).

⁹⁷ Spoerer (2005, p. 550) writes that by 1942 at the latest, most foreigners working in Germany did so against their will.

While forced labourers were at the mercy of the German authorities, the employment of POWs was part of, and governed by, the laws of war. Between POWs and the Gestapo lay, to a varying degree of legal certainty and practical effectiveness,⁹⁸ the Geneva Convention enforced by the protecting power, the International Committee of the Red Cross and its visits and checks, the prisoners' own administration and military hierarchy,⁹⁹ the disciplinary powers of the camp commander, and the juridical jurisdiction of the German military courts, before which POWs were assisted in their defence by the protecting power.

These layers of juridical authority protected POWs from three evils relating to sanctions. The first one was the imposition of disciplinary measures by their civilian employers, who had to bring a complaint with the unit guarding the commando if they thought a POW should be punished (Spoerer, 2005, p. 555), as the military held the monopoly on the power to impose such punishment (Overmans, 2005, p. 857). Overmans, however, also writes that, due to the increasing break-down of communication structures between far-off work details and the main camps, as well as the almost complete integration of prisoners into their employer's sphere of life towards the later stages of the war, this is likely to have in many instances failed to protect prisoners from the direct control of their employers.

The second evil from which POWs were protected was a transfer to the authority of the Gestapo and their subsequent deportation to one of the concentration camps. For this to happen, POWs needed to be released first, and this added at least one hurdle to their disappearance into one of the other types of

⁹⁸ The ICRC's inspection 'rights,' for example, were not codified and at this time could not even be called customary law; they had developed out of the visits by the ICRC to camps to distribute relief goods and were entirely dependent on their toleration by both parties (Overmans, 2005, p. 843).

⁹⁹ Karner (1999, p. 408) states in this respect that very little is known about the self-organisation and administration of POWs other than those from Britain and the USA. In fact, as Overmans (1999, p. 498) notes, there has been little published on French POWs in German war imprisonment in general (Yves Durand's writings being one of the notable exceptions), with the German-Russian relation captivating the interest of those publishing in this area, at least in Germany.

camp.¹⁰⁰ And while for civilian workers criminal prosecutions were governed by jurisdictional rules so complicated and contradictory that at some point neither the judiciary nor the police knew who was responsible (Spoerer, 2005, p. 557 n. 157), clarity reigned for POWs. Not only was their category clearly defined (something that could not be said for the different categories of civilian workers), but the legal framework of the Convention also prevented their falling into the web of disciplinary competences that governed other foreigners. Excluded from combat and its inherent sovereign decisions on one side, prisoners were protected from being transferred into the control of the sovereign power and its spaces of exception on the other. And yet, they did not thereby return to civilian life, which provided the third coordinate to their suspension; while their work took place within society, it was governed by other arrangements than the normal regime of labour law. Spoerer (2005, p. 504) thus writes that, although the military handed POWs over to civil enterprises under contract, a relation termed a ‘public legal relationship of special kind’ (*öffentliches Rechtsverhältnis besonderer Art*), POWs can in this respect be distinguished from other foreign workers that were equally placed outside normal labour laws (such as *Ostarbeiter*, Jews and travellers or gypsies), who were under an ‘employment relation of its own kind’ (*Beschäftigungsverhältnis eigener Art* (Spoerer, 2005, p. 499-500)), as in relation to POWs the laws of war continued to function as an overall governing mechanism.

Finally, where POWs themselves were mistreated at work, the avenues of complaint open to them were perhaps more effective than those available to other workers, whose country representatives had often little leverage to negotiate the treatment of their workers with the German authorities (foreign workers in Germany were not permitted to go to court under German labour laws (Spoerer, 2005, p. 551), and who were therefore helpless in the face of abuses by their employers. Overmans (2005, pp. 855-856) indeed writes that it was the units guarding the POWs who protected them from the excesses of their employers

¹⁰⁰ Although POWs could, and were in fact in certain circumstances sent to special disciplinary camps or commandos; a much feared prospect, as Bories-Sawala (1996, pp. 178-179) describes. Also see footnote 104 below.

until these units were themselves tasked with increasing the work rate of POWs towards the later stages of the war.

Despite these effective legal protections that enclosed working POWs within a world of their own, excluding them from at least the worst abuses taking place all around them, the question remains whether Levinas, and other NCOs like him should not be properly regarded as forced labourers.¹⁰¹ While the 1929 Convention envisaged for POWs *below* officer rank to work, it only made limited provisions for the work of NCOs, who could not be employed other than in a supervisory capacity, unless they volunteered to do otherwise. It was this condition of voluntariness that proved difficult in practice.

The Vichy government had agreed with Germany that it itself would be the protecting power for French POWs, rather than a neutral third party (in this case, the USA), as provided by the Geneva Convention. This meant that Germany was able to negotiate with France directly in matters concerning the fate of French POWs. Given the unequal balance of power that existed between the two nations since the armistice (Hilberg, 1985, 2:609), this led not only to a visibly relenting attitude on the part of the French delegates (chosen themselves from POWs of officer rank) who were visiting the camps to ensure compliance with the Convention vis-à-vis the officers of the German army that were accompanying them (Hoch, 1992, p. 225), but also to the agreed setting aside altogether of certain requirements of the Convention (Durand, 1991), amongst them the requirement that NCOs could not be forced to work other than in a supervisory capacity. This resulted in ‘encouragements’ of French NCOs by their own representatives to sign voluntary work contracts (Durand, 1999, p. 7), while the Germans aided this effort from their side by applying ‘massive pressure’ (Bories-Sawala, 1996, p. 228), including threatening prisoners unwilling to work with a transfer to the East.¹⁰²

¹⁰¹ As Caygill (2010), for example, does.

¹⁰² For this purpose, a camp was established in Kobierzyn near Crakow, into which resisting NCOs were transferred (Spoerer, 2005, p. 504). Bories-Sawala (1996b, p. 181) also mentions that POWs who generally insisted too much for the comfort of the Germans on compliance with the Convention were sent to disciplinary camps. Braudel was sent to such a camp, partly due to his

This blatant contravention of the law added to the well-known problems with the identification, classification and treatment of NCOs in the Second World War (cf., for example, Gasca, 1967, pp. 242f). Bories-Sawala (1996, p. 227) writes that it is likely that the rights of NCOs were at first not widely known amongst French POWs, and that once they were, only few succeeded in having their rights recognised. Others did not even try, whether out of solidarity or fear of making their situation worse. Durant (1982, p. 142) appears to attribute the NCO problem to the fact that NCOs were not, like officers, separated from other soldiers into different camps in the first place, and either had to get themselves assigned to supervisory positions on arrival in the camp, or refuse work altogether. While any wrongful treatment was applied to Jewish and non-Jewish NCOs alike, it is for obvious reasons likely that Jewish prisoners offered least resistance, especially when they were already separated from the rest of the prisoners with the sole purpose of discriminating against them.¹⁰³

While Levinas and other NCOs may have technically been ‘forced labourers,’ they should nevertheless be distinguished from other groups of foreign workers in Germany that were forced to work outside the overall protecting framework of the Convention. Even if, as Overmans (1999b, p. 18) claims, “[t]he fate of POWs and interned civilians [such as forced labourers] comingled, [and] the treatment was less dependent on differences in status than on the national socialist hierarchy of the race of peoples,” this should be taken as a statement about the comparatively humane treatment of French foreign labourers rather than the abuse of French POWs, given that he also states that the treatment of French POWs was “hard, but not in breach of the laws of war” (Overmans, 1999b, p. 18). At least POWs had the legal certainty that allowed breaches to be established in the first place. MacKenzie (1994, p. 500) thus concludes that even where the provisions of the Convention were already regularly violated in relation to POWs, it still protected prisoners from a

“intervention discouraging fellow inmates from offering voluntary labour to the Germans” (Caygill, 2004, p. 159 n. 11).

¹⁰³ Although according to one *Wehrmacht* camp inspector in 1941, 85 Jewish NCOs refused to work in one camp (Chambrun, 1989, p. 52).

wholesale exploitation as slave labourers.¹⁰⁴ And while the influence of civilian authorities striving to increase labour output meant a worsening of the working conditions for POWs as the war progressed, their living conditions at least remained under the authority of the military (Kochavi, pp. 63-64).¹⁰⁵

As to the actual conditions under which Levinas lived and worked, Stalag XI B, the camp in which Levinas is usually cited to have lived, was established in 1939 on the site of a German military training ground that stretched over the Lüneburg Heath. The POWs were accommodated in wooden temporary barracks, around which fences were drawn. These barracks had initially been erected for the workers building the training ground barracks in 1935, and Stalag XI B and the cluster of other camps that arose in the area of Fallingbistel (including Stalag XI C, parts of which became the concentration camp Bergen-Belsen, and Stalag XI D, which housed (or rather, did not *house*, as there were initially no barracks) Soviet POWs) were now surrounding the training ground. On this training ground, the German military continued to train during the war.

A very large number of prisoners were held in the camps at Fallingbistel; at its peak in 1944, the cluster of camps held 96,000¹⁰⁶ (Fallingbistel Military

¹⁰⁴ A ‘problem’ for the German authorities that was solved by transferring some of the POWs into civilian status.

¹⁰⁵ There is also an argument, which, although not entirely convincing, occasionally appears in the literature and therefore deserves at least mentioning. This is that one should see the work required of POWs in the context of an enforced idleness that was the only alternative and which, as some (see, for example, Overmans, 1999b, p. 23 n. 49) claim, represented a far harder challenge for POWs than enforced work. Scheidl (1943, p. 372) thus writes: “A healthy human being who over a longer period of time is, as one may fittingly say, ‘banished’ or ‘condemned’ to idleness, always feels unhappy.” Scheidl (1943, p. 371) also claims that during the negotiations for the Hague Conventions, the possibility of employing POWs was supported “in the first place entirely in the interest of the POWs themselves.” Boredom, in any case, appears to have been a prevalent negative aspect of war captivity for officers who were not required to work (Overmans, 2005, p. 848).

¹⁰⁶ Mattiello and Vogt (1986, p. 22) as well as the Stiftung niedersächsische Gedenkstätten cite a number of 95,000 prisoners under their information on Stalag XI B, while Malka (2006) gives a figure of 32,000 and the Pegasus Archive of 49,138. These lower figures are likely to refer either to the main camp on its own (without its branches and the work details) or to the number of prisoners at a certain point in time.

Museum) POWs of French, British, Belgian, Polish, Yugoslav, Soviet, Dutch, Italian, American, Romanian and Czech nationality, thereby constituting one of the largest POW camp complexes in Germany at the time (Stiftung niedersächsische Gedänkstätten). General living conditions are likely to have been similar to most Stalags, with overcrowding, rudimentary sanitation and medical care, insufficient or non-existent heating, infestation with vermin, and inadequate food and clothing being the norm (Tyas, 2010, p. 180).

Levinas, however, is likely not to have been held at Stalag XI B itself. Each Stalag had a myriad of small ‘camps’ attached to it – in the case of Stalag XI B, these numbered more than 2,000 (Stiftung niedersächsische Gedänkstätten) – and he and his seventy or so Jewish comrades-in-arms (Levinas, 1990b, p. 152) appear to have lived in a disused farm called *Stelterhof* (Levinas, 2011, p. 27) in the vicinity of their place of work in the forest. This was nothing unusual; many POWs were accommodated in work details near to where they worked, as the daily return to the main camp would have been impracticable or impossible on foot.

Living away from the main camp would have made a positive difference to Levinas’s life in captivity. For example, Levinas tells a story about a dog that lived with the Jewish prisoners on the farm, something impossible to think of, had he remained at Stalag XI B itself:

A little dog associated himself with us prisoners one day as we were going to the workplace; the guard did not protest; the dog would install himself in the commando and let us go to work alone. But when we used to come back from work, very relieved, he welcomed us, jumping up and down (Levinas, 2001, p. 41).

While no information is available on the nature or capacity in which Levinas worked in the forest, it is known that the workers in his commando had one day off each week,¹⁰⁷ which placed them in a better position than those of

¹⁰⁷ Malka (2006, pp. 75-76) writes that a son of a fellow inmate of Levinas had told him that they were allowed one day off a week, during which they could have a tooth removed, and that the father of said informant accordingly returned from captivity without any teeth left at all.

many ordinary foot-soldiers, who Tyas (2010, p. 200) reports as having been “forced to work 12 hours a day, day after day, every week of every month for years.” Although the commando was restricted to Jewish prisoners, there is no indication that the work carried out by this unit was more degrading or punishing than that of other units. POWs are said to have generally preferred work in the agricultural sector over that in the mining and production industries, as working and living conditions on the countryside were thought to be better (Bories-Sawala 1996, pp. 216-217), but conditions in fact varied widely due to local circumstances and attitudes. Overmans (2005, p. 764 and 767) lists under one of the achievements of Scapini’s mission that restrictions on the guarding of working French POWs were loosened to the extent that POWs could “move freely, *de facto* unguarded with only a French commando leader as responsible person.” While it is not known whether this applied to Levinas’s commando,¹⁰⁸ the reference to ‘the guard’ in the quote above suggest otherwise. Nevertheless, it is reasonable to assume that Levinas’s work did not belong amongst the harshest types of work imposed even on French POWs. The fact that Caygill (2010, p. 28) writes that Levinas “as a Jew was set to work in a ‘Forestry Commando Unit’ specifically assembled for Jewish POWs,” and that this meant “that his experience of the camp was even more insecure and traumatic than that of his fellow non-Jewish POWs” should therefore not, without more evidence, be taken as an inference of special hardship or targeted maltreatment. On the contrary, taking a comparative view on the different groups of foreign workers, Levinas’s position even as a French Jewish POW was, if not of a certain privilege,¹⁰⁹ at least subject to the most basic protections at a time when for many, these were akin to privilege.¹¹⁰

As to their general living conditions, prisoners in Levinas’s group are reported to have been able to send and receive letters and parcels (see Malka,

¹⁰⁸ It would not be surprising if it had, as escape would have been ill advised, if not altogether suicidal for Jewish POWs.

¹⁰⁹ Bories-Sawala (1996, p. 215) uses the term ‘relative privilege.’

¹¹⁰ Spoerer (2005, p. 555), for example, claims on the basis of reports by eyewitnesses that Western POWs were rarely hit by their civilian employers, which appears to have happened regularly to Soviet POWs.

2006, pp. 76f), read books in the camp's library, and stage theatrical events, suggesting that the state of living conditions in the camp did not reach the "cruel reduction to the minimal conditions necessary for survival" that Bloechl (2011, p. 116) refers to. Levinas continued to be philosophically occupied during his time in captivity; he read a number of philosophical works¹¹¹ unlikely to have made sense on an empty stomach,¹¹² which he would have either obtained from the camp library, through book boxes circulating amongst the commandos, or through parcels sent to him. Like any good philosopher, Levinas is recalled scribbling from time to time into a little notebook or reading to the other prisoners "from texts that would make little sense to them" (Malka, 2006, p. 78). While the camp authorities did not allow Jewish prisoners to celebrate their religious holidays, the POWs were able to do so nevertheless, clandestinely, and Levinas appears to have experienced a spiritual awakening during his time in the camp (see Levinas, 2009).

Unsurprisingly, however, towards the end of the war living conditions would have worsened.¹¹³ Durand (1999, pp. 72 and 75-76) in this context

¹¹¹ Amongst them was Hegel's *Phenomenology of Spirit*. Caygil (2010, p. 28) writes that "the experience of forced labour in the Stalag, accompanied by a critical reading of Hegel's *Phenomenology of Spirit* in the prison camp reading room, led Levinas to an extreme degree of scepticism about the liberatory potential of work" For an analysis of Levinas's concept of fatigue in this context, see Caygill, 2002, pp. 58f.

¹¹² One can therefore gather that conditions were not nearly as bad as Spanos (2010) describes for American foot soldiers working in a mill towards the end of the war, where food rations were so low that starvation combined with a heavy work load would have led to an eventual death of exhaustion had the prisoners not been liberated.

¹¹³ A telegraph sent in November 1944 from the Red Cross in Geneva to the Red Cross in the US states the prevailing conditions in Stalag XI B: "Visited November 9th American representative Bedner Frank Sergeant 118956 out of 44,500 prisoners, 90 Americans of whom 2 officers 32 noncommissioned officers. Constant flow new arrivals Dutch Front majority paratroopers many wounded. Overcrowding alarming. 3 Decker beds 1 blanket. Straw mattresses promised. Stock clothing exhausted men recently arrived must be completely reequipped. Prisoners prepare food reglementary rations insufficient individual preparation of food possible but fuel scarce. Marked diminution Red Cross shipments new shipments impatiently awaited nothing has been received for 4 months. Sanitary installations temporarily insufficient. 500 wounded recently arrived from front are in infirmary an [sic] Lazarett possibilities medical care limited reserves medical

describes how, mirroring the year of 1940, when Germany saw itself suddenly confronted with the task of looking after such a large number of prisoners,¹¹⁴ at the end of the war chaos once again resumed. Prisoner mortality sharply increased at this time, as Germany itself became a ‘battleground’ (Durand, 1999, p. 75). The approaching armies of the allies necessitated the movement of POWs (often by way of long marches without adequate provisions and under danger of bombardment, as the columns of marching prisoners were un-marked and could therefore not be identified as such from above) away from camps situated at the front and into the interior, where camps were now becoming overcrowded. Furthermore, due to the break-down in relations between Germany and France from August 1944 onwards, French prisoners suffered the additional hardship of seeing a temporary interruption in the delivery of their mail and parcels, which were vital in order to make up for the insufficient German food rations provided to them. “These hard living conditions during the last phase of imprisonment,” Durand (1999, p. 76) writes, “are not, however, attributable to a deliberate decision on the German side.” At this time, he explains, soldiers and civilians were suffering to an equal extent, and despite the conditions, POWs were able to “‘organise’ and make the long time spent in exile behind barbed wire bearable” (p. 75).

It thus becomes apparent that the living and working conditions themselves must be distinguished from the factors that enabled them, if any sense is to be made from the legal framework in which the Western POW experience took shape. At certain times during the war, all groups in Germany would have undergone similar experiences, but this did not render them equal. Going hungry

dressings drugs exhausted need is urgent. Regular religious services. Conditions of work increasingly hard 72 hours weekly without increase of food rations frequent bombing stocks destroyed but victims few. Stricter discipline” (Pegasus Archive).

¹¹⁴ At that time, the mass influx of POWs after the collapse of the French army had also meant that camps were growing larger in size and could no longer be managed through personal links of respect between prisoners and Germans that had characterised relations at the very beginning of the war, when there were few POWs, mainly British air force personnel. Overmans (1999b, p. 15) writes of ‘an astonishing meticulousness’ in complying with the Convention by both Germany and Great Britain at the beginning of the war, both due to the lower amount of prisoners and less ideological pressure.

as a Jewish POW because of a shortage of food, for example, cannot be said to have been the same as being purposely starved of food in a concentration camp, even if the effect would have been very similar. The difference is important if one is to appreciate the remarkable fact that at one and the same time in Germany, Jews would *either* openly and in accordance with public policy be put to death, *or* kept alive by the authorities, depending on their legal status. Where commentators fail to take due care in making this distinction, such as when Hammerschlag (2012, p. 394) states that Levinas was interned in a “Nazi labor camp,” giving to the uninitiated reader the impression of persecution and punishment,¹¹⁵ what falls away is both an appreciation of the protection afforded by the laws of war and the hardship that any war, no matter how legal, imposes on its participants, amalgamating both these aspects of war with persecution.

After all, that POWs would be asked to carry out work was not only envisaged by the Geneva Convention and thus part and parcel of war, but it had been so for some time before the Convention was drawn up. The work requirement had developed from the institution of ransom payments for captured knights in the late Middle Ages, where the capture and collection of a ransom for the prisoner was often the sole purpose for the hostilities. At that time, the obligation to secure and pay the ransom from the prisoner’s estate was the personal obligation of the prisoner himself to the person to whom he surrendered on the battlefield. The relationship was one of private debt, which, if undischarged in the prisoner’s lifetime, would burden his heirs (Keen, 1965, pp. 158-159).

During the sixteenth century, the aristocratic practice of ransom was then transformed from a payment individually negotiated between captor and prisoner to one that was regulated through bilateral agreements between military commanders and increasingly applied to all soldiers. With the emergence of absolute monarchies that maintained permanent armies, prisoners became seen as representatives of a state rather than as individual opponents. At first, the state reserved the right to collect the ransom for particularly valuable prisoners. Then,

¹¹⁵ Hammerschlag (2012, p. 394) indeed proceeds to depict Levinas’s writings immediately after the war as “an attempt at re-appropriating the experience of being persecuted.” Later in the same paper, she describes Levinas as “a victim of [the Nazi] regime” (p. 406).

during the seventeenth century, ransom began to be paid to the state as a matter of course, and finally was also paid *by* states, who were soon ransoming those of their soldiers who would otherwise not have been released. The reason for this development can be seen in the significant investment that soldiers represented for states whose treasuries were not yet highly developed (Rosas, 1976, pp. 49f).

In the seventeenth and eighteenth centuries, the significance of ransom payments decreased, although it still formed part of prisoner exchanges during the war. From the Peace of Westphalia in 1648 onwards, treaties had begun to stipulate the release of prisoners without ransom on the conclusion of the conflict, as states were increasingly able to accommodate large numbers of prisoners and were less reliant on having their own captured soldiers returned to them during the war so that they might re-join the fighting (Rosas, 1976, pp. 54 and 66). After the French Revolution, the practice of an equal exchange of prisoners regardless of rank was advocated (previously, officers had been exchanged for up to 5,000 times as many soldiers or their value), even if not universally followed, and ransom was discontinued altogether between 'civilised' states (Rosas, 1976, pp. 54 and 66-67). The emphasis now shifted to indirect advantages gained and disadvantages inflicted through the holding of prisoners. Not only were prisoners unavailable as soldiers while they were held, but their salaries continued to be paid by their home state, representing a strain on its resources. But in the 19th and 20th centuries, when armies were enlarged through conscription, even this became impossible, and prisoners were only kept for exchanges (Oeter, 1999, pp. 46-48). That is, until they were made to work on a large scale in the First and Second World Wars, ensuring they would pay for the considerable costs of their capture and upkeep,¹¹⁶ and support the war

¹¹⁶ Davis (1977, p. 6290) writes: "The disadvantages or costs of taking and keeping prisoners are substantial. In military terms it costs lives, time, supplies, and diversion of forces to compel enemy personnel to surrender, although this may indeed be cheaper in the long run than compelling them to fight to the end. Having taken the prisoners, the captors must get them to a secure place, guard them, provide rations, and burden communications and transportation facilities to arrange more permanent accommodations. If prisoners are taken in large numbers their very presence may reduce the captor's tactical momentum. If they are in poor physical condition they may bring medical problems such as infectious diseases to the captor's forces."

economy.¹¹⁷ Once again, prisoners were responsible for their own ransom. When Levinas (in Saint Cheron p. 36), who uses the term ‘hostage’ and ‘substitution’ in his later writings to describe the ethical relation to the other,¹¹⁸ states in a 1994 interview that “[t]he hostage is the person who works in your place, and if he doesn’t work, he is killed,” he thus cannot be referring to his own experience. As a POW, he might have worked in the place of a German worker called to the front, for whom he thus substituted, but this substitution would have been independent from his position as a hostage held by Germany in order to influence French policy. As part of *this* relation, he was not the innocent victim caught in the middle, but working in order to pay his dues for the protection of his life.

¹¹⁷ But see again Davis (1977), who warns in this respect against viewing prisoner’s labour as a straight-forward profit for the detaining power: “On balance, the economic advantages of keeping war prisoners are reduced by the costs of their maintenance and the fact that POWs have generally been inefficient workers, poorly motivated, ill-suited to their tasks, often unable to communicate in their employer’s language and subject to eccentricities induced by confinement” (Davis, 1977, p. 630). Interestingly, Davis regards the taking of POWs by Germany after the surrender of France as an example of such hostage-taking, as POWs were held “just for leverage in dealing with the Pétain government” (Davis, 1977, p. 625, footnote omitted). While Bories-Sawala (1996, pp. 215f) agrees that POWs were kept as hostages for negotiations with France, adding that it was also hoped they would minimise the resistance movement there, she sees POWs (together with forced civil labourers) as having been vital for the German war economy, writing that without them, “the German defeat would have likely occurred significantly earlier” (p. 215). Having said that, she assesses civil workers as having been much more profitable than POWs, who not only had to be guarded, but whose level of motivation was lower and in relation to whom the Geneva Convention had to be observed (p. 243).

¹¹⁸ I am being held hostage by the other, for whose suffering and actions I am responsible to the point of substitution: “For under accusation by everyone, the responsibility for everyone goes to the point of substitution. A subject is a hostage” (Levinas, 1998. p. 112).

3.3. Engagements

Following Schmitt, Agamben (2005, p. 290) remarks of the space of exception that it is a ‘legal vacuum.’ Not only does law not apply in the state of exception, it has been *withdrawn*, the withdrawal creating the effect of a vacuum. In the concentration camp, where sovereign decisions ‘worked’ directly on the prisoner, who represented nothing than “the mere ‘capacity to be killed’” (Agamben, 1998, p. 114), the absence of law would have primarily manifested itself as a potentiality: Where law no longer restrains and protects, things become possible for those in power that would not otherwise be permitted. In the POW camp, on the other hand, where it was the direct engagement effected by the sovereign decision (whether of one’s own command, or of that of the enemy) that had been withdrawn, and all that was left was law as a protection *from such engagement*, the vacuum effect would have been more tenable. After all, in the absence of the sovereign other, prisoners were left alone, facing nothing – except law, which, however, provided a framework within which little could happen: “Existence . . . in a vacuum,” as Levinas (2009, p. 56) notes in his diary early on in captivity.

When Agamben (1998, p. 59) refers to the relation of a person caught in a space of exception with the absent law as a mere ‘empty form of relation’ (the law applies without applying), he may be said to refer, properly speaking, only to the *form* of relation: Law as that which determines the form of relation *to others*, now an empty, meaningless form. However, the relation with such an other (the sovereign) was fully and immediately constituted in the concentration camp; indeed, constituted with lethal immediacy. In the POW camp, on the other hand, it was the *relation* with the other itself that was, if formally constituted, meaningless and empty. Surrounded as the camp was by German guards, fences, watchtowers and dogs, symbols of the enemy’s power that were only too present, Germany as the detaining power had at the same time its back turned to the camp. It was not towards the POWs that its efforts were directed, but towards the ongoing war.

From this, one would assume that POW camps as spaces of exception would be found on the sidelines of war, if not of the European order as a whole,

whose limit they helped constitute. And yet, these borderline spaces were located neither on the borders of the conflict, such as neutral territory, nor on the borders (or even just outside) of Europe. On the contrary, they were placed in the middle of enemy territory.¹¹⁹ Therefore, exiting the war meant more often than not a transfer much further into enemy territory than most prisoners had ever been before. For pilots this was perhaps most pronounced, as captivity was preceded by a fall from the sky and the loss of distance associated with flying over the land, but for all soldiers capture tended to present only the first step in a long journey through and into unknown territory, with French prisoners being moved at times in forced marches or in cattle freight cars (Durand, 1999 p. 72), and often without adequate provisions. Therefore, although it marked the official end of hostile action for the prisoner (famously declared by German captors in the phrase ‘for you the war is over’), capture most often than not meant a worsening of conditions for the prisoner, and was perceived as leading further into, rather than out of, the war: It was an exclusion and protection from hostile action that at the same time rendered prisoners wholly into the hands of the enemy.

And the danger did not just relate to the enemy, but also to civilians. These presented an object of fear particularly for air crews, as civilians could not be trusted to respect the laws of war and hand the prisoner over unharmed to a member of the armed forces. The problem of lynching became more pronounced after the allied bombardments of civilians towards the end of the war, although the police had already in 1943 been instructed not to interfere (Overmans, 2005, p. 864).¹²⁰

It was only at the end point of their journey, when paradoxically, the prisoners reached the camp where the enemy had most control over them – in the camp, they were confined to a purpose-built, closely guarded, watched-over

¹¹⁹ This was not only for reasons of labour deployment; in 1943, for example, especially ‘valuable’ groups of POWs, such as fighter plane crews, were moved as far away from foreign territory as possible, as an increased number of escapes sparked fears about a possible uprising amongst POWs and foreign workers (Overmans, 2005, p. 860).

¹²⁰ Interestingly, however, Overmans (2005, p. 865) also notes that despite propaganda claiming that it was no longer possible or appropriate to employ German police against German people when the latter took the law into their own hands, it was more often than not the police and the Gestapo who killed the pilots, 30 in total.

space from which it was much harder to escape than from a freight car or marching column –, that they were safe, as their presence was at this point notified to the protecting power. Their corporate identity as a member of a state's armed forces, an enemy (a status which had been threatened by the exposure to civilians, law enforcement and individual military personnel), was thus affirmed. Only once prisoners' status as POWs was registered did they gain their 'liberty,' their lives now being protected under law. Of course, prisoners were still at the mercy of the German camp administration and its attitude towards governance and compliance with the Convention. This manifested itself in every-day aspects of camp life, such as in the punishment for attempted escapes or the delivery of food parcels. But they were no longer under threat of being killed, not unless they escaped or otherwise provoked their captors.¹²¹

Provocation, however, played an important role in eliciting precisely the enemy stance from the camp administration that was missing in their role as detaining power under international law, recreating a situation *within* the camp that would at least in some way resemble combat *outside*. Anti-German activity, of which escaping was the most notable, but which also included a host of other tricks played on the German guards, is described by Durand (1988, p. 192) as a 'morale booster' that was important to create 'the feeling of active opposition' on the part of the POWs. In practice, escape meant triggering an immediate engagement by the enemy once again *as enemy*; it meant being hunted and forced into hiding. It was an escape more into than from danger,¹²² more into the closed than into the open, given the distribution of power in Europe at the time: After the first period of occupation of France and Poland, "there existed,"

¹²¹ Even when they escaped, they should not have been under threat of being killed as punishment, as the right to attempt escape constitutes the counterpart to the detaining power's right to imprison, and the Convention hence imposes limitations on any punishment that may be imposed for escapes (Overmans, 2005, p. 860). Unfortunately, these limitations were not always complied with. Most infamously amongst such contraventions is the shooting of 50 recaptured escapees after the attempted mass escape at Stalag Luft III at Sagan, popularised by the 1963 film *The Great Escape*.

¹²² This is true in particular for Oflag such as the one Ricoeur was in, as here prisoners had tried "to create a replica of free society within the camp," including a university, a theatre, and a stock market (Ricoeur, 1998, p. 17).

Overmans (2005, p. 859) writes, “in a – with the exception of Switzerland – largely closed European area of German-Italian rule, hardly any possibilities for escape.” To attempt escapes also gave prisoners a sense of usefulness – the guarding of the POW camps generally, and the search for escaped prisoners in particular, tied up German troops otherwise deployed at the front – and relieved “the utter boredom of camp life” (Tyas, 2010, p. 185).¹²³

Unless provoked into a reaction – into focussing their attention *onto* the prisoners – the camp, however, was an open space, guarded and yet without engagement. Especially for Jews, this must have been disorienting. Levinas, for example, declared his religious faith on the occasion of his capture,¹²⁴ and according to his son, spent the next five years in the expectation of imminent deportation and death, accepting this to be his fate as a Jew (Malka, 2006 p. 262). Against all expectations, however, persecution did not follow, and his captivity remained uneventful. There is thus no reported evidence of specific instances of hardship that befell the Jewish prisoners interned in Stalag XI B, even though they were segregated from other prisoners, forming a separate unit. The protection afforded by the French uniform appears to have been effective, and given the extensive persecution of Jews at the time, perhaps the most outstanding aspect of Levinas’s time in war captivity is the *absence* of persecution. But this does not mean that life in captivity did not appear precarious for Jewish prisoners, to whom the Convention – that ‘sheet of paper’ as Levinas calls it – seemed no more than a ‘fragile guarantee’ (Levinas, 2009, p. 210, 207). The simultaneity of actual protection and potential danger, a lack of events together with the intense anticipation of them due to the ominous separation of the Jews from other prisoners, characterised the way time passed in the camp, which

¹²³ One should remember, however, that this was a game predominantly played by officers not otherwise occupied during their time of captivity. As Tyas (2010, p. 200) writes, for those who were working under difficult conditions, “there was little time to either think or plan means of escape when food was a prime requirement.” For Jewish prisoners, similarly, such activities were quite inconceivable, as they would not only have exposed themselves to re-capture and potential punishment by their detaining power, but also to persecution as Jews by authorities outside the camp.

¹²⁴ While this may seem brave (or foolish), it should be borne in mind, as Berg (1990, p. 201) points out, that Jews with overtly ‘Jewish’ names did not have much of a choice in this respect.

Caygill (2010, p. 27) describes as a time that was “at once compressed and distended, intense and empty:”

The Jewish prisoners felt the deferred death sentences that hung over their work and their laughter like a familiar shadow. In the special Kommandos in which they were grouped, for the most part lost at some point in a forest, they found themselves at once separated from other prisoners and the civilian population. It was as if something was being prepared for them, but always postponed (Levinas, 2009, p. 210).

Of course, there was still the protecting power *watching over* the prisoners, but for French POWs, this was France itself, and France as the figure of the ‘father’ – an image that was often appropriated by Marshall Pétain for his own relation to the POWs – proved itself a disappointment. Corresponding to the citizen’s duty to sacrifice his life for the defence of the state, it had been the duty of the state since the Enlightenment and the French Revolution to look after its soldiers in captivity (Overmans, 2005, p. 871), whose interests were without doubt best served by the establishment of a neutral protecting power. In relation to France in the Second World War, however, Pétain himself had “wanted to set aside the Geneva Convention in this point in order to make the question of POWs a matter of negotiation between two states (Durand, 1999, p. 74),” and French POWs thus had to endure the thought of the weakness of their own government, if not its outright collaboration with their captors:

It [the Vichy government] chose in June 1940 to stop fighting. Captivity was therefore going to continue for French prisoners of war of 1940 for years not due to a struggle declared between their country and the enemy, but due to an interminable armistice. What’s more, this armistice was conceived by Vichy not as a truce in the continuation of war with Germany, but as a sort of half-peace it tried to negotiate with the leaders of the Reich. The Germans accepted the negotiation, but to their advantage, and moved to established a policy of collaboration between the vanquished and the victor, in which prisoners of war were, to some extent, the stake (Durand, 1987, p. 14).

This was of daily practical significance for the POWs. It meant, for example, that French POWs were significantly worse off compared to their British and American counterparts when it came to nutrition. The French, unlike other nations, opted to provide for their prisoners wholly on their own, and the latter therefore did not receive a share of the ample provisions sent by the British and American governments to their captured soldiers. Given the few resources available to the Vichy government at the time, this meant that up to the year of 1943 (and not counting private parcels), French POWs only received about 800 grams of extra food per month, which was about as much as British and American POWs received extra *per day*. From 1943 onwards, it then was about 5 kilograms, which, although an improvement, was still a significantly lower amount than what others received (Overmans, 2005, p. 847).¹²⁵

In describing this and other disadvantages and breaches of the Convention resulting from the role France had taken on in relation to its own captive soldiers, Durand (1999, pp. 74-76) focuses on the role played by France:

Even though the initiative for this breach of the international laws of war came from the Germans, it was accepted by the French government in Vichy and manifestly supported by the politics of collaboration with national socialist Germany. . . . [O]verall the fate of the French prisoners of war in the ‘*Reich*’ was determined more through the consequences of collaboration by the French Vichy regime with the German *Reich* than through the behaviour of the Germans vis-à-vis the French.

Overmans (2005, p. 764) shows himself more sympathetic towards the Vichy government, describing the difficult situation that particularly Scapini,

¹²⁵ Overmans (2005, p. 848) also mentions, however, that until 1942 the ICRC did not assess the nutritional situation of Western POWs as a humanitarian problem. This shows how well British and American POWs were, overall, provided for, if even the much lower amount of food that French POWs received from their government did not constitute a ‘problem.’ In any case, it appears that Western POWs were often better off than the German civilian population, with this discrepancy becoming most pronounced towards the end of the war, when the bribing of guards by POWs with rare items such as chocolate and cigarettes became a real problem for the Wehrmacht (Overmans, 2005, p. 848 and pp. 860-861).

who had been charged with the oversight of French POWs in German hands, was in, given Germany's threats to remove visiting rights of camps altogether should his mission refuse co-operation on the breaches. Be this as it may, French POWs could not be certain of the unconditional support of their home government vis-à-vis their captors. One incident that exemplifies this ambivalence was the public call by Scapini following the escape of General Giraud from German war captivity, for Giraud to hand himself in and for POWs to consider the negative side effects of escape activity. This led French POWs, who, like all POWs, considered escape to be one of their patriotic duties, and who had applauded Giraud, to be confused about the side their own government was on (Bories-Sawala, 1996, p. 233), leading to a suspicion that their fate was ultimately a matter of indifference to French politicians, whether or not this was in fact the case. Although the episode can be explained by the fact that Pétain, who was expecting the imminent end to the war in 1940 and who had taken a personal interest in the fate of the POWs, was hoping that they would benefit from the collaboration (Bories-Sawala, 1996, p. 223; also see Durand, 1982, p. 315), and that Scapini had tactical motivations in making the call regarding Giraud (Bories-Sawala, 1996, p. 233), this would not have been readily apparent to POWs.

Apart from such disappointments, prisoners had to come to terms with the fact that the French public was distancing itself from their fate. In Vichy propaganda, POWs had been characterised as 'faithful followers of Marshal Pétain' (Bories-Sawala, 1996b, p. 418), and the now increasing loss of popularity of the latter's policies implicated prisoners in turn. In addition, some blamed the soldiers' performance for the defeat in 1940, and projected the shameful collaboration by France with its German occupiers on the prisoners (Bories-Sawala, 1996b, pp. 616-617). The deal struck between Germany and France in 1942 for the release of French POWs in exchange for civil workers sent to work in Germany at a rate of 1:3 (the *rèleve*) further supported the French public's dwindling solidarity with POWs, who, without any wrong-doing on their part, were blamed for the forced recruitment of French workers under this scheme (Bories-Sawala, 1996, p. 237). Unsurprisingly, when the POWs became aware of this 'indifference,' they felt themselves 'let down' (Bories-Sawala, 1996b, p. 420).

Taken together, these conditions led to an increasing detachment of the camp from the French home side; it was beginning to feel like a free-floating, abandoned space, with POWs themselves becoming “patriotic orphan[s]’ and in this lack of orientation probably more amenable to the opportunism of the moment than to principles that had seemed to have lost their course” (Bories-Sawala, 1996, p. 243). For Jewish POWs, this feeling of abandonment must have been particularly pronounced, given the actions of the French government at the time in relation to its Jewish citizens. Protected by the French uniform, Jewish prisoners therefore felt let down nonetheless. As Levinas (2009, p. 207) writes: “Others spoke reform, relief, liberation – the Israelite knew he was in a tough world, without affection, without fatherhood. He existed without recourse to humans. He assumed alone all the weight of his existence.” And while French non-Jewish POWs at least still had each other, Jewish POWs had to bear the additional uncertainty associated with being separated into Jewish faith groups. Why separate them, if not for ‘special’ treatment? This was the kind of question Jewish prisoners had to ask themselves, and it is thus not surprising that Levinas (2009, p. 210) describes this separation as resulting in “a moral solitude that gave all of the acts and all of the thoughts a special gravity.”

But this solitude may not only have resulted from the separation of Jews from their colleagues, but also from anti-Semitism that was itself present within the French armed forces; echoing, as Bories-Sawala (1996, p. 239) writes, the anti-Semitic politics of the Vichy government. Levie (1977, p. 175, n. 324) in this context notes that the German camp administration was not always able to separate out Jews, as they sometimes encountered resistance from the rest of the prisoners. From this one can infer that when they *were* able to separate them, no or little resistance was offered. For this and related purposes, anti-Semitic feelings were also actively encouraged by the Germans. Overmans (2005, p. 766), for example, refers to a proposal issued by the camp commandment in Oflag XVII A to separate Jewish prisoners from the rest of the officers, which could only be implemented without using force after the anti-Semitic sentiments of inmates had been successfully strengthened. Lador-Lederer (1980, p.82) similarly claims that Germany employed anti-Semitic propaganda in order to create divisions between the prisoners that camp administrations could then use

to their advantage. Nevertheless, it appears that the *officier-conseil* responsible under Scapini for the adjacent military district specifically requested the separation of named Jewish POWs into separate commandos from his German colleagues (Bories-Sawala, 1996, p. 240), and both Durand (1982, p. 355) and Berg (2001, pp. 201-202) recount an instance in which an influential French POW tried to accomplish that his Jewish colleagues would be required to wear the yellow star, only to be rebuffed by the German camp commander. From accounts of repatriated POWs, Durand concludes that, despite the often close solidarity between colleagues in the French forces, anti-Semitic sentiments were common. He writes:

The racism of some French seems to have exceeded that of German officers, if one is to believe the testimony cited above. The truth obliges us to say that obvious traces of anti-Semitic spirit were sometimes expressed in the words of repatriated POWs; some denouncing the Jews as responsible for the black market in the camps, others for the political opposition to Maréchal Pétain, some for shady collusions with German guards (Durand, 1982, p. 356).

French Jewish POWs would thus have encountered a certain amount of anti-Semitism from within their own ranks, weakening the relation to their non-Jewish colleagues. But they are much less likely to have been aware of the severe persecution of Jews, Russian POWs and other targeted groups that took place all around them. Ricoeur (1998, p. 19), for example, responds as follows to the question at what time he ‘learned of the death camps:’

We witnessed the brutality inflicted on the Russian prisoners near our camp in Pomerania. But we had not discovered the horror of the deportation and extermination camps until the day we were liberated, because we found ourselves next to Bergen-Belsen. The English had emptied the village of Belsen as a reprisal, and we interrogated Germans who claimed not to know what was happening in the camp seven kilometres away. I saw the survivors coming out so haggard, many of them dying after taking their first steps, after eating jam or something. It was dreadful. All of a sudden, we had the feeling we had been

incredibly spared. And those who felt this difference most strongly were our Jewish buddies . . .

There were, of course, rumours about the events taking place that spread already during the war. News about deportations of friends and family members reached POW camps by way of returned mail marked 'left without a leaving a forwarding address,' and Levinas (2009, p. 210, but also see 206-207) writes after the war that they knew what this meant because they "knew of the mass exterminations of Jews in Eastern Europe." Once during his captivity, Levinas saw a column of deportees destined for Buchenwald while working in the forest, and sensed the extent of the tragedy that was unfolding around him.¹²⁶ It is unclear whether Levinas was aware of the conditions Russian POWs were subjected to (generally speaking, different nationalities were sometimes held within the same camp, and prisoners were able to observe the treatment and living conditions of other nationalities from across a fence separating the units (Stelzl-Marx, 2000, p. 43)), but what has been reported is that Levinas and his Jewish POW colleagues clandestinely threw food over the fence of Bergen Belsen to starving women when the opportunity arose (Gutman, 2011, p. 23). In any case, the full extent of the persecutions emerged only after the war, and it was then that Levinas received the news that many of his immediate family, including his parents, grandparents and two younger brothers, died in his home town of Kaunas in Lithuania, shot there by the Nazis (Lescourret, 1994, pp. 126-127). Only his wife and daughter survived, who had been hiding in France.

In the context of solitude, Levinas also writes about the separation from the German civilian population during his time in captivity, members of which appeared to view the Jewish commando with contempt.¹²⁷ In one of the few

¹²⁶ This experience, Malka (2006, p. 263) writes, was one that Levinas could not forget, but "never evoked in his writings and confided only to those who were very close to him."

¹²⁷ This suggests that the members of Levinas's commando were marked as Jews, something that was prohibited in relation to Western POWs, although both Hilberg (1985, 2:627) and Durand (1982, p. 354) mention a contravention of this prohibition in a camp in the same military district (*Wehrkreis*) as Stalag XI B. After surveying the available evidence, Durand (1982, p. 356) concludes that there were, "although rare, cases in which the wearing of the yellow star was imposed on Jewish POWs." Berg (1990, p. 201) writes about an instance in which Jews in a work

stories from his time in the camp, Levinas (2001, p. 41) tells how the above-mentioned dog that lived with them was the only one who treated the prisoners as human beings:

Now I am coming to the story of the friendly dog. A little dog associated himself with us prisoners one day as we were going to the workplace; the guard did not protest; the dog would install himself in the commando and let us go to work alone. But when we used to come back from work, very relieved, he welcomed us, jumping up and down. In this corner of Germany, where walking through the village we would be looked at by the villagers as *Juden*, this dog evidently took us for human beings. The villagers certainly did not injure us or do us any harm, but their expressions were clear. We were the condemned and the contaminated carriers of germs. And this little dog welcomed us at the entrance of the camp, barking happily and jumping up and down amicably around us.

In a different version of the same story, Levinas (1990b, pp. 152-153) writes:

The French uniform still protected us from Hitlerian violence. But the other men, called free, who had dealings with us or gave us work or orders or even a smile – and the children and women who passed by and sometimes raised their eyes – stripped us of our human skin. We were subhuman, a gang of apes. A small inner murmur, the strength and wretchedness of persecuted people, reminded us of our essence as thinking creatures, but we were no longer part of the world. Our comings and goings . . . passed in parenthesis. We were beings entrapped in their species . . . Racism is not a biological concept; anti-Semitism is the archetype of all internment. . . . It shuts people away in a class, deprives them of expression . . . How can we deliver a message about our humanity

detachment at Stalag IX A were made to wear a 15cm tall inscription reading 'Jew' on their uniforms, and says that in some, albeit not all, camps, Jews were made to wear the yellow star for two months before this requirement was then abolished. Another possibility is that the local civilian population came to know by word of mouth that a work detachment made up of Jews was working in the forest.

which, from behind the bars of quotation marks, will come across as anything other than monkey talk?

...

[But for the dog,] there was no doubt that we were men.

Some commentators, such as Doukhan (2012, pp. 8-9), read this passage as a confirmation of Levinas's status as a persecuted person, seemingly confirmed by Levinas's own mentioning of the members of the commando as 'persecuted people.' However, both the way in which civilians interacted with the commando and Levinas's own feelings about this interaction point more towards an institutionalised racism that rendered POWs invisible as persons than to persecution as such. After all, it is not their *actions* that Levinas complains about, but the fact that they did not recognise the prisoners for what they were; that they had been excluded from normal life – which in a sense, they of course *had* – being 'no longer part of the world', having been put in 'parenthesis,' suspended from the possibility of communication. It was almost as if civilians were not looking at them at all.

However, there are also general aspects of the relation between POWs and the German civilian population that may throw light on this story as one that should be read otherwise than as a story of anti-Semitic persecution. To begin with, one should say that all POWs working within German society, being the only flesh-and-blood representatives of the enemy that the civilian population actually came in contact with, naturally attracted feelings of hatred (Overmans, 2005, p. 732). A xenophobic attitude, in which all foreign workers were looked at as dirty and unkempt, regardless of whether they were Jews or not, was, however, also actively propagated¹²⁸ by the German security forces, who tried to keep the German population at a distance from POWs and foreign workers, who by their very presence were threatening the ideology of the 'master race' on many levels (Bories-Sawala 1996b, pp. 223f). But the civilian population may also have been genuinely taken aback at the sight of POWs. Karner (1999, p.

¹²⁸ Although not at the expense of the war economy, which, as the security forces well knew, was heavily reliant on the ability and motivation of foreign workers to carry out their work (Bories-Sawala, 1996b, pp. 223f).

407) writes in this respect that living conditions of POWs were consciously kept well under that of the surrounding population, although the scale of the discrepancy would have depended on the nationality of the prisoners and the stage in the progression of the war.

Then there was the view that foreigners did not deserve to be working in Germany, carrying out jobs of German men in relative safety when the former were at the same time dying at the front (Bories-Sawala, 1996b, p. 231).¹²⁹ Davis (1977, p. 627) furthermore refers to feelings of resentment directed at POWs by civilian workers; as a cheap labour force, POWs were thought to ‘depress their earnings.’ Such resentment may have been expressed in various ways. Hoch (1992, p. 233) in this context mentions the lack of engagement by civil workers employed in the same work places as POWs on behalf of their POW colleagues, for example when it came to the latter’s right to use bomb shelters during air raids, which was often denied to them; an engagement, Hoch writes, which would have been possible without danger.

Already since 1939, the German population had also been discouraged through official decrees and amendments to legislation from any contact with POWs other than that absolutely necessary in the course of their work, or likely to raise labour output (considerations pertaining to the war economy again trumping ideological ones). While the killing of Jews was carried out in secrecy in the Eastern occupied territories, POWs (and other foreign workers) were employed side by side with the German population. This meant, firstly, that their fate could not be hidden, and secondly, that the attitude of the population towards them needed to be managed in order to make the labour deployment a success; ‘success’ here meaning the maximum exploitation of all foreign workers without undue sympathy or fraternisation with foreign, ‘racially impure’ elements (Herbert, 1997, p. 394). POWs, however, at least did not need to be publicly terrorised in order to silence those German voices who claimed that the influx of foreign workers on such a large scale went against the ideological tenets of

¹²⁹ The fact of this envy by the German population alone should bring to mind how lucky POWs ought to have considered themselves, having been excluded from further participation in a war of such terrible scale.

National Socialism (Hebert, 1997, p. 385-386). Their presence in Germany remained part of the operations of war and could be justified on that basis.

But “one should not,” Spoerer (2005, p. 559) writes, “underestimate the repressive pressure that in this context also particularly the common German person was subjected to under the NS-regime.” The legislation carried provisions for punishment that, for example in the case of forbidden contact with German women, could theoretically amount to death, although most often a lengthy prison sentence was passed (Bories-Sawala, 1996b, pp. 99 and 182). Speckner (2003, pp. 154-175) lists amongst the punished contraventions the taking of photos with POWs, single conversations, and even the passing of a half-smoked cigarette to a POW, while Bories-Sawala (1996, pp. 107-108) also mentions that POWs were not supposed to use sidewalks.¹³⁰

While the legal framework may have influenced, if not the attitude of the German population itself, then at least the extent of civilian interaction with prisoners of war generally, Jewish POWs would have been most likely to encounter actual disdain or hostility in the way Levinas describes.¹³¹ But whatever attitude prisoners witnessed, it is likely to have been institutionalised rather than personal if one is to follow Herbert (1997, p. 396, emphasis added) in

¹³⁰ Both, however, also point out that this pressure did not altogether work, especially in relation to French POWs, who proved popular with German civilians. Particularly where POWs were employed in rural areas that had always seen seasonal workers and where they were integrated into German family life, a strict prohibition of contact could not be implemented. Speckner concludes from this that despite the state’s continued efforts, an overall negative attitude towards POWs could not be established in the German population, but this is unlikely to have been the case overall.

¹³¹ Although it should also be remembered that not all Germans were anti-Semites. Durand (1982, p. 356) thus recounts a story in which a Jewish POW working in a factory and illicitly engaging in small acts of sabotage, was discovered by the German foreman, who, if he knew what would happen to a Jew once removed from the protection of the laws of war and placed under civilian adjudication, had clearly no intention of bringing about such punishment. Instead of denouncing the prisoner, he simply told him, in referring to the sabotage: “When one is called Bernheim, it is an imprudence that one better not commit.”

his assessment of the German population as being overall indifferent¹³² to foreign workers:

[O]n the whole, the vast majority of Germans evinced little interest in the fate of the foreigners. They neither took part in ill-treatment and harassment nor sympathized with the foreign laborers around them: they had problems enough of their own. . . . *The foreigners were simply there*, as much a part of wartime life as ration cards or air-raid shelters.

Herbert argues that this indifference was not only the result of the mounting problems that the German population itself was experiencing, but also of the successful institution and internalisation of political values that rendered individuals mere tools in the political system of discrimination: “Yet this was precisely the essential underpinning of the Nazi system of forced labor for foreigners: the practice of racism became a daily habit, part of everyday life, without individual Germans having to participate in active discrimination or oppression” (Herbert, 1997, p. 396). Spoerer (2005, p. 560) appears to agree, in that he writes that where the reach of the German bureaucracy ended, it was the traditional attitudes of Germans vis-à-vis foreigners that took over, and that even where foreign workers were treated as fellow human beings, this was just as likely to be out of passed-on patriarchal thinking than out of actual empathy.

In other words, what POWs encountered in members of the German population were not individuals with faces, but a system. German civilians were as much part of the prevailing law as the camp guards, which also acted not as the enemy in relation to the POWs, but as the representatives of law. Here, then, we come to a better understanding of the role of the dog in Levinas’s story. The animal, reacting to the prisoners authentically, presented to them its *face*, much in the way that the opponent in war or the concentration camp guard acting on his own account may have done, but which POWs, due to their excluded position, did not experience. It would be this ability to *withhold* oneself and act

¹³² Cf. Geras (1998, p. 6), who terms the indifferent attitude of the non-Jewish population to the fate of the Jews as a ‘mental turning away.’

in accordance with laws (and not, as Schmitt claims, the *decision* on the friend or enemy) that Levinas (in Levinas and Kearney, 1986, p. 29) would come term ‘the ability to be political:’

The human being is characterized as human not only because he is a being who can speak but also because he is a being who can lie, who can live in the duplicity of language as the dual possibility of exposure and deception. The animal is incapable of this duplicity; the dog, for instance, cannot suppress its bark, the bird its song. But man can repress his saying, and this ability to keep silent, to withhold oneself, is the ability to be political.

It is law that provides the framework for this ‘suppression’ of the face-to-face, and indeed, it is law that Levinas (2001, p. 100) would come to regard as anonymous, suppressing ‘charity’ from one person to the other. The laws governing POWs enabled their living without a life, in a space from which, each in their own way, the enemy, the protecting power, German civilians, even their own comrades, had turned away. Jewish POWs were excluded from the political¹³³ (now in Schmitt’s terms), they only encountered law.

There is, however, one further aspect of the prisoners’ lives worth addressing under the rubric of ‘engagement,’ or rather, ‘detachment,’ and this is the past and the future. In relation to the past, prisoners became increasingly detached from the way of life they previously knew, where social expectations had formed a framework for behaviour. In the camp, where life had its own preoccupations, this framework now became redundant. Perhaps the most significant aspect of camp life was thus the egoistic attitude produced in prisoners by the conditions in the camp, of which many later came to feel ashamed. Kochavi (2005, pp. 49-50), for example, quotes the following from the diaries of one British officer Major E. Booth:

¹³³ Ultimately, the political is for Schmitt represented by the possibility of killing: “The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing” (Schmitt, 1996, p. 33).

Sometime, when I am depressed I feel that I have lost the art of being still in the constant hubbub of the last three years; it is not that I haven't done any silent thinking – only too often my mind goes racing away on some meteoric flight – but that even my thinking when walking alone or when lying wakefully on my bed, has been in a way a frenzied reaction from the pettiness of prison life. Sometime I feel that I have been so completely engulfed in this pettiness that the most important factor in my life has been reduced to the next meal or an extra cup of tea, and that gradually my power of affection has withered, leaving nothing but an egoistically centered shell.

Levinas (2009, p. 201) also writes that “in five years, life in the camps was organised. The rules are established – manners, customs – and habits, that poor comfort. So without destroying a kind of latent brotherhood, human defects appeared: selfishness, pettiness, shoving, conflicts.” In the camp, the moral education one had received mattered little; civilisation became a distant memory, if not a direct hindrance to one's successful survival. Partly, this had been an achievement on the part of the captors, who purposefully humiliated prisoners in the beginning stages of their captivity to establish their authority, attacking ideas of the righteousness of their cause, separating them from their comrades who could have been a source of prestige and respect to them, and generally making sure that little of the social and psychological framework sustaining a healthy and confident self remained (Lunden, 1948-9, p. 727). Physical deprivation further contributed to this process, and Spanos (2010, p. 66) recalls the results:

After several days in the camp I began to realize that many of my fellow inmates had lost, or were in various stages of losing, their national and cultural identities, that the deprivation not simply of human rights but also of the basic amenities of civilized life – sanitation, clothing, and bodily nourishment, above all, food – had reduced all too many of them to instinctual life, to the elemental condition of biological survivors. Tobacco was capital, and the knife was the arbiter of conflict.

The future was that which awaited prisoners, reserving their place, harbouring the possibility for a reunion with family and friends, for action by

which they could determine once again their own life, for events. Vichy, however, had its own ideas about the role POWs were to play in the future of France and the establishment of a new nation.¹³⁴ Once Scapini was appointed as head of mission, he was accordingly instructed not only to look after the POWs, but also to convert them to the *révolution nationale* (Overmans, 2005, p. 763). In due course, specifically-targeted propaganda was directed at POWs with a view to instilling Christian values in them, so as to guarantee a new beginning on their return:

Those who saw France's defeat as punishment for its sins felt redemption could only come through suffering, and the prisoners of war were those who suffered most from the defeat. If they meditated on the 'misfortunes of the fatherland' while they were exiled from France, this reasoning went, they would be purified and would return to save the country. With this in mind, Vichy sent many brochures to the POW camps outlining the flaws of the Third Republic and setting forth the reforms of the National Revolution (Fishman, 1987, p. 187, footnote omitted).

It is therefore not surprising that Levinas, like many commentators (see for example Durand, 1987), was comparing his own fate to those sent into exile; an exile that Agamben (1998, p. 110) associates with the sovereign ban, and which his commentators see as the paradigm of life in the space of exception.¹³⁵ Amongst the few references in Levinas's work about his time in the camp thus stands out his mentioning in several interviews of the number 1492 that was displayed above the camp entrance: the year of the expulsion of Jews from Spain (see, for example, Levinas, 1990b, p. 152, 2001 and 2011). This analogy could easily be taken as referring to the persecution of Jews, but it must in fact be read as referring to the exile that French POWs, but especially those who were Jewish, were believing (and meant to believe) themselves to be in.

¹³⁴ One good reason, Overmans (2005, p. 762) writes, why Vichy should be interested in taking on itself the role of the protecting power in relation to French POWs.

¹³⁵ DeCaroli (2007, p. 53), for example, writes about "life that resides within the state of exception, exemplified here by the camp but perhaps best seen in those who have been sent into exile . . ."

Exile entails the exclusion from one's community, an exclusion which, through the negative link it establishes *to* that community, cannot be said to cut the subject wholly off from the legal order, so that the exiled comes to reside in a space of exception. The number 1492 might even have stood for the secondary 'exile' experienced by Jews through their separation from their fellow countrymen. The number is in fact likely to have been the number of Levinas's work detachment, not of the main camp, Stalag XI B. Gascar (1967, pp. 94-95), for example, reports that in relation to smaller work detachments and sub camps, the Stalag was like

. . . the city, the county town, the administrative centre. The prisoner who arrives from his distant commando lost in the countryside feels homesick, being sometimes treated as an inferior person. Flabbergasted, he discovers many things of which he could not have imagine the existence: the black market where there is almost close to everything . . .

But prisoners also had personal futures. Despite the differing conditions across camps, certain features of camp life re-appear in all accounts, the most prominent one being the importance of mail for prisoners' mental well-being. Durand (1987, p. 13, 1988, p. 237-238), for example, reports that the ongoing duration of captivity was not only an essential feature of war imprisonment, but also perhaps the one aspect that was most difficult to bear, and that only mail could lift the sense of all-encompassing meaninglessness associated with being a POW. Mail reminded prisoners that there was an outside after all, which contained – paradoxically it was the outside that contained, while the contained space of the prison was empty – events and a future awaiting their return.

Mail, however, was restricted by censure as to political events, and only seldom reported honestly from family life: “[N]ews about accidents or the fact that the workshop, the business or the farm had to be given up were as far as possible kept from the prisoner” (Bories-Sawala, 1996b, p. 417). Prisoners had their memories, but were unable to follow current events outside the camp, from the participation in which even through discussion they were therefore

suspended.¹³⁶ And it was indeed not only home life and the life of the nation, but also messages about the progression of the war that prisoners lived for. Levinas (2009, p. 202) thus remembers:

The prisoner, like a believer, lives in the beyond. He has never taken serious the narrow part of his life. For five years, despite his installation, he was at the point of leaving. The strongest realities around him wore the stamp of the provisional. He felt himself engaged in a game that exceeded infinitely the world of appearances. His true destiny, his true salvation, was being carried out elsewhere. In the communiqué. They were events of a cosmic scale. With regards to the peasant exiled directly from a corner of Bretagne or Corrèze and who once had no other horizon than the limits of his village, it was the universe. His life ranged from Benghazi to London, from St. Nazaire to Stalingrad, from Singapore to Bucharest. He took his meals fixing the oceans and the wind of the Russian steppes rocked him to sleep. Does one forget a life down to earth or does the down to earth never become Life?

Despite following the events of the war where they could, there was no doubt that prisoners were barely able to take the position of spectators, and this impacted their perception of time: “Time for the detainees was a burden, not only because of the dreary routines of the prison regime but also because of the sense of being detached from crucial historical events and helpless to intervene in them” (Caygill, 2004, p. 152).¹³⁷

Detachment, in fact, is a theme that runs through POW accounts. The trauma of action and capture distanced prisoners from their past life, and interrogators were skilled in further reducing prisoners’ emotional ties to the

¹³⁶ Bories-Sawala (1996b, pp. 416f.) writes that this lack of news was partly alleviated through the arrival of French civil workers in Germany, who not only brought news from home, but through whom correspondence (including with those POWs who had been repatriated) could also be organised. A further source of information were illegal allied radio stations.

¹³⁷ Caygill makes this statement in the context of discussing Ferdinand Braudel’s captivity in an Oflag. While this experience of time would have been particularly acute for an officer not required to work, and more so for a historian, it can be taken as a general feature of war imprisonment. Caygill (2004, p. 152) goes on to characterise time in the camp as “discontinuous, stretched, compressed and reversed.”

world they left behind, so as to increase their control over them. Sooner or later, prisoners discovered that they were no longer able to remember details about their past. Lunden (1948-49, p. 73), for example, observes: “Every prisoner finds that his memory fails him in some way. He cannot remember dates, names, streets, addresses or his own phone number in his home. The past seems to fade out and there is only the present.” This present then played its part in turn to reduce prisoners’ sense of past and future. Its immediacy was overwhelming, ‘melting’ prisoners’ hopes and memories (Spanos, 2010, p. 57). Spanos (2010, p. 76, emphasis added) thus remembers his inability to escape the reality of the prison on his arrival at his work detachment:

I chose a bunk, laid down on its rough and stale-smelling straw mattress in the hope of obliterating the nightmarish reality our higher cause had ordained for us. But nothing I imagined . . . could efface its disconcerting immediacy. The world I left behind when I was captured had become by this time a realm of shadows – disembodied, fragmented, gossamer, *unresponsive* to my effort to bring them to corporeal presence.

In this way, the ever-outward expanding world of the prison overrode the prisoners’ sense of being held merely in temporary suspension. As the past sunk away and the arrival of the future, which “alone could finally date and give meaning to life” (Durand, 1987, pp. 137-138), became more and more uncertain, the present appeared as if time had stood still. Kochavi (2005, p. 57, footnote omitted) in this respect quotes from a letter written from an air force camp by Flight Lieutenant Lloyd S. Adams in 1944: “I have felt terribly depressed and fed up the past few weeks, I hate to admit it . . . but the longer I am here the will to live is becoming less and less. At the moment I feel there is no future, I have forgotten the past and am just living in a dream from day to day.”

For most, this ‘dream’ turned out to be a nightmare,¹³⁸ “a miserable present of which one only asks that it may end, and without future, because one never knows when it will finally begin. . . . the irremediable loss that these days

¹³⁸ In his prison diaries, Levinas (2009, p. 87) writes: “The sense of nightmare. Reality still – absolutely foreign. Night in daylight.”

in exile constitute” (Durand, 1987, p. 137). New arrivals to the camp would report on the war and the world left behind, causing the older prisoners to realise that time was moving on without them. Smith (1968, p. 133) thus recounts the following reaction of a long-term POW on seeing much younger soldiers stream into the camp: “He was now beginning to sense acutely the passage of time, not just in terms of captivity, but as a career officer. He felt sometimes that the war had left him behind like a piece of useless wrack on the tideline of 1939.”¹³⁹

¹³⁹ Pétain’s message to prisoners that ‘patience is a form of courage’ (reported by Gascar, 1967, p. 81) is likely to have proved of little comfort. POWs overwhelmingly regarded their time in the camp as having caused them to have ‘missed their youth,’ as Bories-Sawala (1996b, p. 684) reports from her interviews.

4. Consequences

For Schmitt (1996, p. 37), the political is a ‘mode of behaviour’ that precedes any battle, but is determined by the latter’s ever-present possibility. The seriousness of the threat of war forces an individual to think about his own situation in a way not required by every-day life, as he must now distinguish between friend and enemy. And for this, it is required that he address the question of his identity: “. . . the enemy, and war,” Meier (1995, p. 15) writes, “. . . confront him [the individual] with a question that he cannot evade at will. They confront him with decisions in which he *must* decide about himself, in the face of which he is compelled to achieve clarity about his identity.”

The problem, however, is that this commitment to an identity also requires the merger with a group and the corresponding relinquishment of individuality. War, at least in its limited form, is not about individual feelings and actions; the enemy – *hostis*, not *inimicus* – is an enemy of the state or the people with which one identifies, and not a personal enemy:

The enemy is not merely any competitor or just any partner of a conflict in general. He is also not the private adversary whom one hates. An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity. The enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship (Schmitt, 1996, pp. 28).

The distinction between war as a collective enterprise from individual achievement already held true in ancient times, as Neff (2005, p. 17) points out: “Patriotism, in short, was less a matter of individual derring-do than of the extinction of the self in the community. The archetypal image of war in this sense was the Greek phalanx, with its forces marshalled into closely ordered ranks functioning as a single instrument of destruction.” In European inter-state warfare, the phalanx became the anonymous mass of soldiers, each of whom shielded behind the corporate identity of the state:

Corporate identity has informed both sides in war between modern states. The enemy is not killed as an individual. He remains the enemy even if he has done nothing wrong – indeed, even if he disagrees with the policies of his government. Friends can become enemies because the category has nothing to do with personal subjectivity. The enemy is always faceless . . . (Kahn, 2013, p. 215).

In European war, the enemy was fought in the guise of his corporate identity, but he was no less hated on account of this. On the contrary, the suspension of any overarching justifying framework meant that the parties to a conflict were meeting each other without this meeting being pre-determined or mediated by law. The conflict thus constituted a direct engagement of each other, each corporate identity hardened in its subjective assessment of its own cause, with no common source of moral or juridical law that would unite both under its remit (even if only in the form of Kant’s regulative idea)¹⁴⁰ – except that war was limited.

Part of this limit was the suspension, on the international level, of any sentiments of righteousness that motivated hostilities from a national point of view. This suspension, however, would become apparent to those engaged in combat only if they found themselves held on the threshold between war and peace, i.e., in the POW camp. Usually, the parties would pass through the threshold that divided unlimited from limited war at the beginning of the hostilities (silence, followed by the declaration of war), only to pass through it again at the end of the hostilities, this time from limited war to peace (silence, followed by the declaration of peace). As such, it would be non-apparent. But when combatants were captured, they *became* the limit; their protection marked limited from unlimited war, their imprisonment war from peace. What did they find between these three coordinates?

¹⁴⁰ In the terms of systems theory, one would say that even secondary observation or ‘re-entry,’ i.e., self-reflection on the part of the system or the process of “presenting the difference of system and environment within the system” (Luhmann, 1990, p. 12) must use the system’s own operations, which means it cannot ‘see’ any further than the primary operations of the system, nor observe itself observing itself in real time.

On the threshold, agency was not merely limited, but wholly suspended. In this respect, the POW camp can again be productively compared to the concentration camp. Both constituted the counterpart to the order to which they formed the exception. The concentration camp as an exception from national legal order was, as Fitzpatrick (2005, p. 68, footnote omitted) expresses it, “a work of death, set apart from and ultimately withdrawn from life, and constitutively committed to its cessation.” This ‘work of death’ was accomplished through policy and guidance prescribing every detail of prisoners’ treatment, to the extent where even the precise wording to be used with prisoners was pre-determined. At the same time, there existed a culture of arbitrary decisions and a constant tendency to employ violence (Karner, 1999, pp. 400-401).¹⁴¹ The outcome was always identical: The prescription of every detail of life by sovereign decision, with no space for self-determination remaining for the individual prisoner.

The POW camp, on the other hand, was a ‘work of life,’ so to speak, committed to the exception and protection of life from war. Here, the detailed commands that determined every aspect of the lives and deaths of prisoners of concentration camps were absent. POWs were kept passive not through the agency of the sovereign *holding them down*, but through the agency of law *sheltering* their lives. In the same way in which a concentration camp inmate was “a mere object of political intervention” (Laclau, 2007, p. 18), a POW was a mere object of law. For Jewish POWs from Western nations, this situation was of particular significance; while everywhere Jews under German control were subject to the most detailed policies, no such policies existed for the Jewish POWs, almost as if their existence was denied. They effectively “disappeared in the anonymity of the mass of their nation” (Overmans, 2005, p. 872).¹⁴²

¹⁴¹ Karner (1999, p. 399) explains that in concentration camps, the camp commander was in practice accountable only to his superiors in the SS, and that the structure of the SS meant that the taking of initiative and the assumption of responsibility were valued and rarely disciplined.

¹⁴² Overmans here writes from the perspective of the historian, searching in vain for documentation about the Wehrmacht’s specific policies relating to Jewish POWs. It is interesting that he describes the result, i.e., being unable to find out very much at all about the fate of Jewish POWs, as ‘ironic.’ Ironic, presumably, because one associates lawful treatment with

Given that its inhabitants were governed by law, one would assume that the POW camp opened up a space for individual agency. Indeed, the camp was open if one considers decisions as constituting closure. Thus, while concentration camp inmates were subject to the decisions taken by the camp administration that could not be appealed against, in POW camps the camp administration was itself accountable under the Convention, which ‘opened’ the structure of the camp to a supranational institution (Karner, 1999, p. 399). Furthermore, in a POW camp the functions of a court were carried out by the prisoners’ own military hierarchy and not the camp administration, which only had jurisdiction in certain cases. This meant that often either the trials themselves or the sentences were deferred to a time after liberation, leaving the camp open to an outside and future agency of law.

Prisoners could thus be considered ‘free.’ But this freedom, which arose from the application of law, was empty, a prison made of law. After all, the right not to be killed was a negative right that did not enable prisoners to live. The laws of war protected prisoners’ lives, but merely so that this life might form a basis for agency *in the future* and under *different law*, when the war had ended and prisoners would have returned to their civilian lives. For now, prisoners were simply neutralised in the sense of being silenced, their agency suspended so as to prevent their taking up any stance at all, whether as friend, enemy, or indeed as neutral.¹⁴³ The laws of war were not aimed at prisoners at all, but at the protection of war. The POWs themselves formed no other object of interest, their lives being simply postponed until another legal framework would take over. But what is life if all one has and can do is to be alive, not actively (war), not passively (persecution), but *impersonally*?

accountability, and accountability with documentation. It was, after all, the many members of persecuted groups that ‘disappeared’ without a trace into concentration camps.

¹⁴³ In this respect, one should distinguish their neutrality from that of third states on the one hand, i.e., a neutrality that more often than not amounts to a friendly stance towards both belligerent parties and thus constitutes at least *a* stance, and the neutrality of national law on the other hand, which acts as the common ground for the resolution of conflicts.

If one were to think about the consequences of life on this threshold,¹⁴⁴ someone like Levinas, who not only spent five years in a POW camp, excluded as a Jewish POW from both the war and anti-Semitic persecution, and thus exemplifying the three-way situation of the threshold between the co-ordinates of unlimited war, limited war, and peace, makes an interesting subject. This interest is in particular sustained by Levinas's subsequent thought on ethics. One wonders what lessons life on this threshold, which was also the realm of ethics in Luhmann's sense (i.e., protecting war from the excesses that national hatred would otherwise have caused) taught a young philosopher about the relation of self and other in war, persecution, and in civil society.

¹⁴⁴ And consequences there would always have been. Those engaged in research into war imprisonment not uncommonly say that having been a POW becomes the central experience of someone's life (see, for example, Overmans, 1999, p. 483).

4.1. In the camp

Levinas had known about anti-Semitic violence from a very young age. Burggraeve (2002 pp. 26-27, footnote omitted) writes:

As a child he had heard much tell of the ‘pogroms,’ or popular outbursts of rage against the Jews in Czarist Russia between 1881 and 1917. At the age of eleven, he himself went through the Bolshevik October Revolution (1917) in Ukraine, when his family fled the violence of the war in several steps During this period, he also became closely acquainted with the bitter violence of the persecution of the Jews. . . . Levinas later testified in a letter (1975) that the Russian revolution ‘signified [for him] the beginning of all further developments.

What Burggraeve omits to mention is that, according to Levinas’s own recollections, when in 1920 his family returned to the comparably quiet and ordered Lithuania from tumultuous Ukraine, “[t]he return to normality gave me the impression that something important had been missed, that history was continuing without me in Russia” (Levinas, 2001, p. 27). This feeling of being confined to the sidelines, and a corresponding desire to be part of what he thought was a ‘messianic era,’ stayed with Levinas until his arrival in France in 1923 (Levinas, 2001, p. 27-28). Here, in particular during the years leading up to the Second World War, Levinas felt himself part of a movement of religious affirmation and political opposition that had arisen as a result of the hatred directed against Jews in the first half of the century. Henri Bergson may serve as an example of the sentiments and choices this involved. As Levinas recounts with deep respect, Bergson had offered in 1937 as an explanation for why he did not convert to Catholicism despite an attraction to the faith: “I would have converted had I not seen the formidable wave of anti-Semitism which broke out over the world taking shape over the years. I wanted to remain among those who would be persecuted” (quoted in Malka, 2006, p. 24, also see Levinas, 2009, p. 219).

Underlying this wish ‘to remain amongst the persecuted’ was not just a feeling of solidarity, but the realisation that being and declaring oneself Jewish was no longer a matter of choice. As Levinas had already explained in his 1934 essay *Reflections on the Philosophy of Hitlerism*, truth bound to one’s being and thus one’s particular physical embodiment left no escape (Levinas, 1990, p. 69). In 1935, Levinas then wrote of Hitlerism as “the greatest trial – an incomparable trial – through which Judaism has had to pass. . . . The pathetic destiny of being Jewish becomes a fatality. One can no longer flee it. The Jew is ineluctably riveted to his Judaism” (quoted by Rolland in Levinas, 2003, p. 74).

Once the war had started, anti-Semitism was one, but not the only factor that motivated Levinas to join the army on the side of France. Levinas had held, as his son (in Malka, 2006, p. 263) explains, “a Napoleonic image of France against the Russia of pogroms.” When he had first moved to France in 1923, this move had been accompanied by what Philippe Nemo (in Malka, 2006, p. vii) terms an “unwavering rational and spiritual decision” to become part of a nation that amongst Jewish immigrants was regarded as “a model of emancipation and an ideal of integration” (Malka, 2006, p. 53). Levinas (1990b, p. 291) saw in France “a nation to which one can attach oneself by spirit and heart as much as by roots,” and it is thus not surprising that he sought inclusion in the body politic through citizenship (granted in 1930), and later enthusiastically proclaimed his readiness to join the army in order to repay the debt (Malka, 2006, p. 25). As Berg (1990, p. 197) writes, for Jews the war took on ‘a double meaning’ as the war both against Hitler’s anti-Semitism and the danger Hitler presented to France and the rest of the world.

The war, however, did not last long for Levinas. Once in captivity, his agency in aiding the protection of France from Hitler was suspended, as he found himself exiled from the world he had wished to fight for. In this respect, Levinas was in a similar position to many career soldiers, who felt ‘neutralised’ by the enemy on having been captured when they really had been out for “‘[t]he chop or the top’ – death or glory” (Smith, 1968, p. 27). Levinas’s situation was different, however, in that he was not only suspended from serving France, but also missed – unbeknown to him at the time, although he had his premonitions – what he later called “[t]he great ‘experience’ of Judaism”, the “*passion* in the same sense

as one speaks of the suffering [*Leiden*] of Christ under the Romans” (Levinas, 2001, p. 137), and “the Passion of Israel at Auschwitz” (Levinas, 2001, p. 226).

Levinas short 1947 work *Existence and Existents* can throw some light on the way he himself experienced the camp. The book bears no express connection to Levinas’s time in war captivity, apart from a note in the preface, in which he explains that the book’s essays were “begun before the war [and] were continued and written down for the most part in captivity” (Levinas, 2001b, p. xxvii). And even this note Levinas (2001b, p. xxvii) feels he must immediately excuse, stating that “[t]he *stalag* is evoked here not as a guarantee of profundity nor as a claim to indulgence,” but merely in order to explain why he was unable to take account of certain important philosophical works published between 1940 and 1945. Eager to re-join the universal philosophical conversation from which the interruption of war had excluded him, he thus disclaims any substantive connection between the thoughts written down and the concrete circumstances of their writing. Accordingly, *Existence and Existents* takes up themes and strands of philosophical argument by authors ranging from Hegel to Shakespeare;¹⁴⁵ the camp is not mentioned again.

Nevertheless, the central theme of the book, set out in the section entitled *Existence Without Existents*,¹⁴⁶ appears to be a phenomenological exposition of life in the camp that matches the politico-judicial position of Jewish Western POWs precisely. The main concept is “the fact that *there is*,” (p. 5) or in short, the ‘there is;’ a concept that Blanchot (1985, p. 49) regarded as “one of Levinas’s most fascinating,” Fagenblat (2002, p. 583) as “one of his most well-known but least understood”, and about which Bernasconi (in Levinas, 2001b, pp. xii) writes “that Levinas can barely say even what it is not.”

¹⁴⁵ As Caygill (2002, p. 53) writes, the chapter on the ‘there is’ in particular is an “extremely complex and stratified text . . . of the most extraordinary density. It weaves together themes and preoccupations of the 1930s such as the confrontation between Heidegger and Bergson and the reflection on Durkheim and the Durkheimian school, but with a new sensitivity to Hegel, the insistent presence of Shakespeare and a sensitivity to the sombre themes of murder, horror, insomnia and the night.”

¹⁴⁶ First published in *Deucalion I* in 1946 under the title *Il y a* (Levinas, 2001b, p. 3).

This latter difficulty may be due to the fact that the ‘there is’ stands for pure being itself. Remaining after everything has been negated – therefore the emphasis on what it is *not* –, the ‘there is’ itself *is* nothing in particular – therefore one cannot say what it is. Levinas (2001b, pp. 51-52) begins as follows:

Let us imagine all beings, things and persons, reverting to nothingness. One cannot put this return to nothingness outside of all events. But what of this nothingness itself? Something would happen, if only night and the silence of nothingness. The indeterminateness of this ‘something is happening’ is not the indeterminateness of a subject and does not refer to a substantive. Like the third person pronoun in the impersonal form of a verb, it designates not the uncertainly known author of the action, but the characteristic of this action itself which somehow has no author. This impersonal, anonymous, yet inextinguishable ‘consummation’ of being, which murmurs in the depths of nothingness itself we shall designate by the term *there is*. The *there is*, inasmuch as it resists a personal form, is ‘being in general.’

In the years before the war, Levinas had already written about being. Disclosed only in certain moods, such as nausea or shame, being appeared to him as a prison¹⁴⁷ from which one only wants to escape, “to get out of oneself, that is, *to break that most radical and unalterably binding of chains, the fact that the I [moi] is oneself [soi-même]*” (Levinas, 2003, p. 55).

Already at that time, the relation between this prison of being and the various destinations for escape was complicated; while certain forms of religion, idealism and bourgeois existence appeared to offer liberation, they in fact constituted nothing other than sleep, a dream simulating liberation. ‘Escape,’ then, had two meanings: On the one hand, bourgeois existence constituted an escape from the prison of being. On the other hand, ‘waking up’ in the prison of being and to the fact that one’s existence had been one long sleep itself constituted an escape from bourgeois existence, even though this destination was not the one sought in “the quest for the marvellous,” of which Levinas (2003, p.

¹⁴⁷ In *On Escape*, Levinas (2003, p. 60) writes of being as “the prison of the present time,” (p. 54) ‘enchainment’ (p. 55) and ‘brutality’ (p. 56), containing “a kind of dead weight” (p. 60). The characterisation of being as ‘having weight’ then frequently reappears in *Existence and Existents*.

53) writes that it “is liable to break up the somnolence of our bourgeois existence.” The result was an impasse, and from then on, it would be Levinas’s aim to break out of the prison of being to effect a real escape. Throughout his career, he would in one way or another attempt to retrieve “those moments in the philosophical tradition that exceeded the limits of being . . . [, which] came to be articulated in terms of infinity, the other and the good” (Caygill, 2002, pp. 49-50).

When Levinas became a prisoner of war, this ‘escape to a prison’ became for him a physical reality. He did escape bourgeois existence. In his captivity diaries, he thus writes about the ‘long leisure’ of captivity that allowed him to catch up on reading and led to the discovery “that there were a lot of unnecessary things – in relationship, in food, in occupations” (Levinas, 2009, p. 70). After the war, Levinas (2009, pp. 201-203) then writes about the ‘romantic’ aspects of war imprisonment, in which prisoners were living ‘an exceptional present,’ ‘a new rhythm of life,’ a freedom from concerns such as those with possessions that determine bourgeois life: “Paradoxical as it may seem, they experienced in the narrow expanse [*dans la close étendue*] of the camps a magnitude of life larger and, under the eye of the sentinel, an unexpected freedom. They were not bourgeois, and that is their real adventure, their true romance” (Levinas, 2009, pp. 201-202). In an exception from the often sombre tones elsewhere in his captivity diaries, Levinas remarks on the lightness of being created by the sense of complete detachment from the world that prisoners had left behind: In his captivity diaries, Levinas (2009, p. 83), for example, writes: “Drunkenness is not only the effect of wine. It is this stage of detachment, the output of the life that we can know in every kind of excitement. The commando Sunday evening. The ease of everything because we are detached from everything.”

This new freedom of existence, however, was soon crushed by the weight of the ‘there is,’ which appeared, “like a field of forces, like a heavy atmosphere belonging to no one” (Levinas, 2001, p. 53), when the detachment was complete on all sides. After all, captivity had not only negated bourgeois life, which the war would have already achieved to some extent, but had also negated prisoners’ capacity for agency, and, by withdrawing engagement from their lives, had at the same time withdrawn the meaning of their existence. In the camp, POWs were

no longer combatants, nor persecuted, nor could they assume their normal civilian identities. What remained was only bare existence in the face of a world of which they were no longer part. “[T]he Being which we become aware of when the world disappears,” Levinas (2001b, p. 8) writes in *Existence and Existents*, “is not a person or a thing, or the sum total of persons and things; it is the fact that one is, the fact that *there is*.”

A shared feeling that the world had come to an end had already prevailed in the inter-war period, when the First World War had proved wrong the intellectual certainties of the time:

The first war forced philosophers – as it did artists and poets – to address the possibility, fact, and effect of such unprecedented carnage at the heart of a Europe identified with progress and the supposed pinnacle of modernity, opening up an apocalyptic imagination and by and large destroying the cultural optimism that had marked the turn of the twentieth century (Geroulanos, 2010, p. 5, footnote omitted).

With the rise of National Socialism before the Second World War, there then came a renewed sense of impending doom. Levinas (1990b, p. 168) remembers: “Imagine the atmosphere of this period 1933-1939, as if the end of the world approached! How the war approached and how the swastika, cheered by the masses, spread!” It is thus unsurprising that Levinas (2001b, p. 7) begins *Existence and Existents* with the statement that “[e]xpressions such as ‘a world in pieces’ or ‘a world turned upside down,’ as trite as they have become, nonetheless express a feeling that is authentic.”

What was different in the camp, however, was that Levinas was not only an intellectual diagnosing the end of the world from the position of an observer, but that he was now *in fact* excluded, pushed to the outside. He could not even be the one (the Jew, the intellectual) proclaiming the end of the world, which had ended in a different way than he had ever expected. Parcelled up and sent to the very edge of the European order, he was kept there until the drama had played out and the actors had returned to their places to resume their normal existence. Like the moods before the war, the camp disclosed a sticky, unbearably eventless

existence without meaning. The prisoners had been thrown into a realm antecedent to the world. From here, escape was not merely a matter of manoeuvring to achieve a better position *in* the world, as if one wished to move from the sidelines to the centre: “. . . we want to escape existence itself, and not only one of its landscapes, in a longing for more beautiful skies” (Levinas, 2001b, p. 12).

Some commentators locate the meaning of the ‘there is’ in ‘the impossibility of not being’ (Davies, 1990, p. 42) or “*the impossibility of my death*” (Critchley, 2004, p. 69). It is true that Levinas saw being as an ‘unrevokable contract’ that forces one to go on living, to ‘act and undertake’ (2001b, p. 12), and it is also true that Levinas had expected to die when he was captured, perhaps already when he joined the war, and that this expectation remained unfulfilled in a camp (a ‘prison of being’) whose sole purpose was to keep prisoners alive. But when in *Existence and Existents* and *Time and the Other* Levinas (2001b, p. 56 and 1987, p. 51) writes about the impossibility of dying or death, he means not primarily the inability of the *subject* to die, but the inability of *existence* to end when the world has ended, or, which is the same thing, when the world as meaningful has ended: “The absence of everything returns as presence . . .” (Levinas, 1987, p. 46); “the horror of the unceasing, of a monotony deprived of meaning” (Levinas, 2001, p. 45). This never-ending existence includes the subject, which goes on living even though it can no longer find meaning (i.e., a way of escaping), can no longer forget itself, as Levinas (2001b, pp. 11-12) writes, “in the essential levity of a smile, where existence is effected innocently, where it floats in its fullness as though weightless and where, gratuitous and graceful its expansion is like a vanishing.” The subject is unable to leave pure existence for meaningful life, nor can it die, even in suicide (Levinas, 1987, p. 50). Already in *On Escape*, Levinas had written about nausea as that “which amounts to an impossibility of being what one is,” while “we are at the same time riveted to ourselves, enclosed in a tight circle that smothers” (Levinas, 2003, p. 66).

The ‘there is’ thus brings together two things. On the one hand, the exclusion of the subject from the world as meaningful, the *interruption* of life as one knows it, exile. On the other hand, this absence of the world returning as a

‘presence of absence’ (Levinas, 2001b, p. 59 and 60), as existence apart from the world. This presence is neither finite, like life, nor nothingness, like death, but infinite. After the disappearance of the meaningful world, pure being expands ever more outwards like a pot continuously boiling over, its contents engulfing everything. In the ‘there is,’ each instant “is not redeemed by the next instant but is instead locked helplessly in the infinitude of frozen time” (Severson, 2013, pp. 48-49).

Without meaning, pure being offers no hope for escape. “For Levinas . . . the present, the instant, is a captivity” (Severson, 2013, p. 50); there is no exit, no tomorrow, because today is already infinite.¹⁴⁸ The ‘permanent quality’ of existence is thus *impossible to interrupt*: “the condemnation to perpetual reality, to existence with ‘no exits’” (Levinas, 2001b, p. 58). The ‘there is’ becomes a *permanent interruption*.¹⁴⁹

So when Caygill (2002, p. 50) writes that, “[a]s a work of the parenthesis that was Levinas’s direct experience of National Socialism, *Existence and Existents* (1947) is suspended between presentiment [of Hitlerism] and mourning [of the victims of the Holocaust],” one should see that this work is not only *of* the parenthesis in the sense that it was composed during war captivity which itself represented an exclusion from war, persecution, and civilian life; and that it is not only suspended between Levinas’s pre- and post-war work, but that its subject *is* parenthesis and the in-between, suspension, interruption, and exclusion.

Levinas describes the ‘there is’ through two images. In both, the ‘there is’ is produced through a change in the relation to the other person, and in both, it constitutes a halfway state between being alone and being in the presence of another. The first image shows the other turned away: “When you were a child and someone tore you away from the life of the adults and put you to bed a bit

¹⁴⁸ “‘Tomorrow, alas! One will still have to live’ – a tomorrow contained within the infinity of today” (Levinas, 2001b, p. 58).

¹⁴⁹ Davies (1990, p. 42) writes: “In testifying to a passivity that is never yet extinction but that always overruns any formation of a ‘proper end’, the *il y a* can be seen as a contribution to ontology that thereby ruins it, an idealist reduction rendering all idealism unfeasible. For Levinas, it turns us towards a thinking that is beyond idealism and other than ontology.”

too early, isolated in the silence, you heard the absurd time in its monotony as if the curtains rustled without moving” (Levinas, 2001, p. 45). And: “One sleeps alone, the adults continue life; the child feels the silence of his bedroom as ‘rumbling’” (Levinas, 1985, p. 48). In the second image, the self kills the other, and the ‘there is’ is the presence that returns despite this negation of life: “Horror is the event of being which returns in the heart of this negation, as though nothing had happened” (Levinas, 2001b, p. 56). Accordingly, the ‘what’ that returns as the ‘there is’ no longer attaches to another person (or even thing); it is without author or ‘master’ (Levinas, 2001b, p. 64):

There is is an impersonal form, like in it rains, or it is warm. Its anonymity is essential. The mind does not find itself faced with an apprehended exterior. The exterior – if one insists on this term – remains uncorrelated with an interior. It is no longer given. It is no longer a world (Levinas, 2001b, p. 53).

In the ‘there is,’ one is outside the world made up by friends and enemies. Instead, one faces what Levinas (quoted by Rolland in Levinas, 2003, p. 27) terms an ‘inhuman neutrality.’ With this phrase Levinas clearly aims to denote something that is not the benevolent neutrality of the judge or the neutral state.¹⁵⁰ Here is something that is evil,¹⁵¹ ‘horrific neutrality’ (Levinas, 1990b, p. 292), something that is not only *not* human, but also inhuman in the sense that it is beyond the humanly bearable. From the ‘there is,’ no engagement is forthcoming; something is there but what it is, is ‘ambiguous:’ “anything can count for anything else” (Levinas, 2001b, p. 54). And of course, in the camp, this was precisely the problem, namely that the laws of war had ended prisoners’ involvement in the hostilities, but were not, thereby laws of agency; that the neutral protecting power was not neutral; that the German enemy was there, but not in his capacity as an enemy, and that even this status as enemy was double

¹⁵⁰ Davies (1990, p. 47) thus distinguishes the ‘there is’ from the neutrality that makes ontology possible, the neutrality that is “neither one thing nor the other but their *ground*, the guarantor of their commensurability, [that] is marked by its generosity and benevolence.”

¹⁵¹ The present is known to be problematic for all prisoners: “The future and the past are perceived as full of goodness and beauty, the present as an absolute evil” (Frese Witt, 1985, p. 20).

sided – enemy to the West, foe to the Jews in the East. Anyone could count for anyone else.

It seems impossible to separate the rise of the ‘there is’ from the absence of the determinable other. The other turns away, and together with his engagement disappears the meaning it had cast like a net over the world. What arises is the indifference of the ‘there is’ – or is this the indifference of the turned-away other? The other’s indifference *is* his absence, which at the same time is also the indifference of the ‘there is,’ namely the in-difference (as Levinas sometimes spells it) of the not-constituting-a-difference, of there not being an other from which one could distinguish oneself.¹⁵²

For Levinas, this was not a matter of bemoaning the indifference of the world to one’s own suffering (or indeed, celebrating the “benign indifference of the world” that goes on while oneself has to die (Camus, 1998, p. 113)),¹⁵³ nor

¹⁵² This reading diverges from that offered by Rose in *The Broken Middle* (1992), where she refers the “malignant power [of] the echoic *il y a*” (p. 255) to the fear, desire and jealousy of the child (“or adult in the state of a child” (p. 255)), who is left alone at night: “It is fear of her desire, desire for her fear, exposed to such magnification an omnimobile projection because there is no Other present or proximate to receive, absorb and return such desire, such fear, and alleviate it by teaching it movement and configuration and growth. Jealousy too, perhaps, because the child has been sent to the silent, noisome night, while the ‘beloved’ parent continues, vivacious, to engage and be engaged not so far away – downstairs? – but infinitely removed from her fear and her desire – her desire for what she fears, her fear of what she desires” (p. 255, footnote omitted). What is problematic with this reading is that Rose reduces the ‘there is’ to the absence of the other on the one hand, and the needs of the self, expressed in its desires, fears etc. on the other hand. This has the effect of rendering the ‘there is’ superfluous as a concept, as it only stands for the sensible effects of abandonment. If one, however, takes the ‘there is’ as a type of relation in its own right, whereby the self finds itself in front of an indifferent other, then it is not the unfulfilled needs of the self for *another type of relation* as much as *this relation* which causes the horror of the ‘there is.’ After all, Levinas does not describe life in the ‘there is’ as full of pain, but as filled with the cold horror of the realisation that beneath meaningful relationships, there lies a realm of existence that offers nothing to which needs could even attach.

¹⁵³ Such benign indifference is what is at stake in the story by Blanchot that Critchley (2004, pp. 74f.) relates to the ‘there is.’ In the story, a child looks out of the window and up towards the cloudy grey sky, which suddenly opens: “*What happens next, the sky, the same sky, suddenly open, absolutely black, revealing (as through a broken window) such an absence that everything has been lost since always and for ever, to the point where the vertiginous knowledge is affirmed*

the anxiety before the nothingness represented by one's own death, an anxiety that Levinas (2001b, p. 58) attributes to Heidegger.¹⁵⁴ Rather, it was the indifference itself that caused the suffering. The horror and 'unbearable indifference' (Levinas, 2001, p. 45) of the 'there is' consists in not mattering any longer, in *not making a difference* because there is no one in relation to whom one could position oneself. In this sense, the POW camp as a space of exception achieves what Agamben (1998, p. 175) on the national level calls 'dislocation,' namely the dissolution of the connection between the categories friend/enemy and the order of war.

In a 1978 essay entitled *Transcendence and Evil*, Levinas (1998e, p. 180) writes about evil in these terms, calling evil an excess. In doing so, he distinguishes the excess that is at stake in evil from a simple 'too much.' It is not

and dissipated that nothing is what there is and above all nothing beyond'" (Critchley, 2004, p. 75, quoting from Blanchot, *The Writing of Disaster*). The child, Critchley (2004, p. 76) writes, experiences "the night that is not the starry heaven that frames the Moral Law." It understands that nothing is necessary, that nobody is watching, and therefore, that there is freedom. The absence of necessity here is not disabling, like in the 'there is,' but enabling of subjectivity.

¹⁵⁴ The difference here is perhaps less pronounced than Levinas makes out. After all, for Heidegger, as for Levinas, it is in the encounter with pure being that one first realises that one *is* and *has to be*. The difference lies in the consequences of this realisation. While for Levinas, the encounter with the 'there is' proves disabling, for Heidegger, it results in a turn towards the possibility of one's own death, a consequent anxiety about one's potentiality for being in the world (Heidegger, 1962, p. 232 [§40, p. 187]), and the final taking up of one's life as a project, i.e., one's projection towards death. Despite this difference, Heidegger's description of pure being closely resembles the 'there is'. Thus Heidegger (1962, p. 233 [§40, p. 188]) writes that the threat of uncanniness arises when confronted with the 'indefiniteness' of the 'nothing and nowhere' of pure being, which he describes as the '*es*' of '*es ist einem unheimlich*', perhaps best translated following David Farrell Krell as the 'it' of 'it makes one feel ill at ease' (Heidegger, 1993, p. 101). Heidegger sees darkness as particularly conducive to evoking such feelings of uncanniness, precisely because in the 'nothing' of darkness, the 'there' of the world emerges: "In the dark there is emphatically 'nothing' to see, though the very world itself is *still* 'there', and 'there' *more obtrusively*" (Heidegger, 1962, p. 234 [§40, p. 189]). This obtrusiveness manifests itself, like the 'there is', in a stifling of one's breath: "[T]hat which threatens cannot bring itself close from a definite direction within what is close by; it is already 'there', and yet nowhere; it is so close that it is oppressive and stifles one's breath, and yet it is nowhere" (Heidegger, 1962, p. 231 [§40, p. 186]).

the fact that suffering is unbearable which makes evil an excess, but evil's 'non-integrability' that makes suffering a suffering in the first place:

In the appearing of evil, in its original phenomenality, in its *quality*, is announced a *modality*, a manner: not finding a place, the refusal of all accommodation with..., a counter-nature, a monstrosity, what is disturbing and foreign of itself.

On being shown some years after the war a pencil-drawn map of Stalag XI B and being asked whether he thought this was the face of evil, Levinas famously responded: "Evil has no face" (quoted in Malka, 2006, p. 75). It was not that there was no evil in the camp; on the contrary, the space of the camp represented evil precisely:

There is nocturnal space, but it is no longer empty space, the transparency which both separates us from things and gives us access to them, by which they are given. Darkness fills it like a content; it is full, but full of the nothingness of everything (Levinas, 2001b, p. 53).

It was simply that the question was incorrectly asked, as it assumed that evil could lie in signification, in a face, even in something as easily representable as physical co-ordinates. It was the absence of such meaning that was evil, the placelessness that lay behind the co-ordinates on the paper and that could never be represented in the format of a map.

With the concept of the 'there is,' the meaninglessness that arises when the other turns away, and thus becomes ambiguous or indifferent, Levinas achieves to describe for the first time in his work a relation that is a non-relation. Later in his work, the other will again be the focus of such a non-relation, albeit then from the point of view of an ethical subject. Now, in the 'there is,' the subject loses its footing, unable to retain its subjectivity:

For what holds me to my existence is my relation to things and people; when this relation disappears, my own existence as something personal is also extinguished. As a pure interiority, it cannot be said to be mine at all. It is the

impersonality of existence outside of any specific relation to things and people. Yet if this interiority is no longer mine, in what sense is it interior (Large, 2002, p. 138)?

Levinas (2001b, p. 45, emphasis added) compares this existence to existence in the world, where at the same time to being *in* the world, one “is able to withdraw *from* the world.” By contrast, the ‘there is,’ which does not allow for difference, offers no place to hide.¹⁵⁵ “Before this obscure invasion it is impossible to take shelter in oneself, to withdraw into one’s shell. One is exposed. The whole is open upon us. Instead of serving as our means of access to being, nocturnal space delivers us over to being” (Levinas, 2001b, p. 54). Because no perspective can be gained on the ‘there is’ from within the ‘there is,’ subjectivity cannot securely establish itself:

The absence of perspective . . . becomes an insecurity. Not because things covered by darkness elude our foresight and that it becomes impossible to measure their approach in advance. For the insecurity does not come from the things of the day world which the night conceals; *it is due just to the fact that nothing approaches, nothing comes, nothing threatens*; this silence, this tranquillity, this void of sensations constitutes a mute, absolutely indeterminate menace (Levinas, 2001b, pp. 53-54, emphasis added).

It is for this reason that it is not only the ‘there is’ that is anonymous, but the subject itself, whose subjectivity is ‘submerged,’ ‘invaded,’ ‘depersonalised,’ and ‘stifled’ by the ‘there is:’ “The disappearance of all things and of the I leaves what cannot disappear, the sheer fact of being in which *one* participates, whether one wants to or not, without having taken the initiative, anonymously” (Levinas, 2001b, pp. 52-53). “Horror is somehow a movement which will strip consciousness of its very ‘subjectivity’” (Levinas, 2001b, p. 55).

This loss of subjectivity, then, is the consequence of existence in the camp. As a space of political exception, the camp is located between disorder

¹⁵⁵ There was no private existence in POW camps, no space to which one could withdraw from collective existence to collect oneself. This went so far that solitary confinement became a treat rather than the punishment as which it was intended (Kochavi, 2005, p. 56).

and order, persecution and war, war and peace. The ‘there is,’ in Levinas’s ontological terms, lies between being and nothingness, the “excluded middle . . . this horrible thing” (Levinas, 1985, pp. 48-49). Echoing Schmitt’s statement that the state of exception belongs to order by virtue of its exception, Levinas assigns the ‘there is’ to one side of the distinction as that which occurs within being as its ‘interval and interruption’ (Levinas, 2001b, p. 60). If being is made up of the states of consciousness (the freedom associated with being a ‘master of being’ (Levinas, 2001b, p. 55)) and sleep (“relaxation, drowsiness, absence” (Levinas, 2001b, p. 62)), the ‘there is,’ this nothingness that is *not* nothing, forms the foundational moment for both. It is accessible in insomnia, but also in the state of suspension of the POW camp.

What Levinas is describing is the meaninglessness that follows the sinking into indifference of the other, an exclusion from the world that he experienced in war captivity and that will later re-appear as that which follows the death of the other person (but then, it will have meaning, it will respond). Like Agamben, who claims that the state of exception *is* the state of nature, created by the very same order from which it is exempt (see footnote 25 above), Levinas locates in the ‘there is’ the significance of nothingness. Nothing, Levinas appears to say, is not that which happens when one dies, but that which can happen in the middle of life, as the exclusion from the world constituted by the other:

One starts with being, which is a content limited by nothingness. Nothingness is still envisaged as the end and limit of being, as an ocean which beats up against it on all sides. But we must ask if ‘nothingness,’ unthinkable as a limit or negation of being, is not possible as interval and interruption; we must ask whether consciousness, with its aptitude for sleep, for suspension, for *epoché*, is not the locus of this nothingness-interval (Levinas, 2001b, p. 60, footnote omitted).

The prisoners of this interval, in which nothing happened and nothing appeared, lived as mere ‘phantoms,’¹⁵⁶ suspended, as the son of a fellow POW of Levinas (quoted by Malka, 2006, p. xxxi) would recall later, “between the living and the dead.” On this threshold between unlimited and limited war, and between war and peace, where one cannot draw a distinction between foe and enemy, enemy and friend,¹⁵⁷ there was no longer a god nor yet men who would determine justice:¹⁵⁸ “There is no discourse. Nothing responds to us but this silence” (Levinas, 2001b, p. 52).

¹⁵⁶ In *Existence and Existents*, Levinas (2001b, p. 56) writes about the return of absence as presence in the form of the ‘there is:’ “A corpse is horrible; it already bears in itself its own phantom, it presages its return. The haunting spectre, the phantom, constitutes the very element of horror.” In his captivity diaries Levinas (2009, p. 126) similarly calls the members of his unit “[p]hantoms – they perform actions in the real world without reality – not only an absence of objects but an absence of progress, of achievement.”

¹⁵⁷ Analogous to the realm of politics (Luhmann, 1989, p. 73) or the ‘alegal’ (Lindahl, 2009, p. 60), i.e., that which no longer belongs to the state of nature but has not yet been determined as either legal or illegal.

¹⁵⁸ Davies (1990, p. 49), who treats the ‘there is’ in the context of Heidegger’s, Blanchot’s and Levinas’s understanding of literature and poetry, writes: “[W]hen language becomes poetic language (when language turns into literature), what Blanchot will call the ‘neuter’ and Levinas hear as the *il y a* comes into play. The language of the poem shows itself as the interminable, the incessant. At the moment when the poem is experienced as an origin, it carries in its wake and at its centre the question of the most radical anteriority. An anteriority that renders nothing possible, not even the thought of *nothing*. The time of this encounter with the work is indeed the time of a ‘between’, the *no longer* and the *not yet*, but it is a ‘between’ that is somehow ‘outside’; the time and the space of exile.”

4.2. After the camp

Since the publication of Levinas' captivity diaries, there has been some engagement with the question of the status of this experience in his work. The views expressed in this respect most commonly follow one of three lines. The first line is that Levinas's time in the camp constituted a literal practicing ground for the philosophical concepts he would later deploy; an 'apprenticeship' (Cohen-Levinas, 2011, p. 15). Arbib (2011) thus describes Levinas's experience of being a Jewish POW as an ethical experience that constituted a direct precursor to his later writings. Levinas's biographer Simon Malka (2006, p. 80) similarly writes that despite the comparably few comments Levinas made about it, "[t]he experience of captivity was nevertheless decisive for Levinas: the encounter with the most simple things, the ordeal of loss and of liberty, the sensation of time, deliquescence, misery, absolute passivity, fragility, precariousness – everything that continually tormented his work." After reading Levinas's prison notebooks, Caygill (2010, p. 28) also confirms "the significance of the prison camp experience for his [Levinas's] rethinking of the axioms of Western philosophy." This line of thinking is problematic, as it appears to draw a direct link between Levinas's own experiences as a protected combatant and the exposure of the self to the 'persecuting' other that characterises the ethical relation in Levinas's mature work.

The second line of thought simply brackets Levinas's time in captivity from the analysis of his work, an approach that appears to be supported by the fact that, apart from a few instances in which Levinas directly engages with his time in captivity,¹⁵⁹ his mature work appears wholly unconnected to the experience of war captivity. However, this leaves open the question of how this interruption in Levinas's life represented by five years in captivity could be of no

¹⁵⁹ In the main, these are his diaries and a number of short essays and radio-programmes based on his experiences as POW (published as *Carnets de captivité: suivi de Écrits sur la captivité et Notes philosophiques diverses*), although there are also a handful of instances elsewhere in his work where Levinas tells a story from captivity. See, for example, 'A Religion for Adults' and 'The Name of the Dog, or Natural Rights,' collected in *Difficult Freedom*.

significance when, in the final analysis, Levinas's ethics is all about interrupting the self-sameness of the self.

Part of this line of thought is that Levinas's early work about the 'there is' – whether or not it is recognised as reflecting life in the camp – is no more than an impasse to be left behind. After all, the self will come to be properly 'liberated' by the other as part of the ethical relation, thus overcoming its helpless subjection to pure being. Indeed, Davies (1990, p. 44) notes that commentators “ . . . see the *il y a* . . . as a marginal issue, as no more than a necessary (and polemical) moment in the development of Levinas's work.”¹⁶⁰ While it has often been noted that the 'there is' re-appears in strange places throughout Levinas's work, usually as the evil counterpart to the other's goodness, but sometimes also as resembling the other (or rather, alterity in its various incarnations) to such an extent that the two may be confused – God is “transcendent to the point of absence, to the point of a possible confusion with the stirring of the *there is*” (Levinas, 1989b, pp. 179)¹⁶¹ – or even merging with the other altogether – “[t]he *there is* is all the weight that alterity weighs supported by a subjectivity that does not found it” (Levinas, 1998, p. 164) –, it is unclear, what, if anything, on the level of meaning (as opposed to philosophical exegesis) links Levinas's early and mature work.

What is clear, however, is that the 'there is' – “[t]race of a past which was never present, but this absence still disturbs” (Levinas, 1989b, p. 188, n. 16) – 'disturbs' the relation with alterity as much as alterity 'disturbs' the intentionality

¹⁶⁰ Davies (1990, p. 44) asks: “Does Levinas not imply as much himself in the preface to the second edition of *Existence and Existents*? There, he seeks to situate the discussion of the *il y a*. He comments on its perhaps premature outcome in the analysis of the 'hypostasis' with which the books ends: the coming about of the existent that is the overcoming or vanquishing of this existence without existents.”

¹⁶¹ Cf. also Levinas, 1998, p. 97 (footnote omitted): “The trace of a past in a face is not the absence of a yet non-revealed, but the anarchy of what has never been present, of an infinite which commands in the face of the other, and which, like an excluded middle, could not be aimed at.”

of the subject.¹⁶² In fact, throughout his entire career Levinas aims to establish the disturbance or interruption of the subject's capacities for self-formation, agency, and the finding of meaning, laying bare beneath the world a foundation that, once recognised, will forever prevent a comportment of the self in the world forgetful of itself and others.

This begins with the phenomenological method Levinas employs, whereby he seeks to supplement the clarity of the object as it appears with that which is hidden by this clarity; "the object which, left to itself, is clarified, as much as it closes off the gaze – as if the giving was like an eyelid which lowers itself as an object appears, and consequently as if the objective is always abstract" (Levinas, in Mortley, 1991, p. 14). This method was directed against idealism in the aim of unmasking the self-confidence of an intentionality striding out into the world, only to return to itself in self-sameness, having 'captured' stable meaning:

Idealism has always wanted to interpret experience. In a sense it wanted to think that the real was absolutely equal to consciousness, that there was no overflowing, deficit, no surplus. However . . . [f]rom the outset, we think more than we can think. . . . The things that we have within our horizon always overflow their content. . . . Idealism always imagined that reality was only representation; phenomenology teaches us that reality constitutes more than what captures our gaze. . . . Reality has weight when one discovers its contexts (Levinas, 2001, pp. 159-160).

After the unprecedented destruction caused by the First World War, the subject could no longer be regarded as being in control of the world objectively constituted. It was the notion of the human being as the seat of universal reason, a reason that was also thought to govern nature and thus make it controllable through science, which was to be blamed for the belief in almost unlimited human potential, which the carnage of the war had revealed as mistaken. By

¹⁶² Critchley (2004, p. 90), for example, writes: "Is the neutrality of the *il y a* ever decisively surmounted in Levinas's work? And if this is so, why does the *il y a* keep on returning like the proverbial repressed, relentlessly disturbing the linearity of the exposition?"

turning from an object taken on its own (and related to other objects within a scientific system) to the ‘forgotten experience’ or context in which such an object was intended, one can give, so Levinas (1969, p. 28) would claim in *Totality and Infinity*, an account of the object richer than if it were cut lose from such context, i.e., considered abstractly. Ultimately, this was about showing the fragility of abstract thought that might at any time fail to accomplish its aim of establishing meaning.

When Levinas began to write about the ‘there is,’ this phenomenological method revealed beneath the sensible world a realm of pure being:

The *il y a* makes us mindful that all representations rest uneasily on structures that fade away in the night, and this fading reveals a reversal of intentionality. The experience toward which Levinas is gesturing is the antecedent of all events, the *before* that is not a recoverable or prior moment (Severson, 2013, p. 47, footnote omitted).

But of course, the time in the camp also constituted *itself* a bracketing of meaning. When war became bracketed, it was the POW camp that came into existence as the exception to the rule. Both Severson (2013, p. 48) and Caygill (2010, p. 30) seem to assume that the ‘there is,’ insomnia, and in Caygill’s case, the “material reduction, the removal of the comforts and alleviations of civilization and the literal entry into a winter landscape devoid of colour” that Levinas describes in his captivity diaries arose as a result of the application of the phenomenological method of *epoché*. But why would Levinas even need to apply this method, if he already found himself in a real space from which everything that was meaningful had been bracketed? If Levinas’s business as a phenomenologist was to conduct “research into the staging [*mise en scène*] of that which is the object” (Levinas, in Mortley, 1991, p. 14), then he was already in the right place: imprisoned behind the stage of Europe as the theatre of war, and behind the ‘drama of European Judaism.’¹⁶³

¹⁶³ As Levinas (2009, p. 209) himself says, “[i]n the drama that comes from living European Judaism, Israelite POWs have not held the first role. They have not lived in the death camps.”

After the Second World War, the critique of idealism took a renewed urgency: “The unburied dead of wars and death camps accredit the idea of a death with no future, making tragicomic the care for one’s self and illusory the pretensions of the *rational animal* to a privileged place in the cosmos, capable of dominating and integrating the totality of being in a consciousness of self” (Levinas, 2003c, p. 45). As Drabinski (2009, p. 136) explains, Levinas was facing what he thought was the death of the Western philosophical tradition: “Without the tradition, there is the complete disorientation of subjectivity. There is no footing or ground on which subjectivity might gather itself or make sense of the world.” This perceived lack of ground affected the possibilities for writing philosophy (both in the sense of content and of making a name for oneself, finding one’s place). While the death of tradition had created a space for a new beginning, how was one to begin if the aptitude for beginning, the notion of the subject as origin, autonomy, strife, even knowledge itself had been discredited?

For Levinas personally, this is likely to have presented a particularly difficult problem to overcome due to his own upbringing. Levinas’s parents had been tradition-observant Jews, for whom religious observance provided a structure for day-to-day life (Malka, 2006, p. 6), but who did not live in a closed community. Instead, they followed “an ideal of *Bildung* and of emancipation through education, which was popular among the Jews of the time” (Malka, 2006, p. 9). This meant that throughout Levinas’s childhood, daily religious observance went hand in hand with an intellectual thirst for Russian language and literature as the ideal of this education. *Instruction*, symbolised through books (the bible as much as Dostoyevsky; a copy of Cervantes’s *Don Quixote* that Levinas’s mother had received as a prize when she herself was a student, prominently displayed on the dining room cabinet (Malka, 2006, p. 7)) was valued above all else.¹⁶⁴ Levinas (1985, p. 22) would claim later that reading

¹⁶⁴ For example, when after 1914 the family had to flee from the German occupation to the Ukraine, Levinas’s father engaged a Hebrew teacher immediately upon their arrival as “the first source of comfort” (Levinas, 2001, p. 26). In 1917, Levinas’s admittance to the Russian *lycée* along with only four other Jewish boys was “celebrated at home like a true family holiday, a promotion! A doctorate” (Levinas, 2001, p. 27)! This faith in instruction appeared to have lost

books “is a *modality* of our being,” and Burggraeve (2002, p. 31) accordingly gives a Levinasian reading of the activity of reading, whereby “[to] read is to raise oneself up to, to listen to and obey exteriority, the essentially new which does not rise up from within ourselves but breaks in upon us as a ‘revelation’ from the foreign . . .”¹⁶⁵ The sense of impotence as an individual that Levinas (in Levinas and Kearney, 1986, p. 24) later expresses in the words “the self cannot survive by itself alone, cannot find meaning within its own being-in-the-world, within the ontology of sameness,” may therefore not only be an outcome of Levinas’s life experiences, but have its earliest roots in his upbringing.

When Levinas began to study philosophy at the University of Strasbourg in 1923, philosophy represented for him the concern with those ‘fundamental things’ that had also been the subject of the Russian novel (Levinas, 2001, p. 28). In the first years, the sense that deference to masters must come before the articulation of one’s own thoughts was confirmed by the philosophy faculty’s understanding of philosophy as a field for which the study of its own history is of primary importance. “This ascetic commitment to transmission, this respect for the great masters, this rumination of foundational texts was enough to win over the mind of the young Levinas” (Malka, 2006, p. 22). However, when Levinas had in 1928 almost completed his studies, this approach left him with little options for the future. He could not see himself merely repeating or expanding on what others had said before him, but the free inception of philosophical work also attracted his negative judgement.¹⁶⁶

Now, after the war and its destructions and disappointments, the relation to tradition became one that Drabinski (2009, p. 137) describes as one of complete disconnection, free from any nostalgia. If there was to be a new beginning, it had to be “utterly ungrounded” (Drabinski, 2009, p. 147).

none of its strength by the time Levinas’s own children went to school. His daughter Simone thus recalls: “School . . . was placed above everything” (in Malka, 2006, p. 237).

¹⁶⁵ Interestingly, Primo Levi (1989, p. 112) writes in this respect about the role of books (in his case, cultural works recited by memory) in the concentration camp as one of fashioning a link to the outside world. Through books, prisoners felt themselves ‘spoken to.’

¹⁶⁶ To this, phrases such as “the vanity of fabricating books,” “running the risk of proceeding by chaotic intuitions” (Levinas, 1985, pp. 28-29), and “distrust of untutored fabrications” (Levinas, 2001, p. 26) may testify.

It was at this time that Levinas increasingly deployed the relation to the other as the element of disturbance. The other's always-prior demands to which the self must respond but to which it can never respond adequately, disturb it in its efforts to establish itself, thus determining the formation of subjectivity. It is in this sense that Levinas (in Levinas and Kearney, 1986, p. 22) writes about philosophy:

Now what I am interested in is precisely this ability of philosophy . . . to question itself, and ultimately to unsay itself. And I wonder if this capacity for interrogation and for unsaying (*dédire*) is not itself derived from the preontological interhuman relationship with the other. The fact that philosophy cannot fully totalize the alterity of meaning in some final presence or simultaneity is not for me a deficiency or fault. Or to put it another way, the best thing about philosophy is that it fails. It is better that philosophy fail to totalize meaning . . . for it thereby remains open to the irreducible otherness of transcendence.

The question of the status of war captivity in Levinas's work appears to become redundant at this point. His work now appears as a whole to have been directed from the beginning at the violent assimilation of the other person, the eradication of difference that stems from the self's unhindered imposition of its terms onto the world. Taken on its own, such a view of Levinas's work is not an issue, but it becomes problematic when one links this thought back to his real-life experiences. And there is good reason for doing so, as phenomenology has always privileged the subjective origin of knowledge, effecting a shift from the explanation of facts or the 'objective' world to the self-reflective clarification of meaning (Levinas, 1998b, p. 55). Levinas (1998e, p. 177) thus writes:

Phenomenology has taught us thus not to explicate a meaning by conceiving it uniquely or principally in terms of its relation with other objective meaning, for then all sense gets relativized, and every signification closed up in a *system* without issue. Phenomenology has taught us to make explicit or to elucidate a sense in terms of the irreducible psyche in which it is given, to thus seek it in its origin, to seek out the originating meaning.

It thus becomes an imperative to understand Levinas's own life experiences if one is to understand his thought, which Levinas never wanted to be treated as a 'system' that could simply be studied.¹⁶⁷ In this respect, what would be more obvious than to draw a link between Levinas's concern for the other, his remarks on the Holocaust (which, as Spargo (2006, p. 24) notes, appear "with ever greater frequency in the latter half of Levinas's career"), the loss of his family to the Nazis, and his own captivity in Germany during the war?¹⁶⁸ This explains why even commentators such as Burggraeve, who place Levinas's work in the context of his experiences, bracket his time in war captivity from their analysis. Burggraeve (2002, p. 28) thus writes:

The whole of Levinas' thinking can be interpreted as an immense effort to bring to light the roots of violence and racism, and as an attempt to overcome this in principle by *thinking otherwise*. This 'thinking otherwise' is developed from the beginning as a thinking about the 'other,' since according to Levinas the other is precisely that which is denied in racism. For him, evil lies in 'being' in so far as the being - expressed eminently in his or her effort to be - absorbs the other into itself.

¹⁶⁷ In fact, even such recourse to Levinas's own life is insufficient. For Levinas, the phenomenological refusal of an objective point of view in favour of "a manner of thinking concretely" (Levinas, 2001, p. 94) means that each person must discover the meaning of the self-other relation for him or self, that it cannot be prescribed to others: "[I]f I say that 'virtue is its own reward,' I can only say so for myself; as soon as I make this a standard for the other I exploit him, for what I am then saying is: be virtuous towards me – work for me, love me, serve me, and so on – but don't expect anything from me in return" (Levinas, in Levinas and Kearney, 1986, p. 31). Levinas therefore also discouraged his readers from simply repeating the content of his own work without a sustained engagement with the subject matter itself: "[O]ne should distrust people who repeat what one opens up to them, and who do not enter into where the opening should happen" (Levinas, 2001, p. 82). "We do not dissociate a lesson from the face that was the necessary interlocutor,' Levinas used to say in recalling Husserl" (Malka, 2006, p. xxxiv).

¹⁶⁸ Derrida (1978, p. 103) notes that Levinas's thought is to be understood through the central experience of "the passage and departure toward the other," but appears to treat this as a universal rather than an experience personal to Levinas.

Some commentators, however, have even gone further than merely noting the relevance of Levinas's ethics to the Holocaust, and this is the third line of thought regarding the status of Levinas's experiences during the war. They claim, with more or less explicitness, that Levinas's thought was an outcome of his personal experiences *as* a (persecuted) member of a persecuted minority; that there was an "intertwining of the autobiographical and philosophical genres" (Plant, 2012, p. 983) in this respect. Wood (2005, p. 53, footnote omitted), for example, asks whether the particular origin of Levinas's ethics is "a response to the particular circumstances of imprisonment, degradation, and genocide," and concludes that "Levinas's view of human nature as 'naturally murderous' is perhaps understandable, even 'natural' given what he went through, what he suffered, what he saw" (Wood, 2005, p. 61). Others are less explicit, but by leaving open the precise nature of Levinas's experiences during the war, they lead the reader to draw the wrong conclusions. Finkelkraut (1998, p. 83), for example, writes of the 'Nazi trauma' that effected Levinas's approach to history, without specifying whether this trauma was caused by Levinas's own 'persecution,' by the death of his family members, or by the Holocaust as a historical event of some importance. Cohen (in Levinas, 2003b, p. viii) avoids this difficulty by grouping Levinas's war imprisonment and his family losses together as if they belonged into the same category of experience: "Are we to forget that Levinas spent the war years in a prisoner-of-war work camp for Jewish French soldiers or that this parents, siblings and millions of his coreligionists were murdered by the Nazis?" So does Bernasconi (2005, p. 172), when he writes about "the depth of Levinas's personal suffering during the Second World War, which included the loss of all his family members with the sole exception of his wife and daughter" Even more vaguely, Srajek (1998, p. 16) writes that both Levinas's and Derrida's biographies are "marked by the fact of their Jewishness and the fear, persecution, hatred and exile which they had to confront because of that heritage."

And indeed, Levinas himself contributes to the general uncertainty about what he suffered and saw, and what, perhaps, he did not suffer or see, and therefore could not remember other than through an empty memory, a memory of *non*-involvement. Immediately after the war, Levinas forgoes the language of

persecution and repeatedly¹⁶⁹ refers to the ‘protection of the uniform’ afforded to him and other Jewish POWs. When he talks about the suffering undergone, he terms it “the sorrows he [the Jewish prisoner] shared with his fellow non-Jews” (Levinas, 2009, p. 210). But later, he begins to use phrases such as “[a]fter living through Auschwitz . . .” (Levinas, in Mortley, 1991, p. 21), and when he is 70 years old, adds to the second edition of *Difficile Liberté* the statement that his life had been “dominated by the presentiment and the memory of the Nazi horror” (Levinas, 1990b, p. 291). This, however, could not be the same horror each time. After all, the horrors of the Holocaust consisted in what was done and said, while the horror Levinas experienced, and thus could remember, was that of silence in which nothing happened.¹⁷⁰

But perhaps the best example of the increasingly blurred distinction in Levinas’s work between the exile of the concentration camp and the exile of the POW camp – the first, an exile from law; the second, an exile from war and persecution – is his 1966 essay *Nameless*. This was first published under the title *Honor without Flag* (1996b, p. xii), a reference to Diaspora Judaism (Robbins, 1999, p. 135). Levinas (1996b, p. 120) writes that “[o]ver a quarter of a century ago, our lives were interrupted, and doubtless history itself:”

What was unique between 1940 and 1945 [incidentally, the dates of Levinas’s own imprisonment, not of the war, nor of the Holocaust] was the abandonment. One always dies alone, and everywhere the hapless know despair. . . . But who will say the loneliness of the victims who died in a world put in question by Hitler’s triumphs . . . (Levinas, 1996b, p. 119)?

¹⁶⁹ See for example Levinas, 2009, pp. 207 and 209.

¹⁷⁰ Interestingly, Caygill (2002, p. 52), in picking up on these remarks of Levinas (another one is the “presentiment of Hitlerism and the Hitlerism that refuses itself to any forgetting” that Levinas (2001, p. 39) mentions in an interview later), first writes of the “presentiments and experience of horror” that in his opinion links Levinas’s pre- and post-war work. Then, a few lines on and as if to correct himself, he writes: “The horror of *il y a* is intricately bound to haunting, to the dead who cannot be forgotten – *il y a* is the continual ‘presence’ of the murdered awaiting justice.” In other words, the horrible ‘presence of absence’ of the ‘there is’ persists after the war as the *haunting presence* of those who have been killed by the Nazis, and not as the *ordeal undergone* by those killed.

From this apparent empathy with the dead, Levinas (1996b, p. 119, emphasis added) then continues, as if to correct himself: “Who will say the loneliness of those who *thought* themselves dying at the same time as Justice?” This ambiguity between, on the one hand, his own experiences as someone expecting but not in fact suffering death at the hands of the Germans, and those of the persecuted on the other hand, continues when he writes about the “[a]bsence of any homeland, eviction from all French soil,” “[i]nsecurity of all companionship” (p. 120); themes which could as much refer to the concentration camp as to the POW experience. In an interview with Salomon Malka, Levinas (2001, pp. 96-97) then directly describes his work as ‘translating a Jewish ordeal.’ “It is incontestable that in every philosophical reflection, in every philosophical essay, there are memories of a lived experience which is not rigorously intellectual I do not contest that it is a Jewish ordeal which is translated.”

The relation between Levinas’s wartime experiences and his work is further complicated by the fact that in a sense, Levinas was a ‘survivor;’ he had emerged unharmed from German captivity. Plant (2012) in this respect compares Levinas’s own references to survival with those of Primo Levi, categorising Levinas as a ‘post-Holocaust thinker.’ Schrift (2006, p. 159), after stating that Levinas was a POW during the war and that his family was killed by the Nazis, goes on to write: “Levinas would often allude to the guilt of the survivor in his later writings, and there is little question that his account of the obligation to the other is inflected in part by his experiences as a European Jew.” In 1983, Levinas then refers in an interview directly to a memory of the Holocaust and the guilt of surviving, staying just on the right side of a false appropriation by inserting a reference to ‘those closest to us,’ which clarifies that the memory in question here is not of his own suffering: “No-one has forgotten the Holocaust, it’s impossible to forget things which belong to the most immediate and the most personal memory of everyone of us, and pertaining to those closest to us, who sometimes make us feel guilty for surviving” (Levinas, 1989, p. 291).

The fact, however, is that Levinas was not a survivor in the full sense of the term.¹⁷¹ His survival was not at all like the survival of ex-concentration camp inmates, not even like the survival of those who managed to hide from the Nazis, whether abroad or in close proximity to the events.¹⁷² Not only had he not been a witness to the events (and could therefore have no memory of them), but he had also been intentionally exempted from the persecutions by the very persecutors themselves. As Overmans (2005, p. 872) writes, “[d]e facto the safest place for a Jew in the German sphere of influence was in an *Oflag* or a *Stalag*.”

His special status during the war meant that Levinas’s situation repeated itself once the war had ended, the ‘presence of absence’ returning in the face of the death of his family members, he himself excluded from the agency and meaning associated with having been a witness and the ability to now provide testimony of the events.¹⁷³ There was a past that Levinas had prepared for, *his* past by right and fate, but this past had not come to pass, or rather, had passed him by, leaving him nothing but an empty memory.¹⁷⁴ All he witnessed was the time in the POW camp, suspended from history, uneventful, a time in which time stood still, and which was therefore equally resistant to representation in memory and consciousness. It was as if he had been led through the most important events of his lifetime blindfolded, only to find that, by the time the blindfold was removed, history had already been made and the silence of all those who died had descended. What Levinas had ‘survived’ was not the death of others but the

¹⁷¹ Just as no-one could be said to have 'survived' a plane crash unless they had been on board the plane, even if they could be said to have 'survived' family members who were on board.

¹⁷² The fact that Levinas was ‘barely fifty kilometres’ from the next concentration camp while at Stalag XI B, mentioned by Levinas’s son Michäel and quoted in Bloechl (2011, n. 8, p. 113), can hardly be said to be relevant in this context (or rather, it is relevant in that it meant Levinas was *not* at Bergen-Belsen, excluded from the acts of persecution that went on there *despite* his close proximity.)

¹⁷³ This option was consciously taken up by concentration camp survivors, such as Primo Levi or Imre Kertész.

¹⁷⁴ This gives a new sense to when Levinas (1998, p. 11) writes: “Immemorial, unrepresentable, invisible, the past that bypasses the present, the pluperfect past, falls into a past that is a gratuitous lapse. It can not be recuperated by reminiscence not because of its remoteness, but because of its incommensurability with the present.”

exclusion from such death. He had lived all along and would continue do so; his existence, meaningless in the camp, was just as meaningless now that the proposed return to the world had been revealed as the return to an absence of those who had made it meaningful. No wonder, then, that Levinas and his fellow Jewish inmates barely kept in touch after the war, and that Levinas himself hardly ever spoke about his time in captivity (Malka, 2006).

In a sense, all French ex-POWs were in a similar situation, as they faced the difficulty of assigning meaning to their time in captivity in a post-war society that was overwhelmingly indifferent to their fate (Durand, 1987, pp. 16-17). Thanks to Vichy propaganda, many in France had an idealistic image of the nature of war imprisonment. News of the hard labour, disciplinary camps and bombardments had not been widely distributed (Bories-Sawala, 1996b, p. 617); on the contrary, Vichy propaganda actively encouraged an image of war captivity as something between monastic life and “an extended summer camp of sorts” (Fishman, 1991, p. 236). Fishman (1991, p. 243) writes:

How successful was Vichy in shaping attitudes towards the POWs and prison camps? Most people had no means of correcting the picture of prison camp life they read about. The repetition for four years of the half monastic retreat, half summer-camp image of prison camp life left people with the general sense that the POWs had little to complain about. Preoccupied with the problems of acquiring their own daily bread, most people in France, aside from the immediate families, responded to the prisoners with indifference rather than concern.

The public perception was that POWs had not suffered any more from the war than the civilian population at home, who had to undergo “restrictions, bombardments [and] the oppression by the occupier” (Durand, 1987, p. 17). In any case, there were other, more important, victims within the ‘hierarchy’ of suffering and victimhood (Durand, 1987, p. 17), such as those who had been deported to concentration camps and their families, and workers who had been forcedly recruited and sent to Germany in exchange for POWs as part of the *relève*. In the midst of the general post-war struggle, the fate of POWs counted for little (Durand, 1987, p. 16), prolonging “the alienation of the prisoners from

French society beyond the period of actual physical separation” (Fishman, 1991, p. 246), and causing the prisoners concern that they were being misunderstood and that their suffering¹⁷⁵ would be forgotten (Durand, 1987, pp. 16-17).

There were also those, who rather than being indifferent, blamed the POWs for the defeat in 1940 and their supposed subsequent support of the Petain government. There were doubts about the adequacy of the French army in 1940, given Germany had been able to capture such a large number of soldiers: “People wondered how so many soldiers could have been taken. Had they gone down without a fight” (Fishman, 1991, p. 244)? These doubts extended to relatives of POWs,¹⁷⁶ and indeed to the prisoners themselves, despite the price they paid for their capture through prolonged captivity. While the nation concentrated on the actions of the *résistance*, whose members became the “individualised, heroicised elite of 1945” (Durand, 1987, p. 17), ex-POWs, who were still presented as the defensive units they had been in 1940-41, i.e., as an ‘anonymous masse’ (Durand, 1987, p. 17), were faced with a wholesale taboo concerning their experiences in the camp (Bories-Sawala, 1996b, p. 610). As Durand (1987, p. 11) writes, “[t]hey themselves felt the stigma of [having been a POW involved in the debacle of 1940] with particular acuity”.

Even though no longer excluded from society, POWs thus found themselves again in a space of silence and suspension. They were faced by the fact that all social and political key positions in the newly liberated state had

¹⁷⁵ War captivity, even when not amounting to effective persecution, nevertheless often resulted in mental trauma. Already during their time in captivity, prisoners showed signs of mental strain, suffering mental breakdowns and in some cases losing all ability to concentrate (Kochavi, 2005, p. 57). At the time, the British War Office even thought that all prisoners who had been interned for more than four years would need mental rehabilitation, with social readaptation proving more difficult with POWs than with any other group (Kochavi, 2005, p. 56). According to newer medical findings, “[s]ervice personnel captured and detained as POWs have significantly higher rates of emotional and physical trauma than service members not so detained . . . , exhibiting as a group the highest rates of posttraumatic stress disorder . . . and other mental health conditions” (Doran et al. 2006, p. 241). As Bischof et al. (2005, p. 9) note, “[t]he traumas of war imprisonment troubled the repatriated [prisoners] for the rest of their lives.”

¹⁷⁶ “French POWs returning in 1945 were welcomed by their relatives not as victors, but as losers. The real French heroes were the fighters of the *résistance*” (Overmans, 2005, p. 11).

already been taken and that those who had remained in France or returned home early had an undeniable career advantage; invariably, they felt as if they had come too late (Bories-Sawala, 1996b, p. 609). Assessing that their wartime experiences were of no further interest to the public,¹⁷⁷ nor even to their own families, they concentrated on getting on with their lives in the wish to make up for lost time and show that they deserved their survival (Speckner, 2003). Most did not publish memoirs until years later, and even then, did so mainly for the sake of their own children and grandchildren, and in order to consolidate their experiences and achievements at the end of their life (Bories-Sawala, 1996b, pp. 671-672).¹⁷⁸

Levinas, however, was able to turn this situation into his advantage. Firstly, he created a notion of subjectivity that would depend on interruption. Interruption, he came to claim, would not mean impersonal, neutralised, existence as part of the ‘there is,’ as he had himself experienced it in the camp, but ethical subjectivity as part of the relation to the other. This served the purpose of providing a new concept of subjectivity, thereby lifting the suspension in which the subject had been thrown (both in terms of the philosophy of the subject and his own position after the war), without, however, returning to the “voracious, eliminationist” (Drabinski, 2009, p. 140) subject of idealism. The subject, *in* being disturbed by the other, would attain subjectivity; election rather than exclusion. Secondly, Levinas would describe this subjection to the other in such terms as to almost imperceptibly shift his own position from one who had been excluded from war and persecution, to one who *had* been persecuted all along.

¹⁷⁷ In America, ex-POWs were even officially encouraged not to speak about their time in the camp at all, so as to forget the unpleasant memories (Stelzl-Marx, 2000, p. 212).

¹⁷⁸ Stelzl-Marx (2000) and Spanos (2010) view the heroic memoirs published at this point as a mechanism to speak about the camp experience, to reclaim suffering, and to reject suggestions of responsibility for any wrong-doing. But there were also earlier processes to achieve this. Bories-Sawala (1996b, pp. 617-618) reports in this respect that a French court of honour was established by the association of former men of confidence in the POW camps. This court ruled, for example, on officers who had volunteered to work for the Germans and other such wrongs; a process Bories-Sawala calls one of ‘self-cleansing’ on behalf of the POWs, showing the distrust and accusations that ex-POWs were subject to.

In Levinas's mature ethics, the self is 'persecuted' by the other, or is the other's 'hostage' (see, for example, Levinas, 1998, p. 166 and 1998f, p. 125). Persecution, however, is here not at all the bearing of the other's unprovoked action upon oneself, and the suffering that may be connected with such action. Rather,¹⁷⁹ it is the obsession with the *suffering and the deeds of others*, and the bearing of responsibility for this suffering and these deeds despite the fact that one has done nothing to deserve it. "To bear responsibility for everything and everyone is to be responsible despite oneself. To be responsible despite oneself is to be persecuted" (Levinas, 1990, p. 114-115). The suffering usually associated with persecution thus stems in Levinas's use of the term not from the action of the other upon one, but from the burden of responsibility and guilt that one must innocently assume for the suffering of the other.

Bernasconi (1995) connects this sense of persecution with Levinas's understanding of Judaism as 'universally persecuted' (p. 81) (something which Plant (2012) also notes), a persecution that is not only universal to Jews, but also shared with all others who are persecuted. Having considered Levinas's dedication in *Otherwise Than Being*, which links this work with the concrete persecution of the Jews by the Nazis,¹⁸⁰ he then concludes that the non-philosophical experience of being persecuted, on which Levinas's philosophy rests, is "in some sense Jewish" (p. 84).

One could, however, come to a very different conclusion. Rather than seeing Levinas's philosophy of underserved guilt (and thus persecution) as a primarily Jewish phenomenon – in which case it would relate to the real instances of persecution that people of Jewish faith were subjected to throughout the ages – one could see it as the reaction of someone confronted by events of real persecution, which he, however, did *not* experience himself. In other words, a specifically *un-Jewish* phenomenon that nevertheless achieves its own inclusion under the notion of universal persecution.

¹⁷⁹ I am relying here on Bernasconi's (1995) analysis.

¹⁸⁰ Which reads: "To the memory of those who were closest among the six million assassinated by the National Socialists, and of the millions on millions of all confessions and all nations, victims of the same hatred of the other man, the same anti-semitism" (Levinas, 1998).

“[T]he unjustified privilege of having survived six million deaths,” (Levinas, 1996b, p. 120) which for Levinas was making itself felt as an obsession with the suffering of others after the war, could at this point reveal itself as having been a Jewish experience all along. In this way, the exclusion Levinas experienced in the POW camp is turned into the ground that makes persecution possible – he could only be obsessed, i.e., responsible for the suffering and the deeds of others because he himself was neither suffering nor doing anything particular at the time.

Time, in fact, as the present after the war, is always split,¹⁸¹ as it contains a reference or ‘trace’ to an unrepresentable past, “as though the invisible that bypasses the present left a trace by the very fact of bypassing the present” (Levinas, 1998, p. 12). The cry of help of the dying other, not heard at the time, now appears as a trace in the face of the other, my response to this cry being always already doomed to failure, as there is nothing I can do to change the past. One always arrives late on the stage of human relations, implicated and accused by the other already before one arrives, not because of some Jewish essence, but because Levinas, as Hammerschlag (2012, p. 403) writes, was “at the center of war, . . . at the center of history’s drama” without, however – and Hammerschlag omits to mention this – being in the drama itself. The position one then takes on the stage, finally a subject, comes, as Drabinski (2009, p. 145) remarks, at the price of “sealing ethical subjectivity in that which was, which, in an important twist, becomes that which could never have been: the immemorial as otherwise than being, where being itself is configured (then punctured) as time.”

Levinas would also describe this foundation as ‘vulnerability.’ In the 1982 essay *Useless Suffering*, having set out to describe suffering as a sensation that is borne or received by the subject, but that is at the same time unbearable and therefore *rejected* (the sensation of a rejected sensation making up its ‘quasi contradictory structure’ (1998d, p. 92)), Levinas proceeds to attribute the evil of suffering to its passivity. This passivity, however, is not simply the fact that

¹⁸¹ “Proximity is a difference, a non-coinciding, an arrhythmia in time, a diachrony refractory to thematization, refractory to the reminiscence that synchronizes the phases of a past” (Levinas, 1998, p. 166).

suffering is something received (or received-rejected) from the outside, but what he calls a ‘vulnerability:’

The passivity of suffering is more profoundly passive than the receptivity of our senses, which is already active reception, immediately becoming perception. In suffering, sensibility is a vulnerability, more passive than receptivity; an encounter more passive than experience. It is precisely an evil (Levinas, 1998d, p. 92).

This vulnerability is reminiscent of the ‘there is,’ where “[i]nsomnia locks me in a moment, pinning me to an unavoidable affectivity that leaves me stripped of defenses. Enchained to the night, and to the raw fact of being, I can only wait” (Severson, 2013, p. 47). Indeed, like vulnerability, this was not an experience at all. “If there is experience here, it is the experience of needing to be rescued, redeemed” (Severson, 2013, p. 50, footnote omitted).

Evil as persecution thus merges with evil as the absence of persecution, causing the subject to suffer in each case alike. But while the primary suffering of Holocaust victims is ‘senseless’ because no justification exists, the secondary suffering of those suffering for the suffering of others has meaning, and “the only one of which suffering is capable” (Levinas, 1998d, p. 94) at that. This suffering can therefore become the acceptable “nexus of human subjectivity” after a war that left dead those who suffered the most and discredited by implication almost everyone else; a nexus of subjectivity, furthermore, which, because it is based on “the expiatory suffering of the *just* who suffers for [the *unjustly* caused suffering of now-dead] others” (Levinas, 1998d, p. 241 n. 5, emphasis added), can be distinguished from the actions and suffering of both these groups and elevated “to the level of supreme ethical principle – the only one it is impossible to question . . .” (Levinas, 1998d, p. 94).

In a radio broadcast from 1945, Levinas (2009, p. 211) compares the situation of the deportee to that of the Jewish POW: “[I]f for the deportee martyrdom was immediate, the prisoner had time to prepare himself. Between man and his suffering, there was an interval that permitted the taking of an attitude with respect to the pain before being seized and torn by it.” Of course,

that martyrdom never materialised for the prisoner, so strictly speaking, there was also no interval. But as Caygill (2010, p. 29) points out:

The theme of the interval as a space for ‘mediation’ both spiritual and philosophical becomes central to Levinas’s thinking in and after the Stalag. He later described the captivity itself in terms of an interval between the intimations of National Socialism in the 1930s and the mourning of its murderous course after the war. The interval is a space of horror and anguish, but it also sustains the frail possibility of escape or survival.

The interval, then, was the time in the camp before Levinas knew (and could therefore be ‘obsessed’ by) the extent of suffering others had undergone. And yet, the interval also signifies, as Caygill expresses it, the ‘possibility of escape or survival.’ This is not only because being a POW saved Levinas from deportation and death, but because it is precisely through the experience of persecution in the Levinasian sense that the subject attains its subjectivity: “The subjectivity of the subject is persecution and martyrdom” (Levinas, 1998, p. 146).

In this way the interruption that the time in the POW camp constituted in Levinas’s life, and that also turned out to have been a lack of involvement in history’s drama, becomes the reason why one is persecuted by the obsession with the suffering of others, and thus an interval between premonition and persecution. But as an interval it also constitutes the *space* for the other in one’s life, whose suffering could hardly be said to become an obsession if one had been persecuted and were suffering oneself. The self, which at the time of captivity was simply interrupted or suspended, in this way turns into a host for the other’s suffering; it becomes interrupted *by* the other. The time in the camp, the lack, the suspension, is transformed into an interruption or suspension *of* selfhood, which itself provides the ground for a new subject as martyr.

After the war, Levinas had two choices: He could either mourn silently, or make this mourning into a new beginning. He took the second choice, and took it in such a way as to make this mourning not only into a new beginning for himself, but make the foundation for such mourning, namely the fact of having

been excluded from persecution himself, into the disturbing element of this subjectivity. In the insomnia of the ‘there is’, such new beginning had been signified by the “exterior noises that may mark insomnia” (Levinas, 1987, p. 48) – the adults, who continue life. After the war, these noises, now died down completely, are re-imagined as the question about the justification for one’s own continued life. Re-imagined, because Levinas is ultimately unable to give a *reason* why the death of the other should concern (‘regard’) me in such a way as to put my life in question: “Whether he regards me or not, he ‘regards’ me,” Levinas (1989c, p. 86) simply states.¹⁸²

With the question “Is it righteous to be?” Levinas (2001) finds his place in post-war society. This question both disturbs or ‘destabilises’ (Levinas, 1989c, p. 86) the subject and *enables a voice*: “being-put-in-question, but also put to the question, having to answer – the birth of language; having to speak, having to say ‘I,’ being in the first person, being precisely myself; but, henceforth, in the assertion of its being as myself, having to answer for its right to be” (Levinas, 1998c p. 130). With this invitation to speak, Levinas has crossed the threshold of silence and into the realm of subjectivity once again. The positing of a relation of responsibility and the question of his own survival thus became both the mechanism for speaking *and* the topic of Levinas’s talks, in light of which it seems plausible that Levinas (2001, p. 225), in an interview in 1985, should describe the question of the right to be as his ‘principal theme:’ “[T]he question ‘Have I the right to be?’ expresses above all the human in its concern for the other. I have written much on this theme, it is now my principal theme: is not my place in being, the *Da* of my *Dasein*, already a usurpation, already a violence in respect to the other?”

Paradoxically, therefore, the questioning of his own right of place was Levinas’s way to take up position within the community of Jewish as well as philosophical thinkers. Levinas could now give form to his reluctance to follow Heidegger’s path: “*Dasein?* *Dasein* never wonders whether, by being *da*, ‘there’, it’s taking somebody else’s place” (Levinas, in Mortley, 1991, p. 19)! And with

¹⁸² The ‘he’ is strange here, as it is the other’s death that becomes ‘my affair:’ “As if the invisible death which the face of the other faces were *my* affair, as if this death regarded me” (Levinas, *Paix et Proximité*, quoted by Critchley, 2004, pp. 88 and 245 n. 43).

this, he would establish his own right of place. This paradox explains Ricoeur's (quoted by Malka, 2006, p. 194-195) puzzlement about the fact that Levinas never ceded his position despite his theoretical remorse at the subject's always already accomplished usurpation of another's place:

When he [i.e., Levinas] says, 'I am the hostage of the Other,' it is vital to see that Levinas was hostage to no one. One did not get one's claws into him. When he says, 'I am here, do I not take another's place?' – if you were familiar with the man, you would know that he quietly stayed in his place. I must say that, for my part, I cannot comprehend this.

The subject called Levinas, then, was a subject in mourning, a suffering Levinas, who, however, could never forget himself in this suffering, as every time he mourned the dead he would at the same time remember *why* it was possible for him to mourn the dead – his exclusion from persecution under the protection of the laws of war. In this way, the trauma of finding out about the Holocaust (the 'death of the other') continuously oscillates with the fact of his own non-involvement (the 'there is') in his work, both of which were of the past, and both of which were, each in their own sense, unrepresentable to memory: "[T]he uniqueness of the responsible ego is possible only *in* being obsessed by another, in the trauma suffered prior to any auto-identification, in an unrepresentable *before*" (Levinas, 1998, pp. 122-123). Levinas could thus never free himself from the 'there is,' could never escape *that* present, which had become an eternity without renewal: "The present is welded to the past, is entirely the heritage of the past: it renews nothing. It is always the same present or the same past that endures. A memory would already be a liberation with regards to the past" (Levinas, 1987, p. 48). But memories Levinas did not have.

5. Conclusion

Although Schmitt and Levinas were contemporaries, they did not comment on each other's work. After the war, Levinas was intent to never set foot on German soil again, and it is easy to see why Derrida (1999, p. 147, n. 95) should write that Schmitt would "embody for Levinas the absolute adversary."

Indeed, Levinas would henceforth equate limited war with unlimited war, lawful killing with murder. Where Schmitt saw the need to protect the freedom of the state to enter into war, which also meant protecting Europe from any overarching claims to justice, Levinas saw only the injustice of the natural strive to unilaterally impose one's will on another. Ethics, contained in the command 'Thou shalt not kill,' issuing from the other's face (Levinas, 1985, p. 89), was to stem that natural drive; it was "*against nature* because it forbids the murderousness of my natural will to put my own existence first" (Levinas, in Levinas and Kearney, 1986, p. 24).

And yet, Schmitt and Levinas had much in common. For Schmitt, the enemy was he 'who can put me into question.' For Levinas, humanity consisted in "the putting in question of the good conscience of the being that perseveres in being" (Levinas, 1998, p. xiv). Both, in other words, saw the need to safeguard difference, protecting the other from the hegemonic ambitions of the self.

In the form of the *jus publicum Europaeum*, Schmitt described a plural order in which states could fight, but not destroy each other. The laws of war guaranteed this plural order as laws whose sole intention was that nothing, apart from themselves, should ever become necessary. With this order, Schmitt attempted to put forward a defence of the middle ground, situating himself between the extremes of utopia and nihilism: War should neither be outlawed nor become total. As limited war, war was not only possible once, but continued to be possible, retaining its own possibilities for the creation of order in the future. For Schmitt, sovereignty crystallises in the figure of the *katechon*, who protects the political community from both the coming of the Antichrist and Christ.¹⁸³

¹⁸³ See Rasch, 2004, ch. 5, for an account of the role of Schmitt's sovereign as *katechon*.

In the European order, this sovereignty was constituted by the laws of war. Levinas, subsumed under these laws for five years, paid the price for guaranteeing the order of war, in which, despite his own survival, he recognised nothing but a potentiality for destruction. Captivity itself, furthermore, did not merely present an exclusion from war. As the threshold of silence through which the parties to the conflict had to pass, the POW camp made up the ground for order, present on each of its sides as war, law, and persecution. But it itself had no order; its silence represented law without a content, a law that does not proscribe what is just or unjust, silently occupying the position of the sovereign for the sole reason of guaranteeing that no-one else may take it.

Levinas tried to describe this absence of meaning. The choice of words he uses for the ‘there is,’ such as ‘murmuring,’ ‘rumbling’ or the ‘swarming of points’ (Levinas, 2001b, pp. 52-53), were designed, as Caygill (2002, p. 55) explains in this respect, to disfigure the classical metaphors commonly used for the opposition of being and nothingness in order to denote their middle ground. The horror that Levinas associates with the ‘there is’ in this respect does not describe its meaning, but the reaction to the latter’s absence.

Agamben (1998, p. 174) claims that “the [concentration] camp in our time appears as an event that decisively signals the political space of modernity itself.” Perhaps beyond this political space of modernity, there lay a space that signalled the fact that neither this political space, nor a departure from it, is necessary, and that the only law one needs is the one that prohibits such necessity, calling one to silence. That this is a hard sell is attested by Durand (1987, p. 83), who dedicates his work on war captivity to its “harsh banal historical reality,” which he was neither able to sensationalise nor romanticise, but for which his work was an expression of respect. He would have understood why Levinas (2009, p. 201), on emerging from captivity, began a short piece on his experiences there by writing:

Everything has been said of captivity: the greyness of the barbed wire enclosure and, in the commandos, foggy mornings when one leaves for work. Abandonment. Damp. Cold. Or spring sunshine that mocks you. Count lost of days passed and days to come.

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