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LIEBER SOCIETY ON THE LAW OF ARMED CONFLICT: AWARD-WINNING PAPERS PRESENTATIONS

This presentation was convened at 12:00 p.m. on Thursday, March 30, 2023, by its moderator, Shiri Krebs of Deakin University, Chair, Lieber Society on the Law of Armed Conflict, who introduced the speakers: Ronald Alcala, winner of the 2023 Baxter Military writing prize, for his article: "Cultural Evolution: Protecting 'Digital Cultural Property' in Armed Conflict" (104 *International Review of the Red Cross* 1083 (2022)); Tamar Megiddo and Ronit Levine-Schnur, presenting their timely project "A Theory of Annexation;" Yahli Shershevsky, winner of the Lieber Article Prize, for his article "International Humanitarian Lawmaking and New Military Technologies" (104 *International Review of the Red Cross* 2131 (2022)); and Ka Lok Yip, winner of the 2023 Lieber Book Prize, for her book *The Use of Force Against Individuals in War Under International Law: A Social-Ontological Approach* (Oxford University Press, 2022).

New Frontiers in the Law of Armed Conflict: Lieber Society Research Awards Presentations

By Shiri Krebs *

The Lieber Society on the Law of Armed Conflict is a vibrant community of scholars and practitioners from military, government, and civil society organizations, focused on various issues relating to international humanitarian law or the law of armed conflict, broadly defined, as well as other public international law related to the conduct of military operations. Our community strives to promote understanding of, respect for, and compliance with international law, through research, teaching, leadership, communication, mentorship, and action.

The Lieber society sponsors three annual research awards: the Francis Lieber Prize, awarded to the author of an exceptional book, and to the author of an exceptional article, each making a unique contribution to the law of armed conflict, and the Richard Baxter Military Prize, awarded for exceptional writing that enhances understanding of the law of armed conflict by a person serving in the regular or reserve armed forces of any nation.

This panel showcases the award-winning book and articles that won the 2023 Lieber Society prizes, as well as a thought-provoking work-in-progress that engages with a developing and current armed conflict situation:

First, LTC Ronald Alcala, winner of the 2023 Baxter Military Writing Prize, presents his article, "Cultural Evolution: Protecting 'Digital Cultural Property' in Armed Conflict" (104 *International Review of the Red Cross* 1083 (2022)). LTC Alcala's article deals with a current dilemma of great practical importance concerning the protection of digital cultural heritage during armed conflict. His article explores whether digital creations constitute cultural property, and if so, what types of

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digital works may qualify as digital cultural property deserving of cultural heritage protections, proposing new safeguards required to protect digital cultural property during armed conflicts.

Second, Ka Lok Yip, winner of the 2023 Lieber Book Prize, presents her book, *The Use of Force Against Individuals in War Under International Law: A Social-Ontological Approach* (Oxford University Press, 2022). Dr. Yip's book sheds light on the structural constraints on human agency in times of war, and on the law of war's regulatory focus on agential conduct. The book further contrasts the social ontological presuppositions harbored by the law of war against those harbored by international human rights law and argues that their convergence entails a conflation of ontologies.

Third, Yahli Shershevsky, winner of the 2023 Lieber Article Prize, presents his article, "International Humanitarian Lawmaking and New Military Technologies" (104 *International Review of the Red Cross* 2131 (2022)). This article examines the informal regulation of new military technologies, exploring the impact of various factors such as fear of new technologies, uncertainty regarding their impact, and the secrecy of their development on their regulation. The paper then focuses on three interrelated phenomena. First, it explores states' participation in and adoption of techniques that are often used by non-state actors to promote their legal positions and interpretations. Second, it recognizes the various elements of lawmaking initiatives that can influence their effectiveness, such as their structure, the type of legal argumentation used, and the techniques selected to enhance their accessibility, visibility, and authority. Third, it reevaluates the effect of power differences on informal lawmaking. The paper recognizes the unequal distribution of lawmaking capabilities but also the potential for enhancing the participation and impact of states from the global south.

Finally, Tamar Megiddo, Ronit Levine-Schnur, and Yael Berda present their timely project, *A Theory of Annexation*. In this paper, the authors propose to reconceptualize annexation, breaking this legal term into three qualifications. First, the normative organizing framework that a state uses to manage the disputed territory. Second, the organizational structure of control over the territory, including the administration and bureaucracy used to manage the territory under control. Third, the symbolic performance of power, including the type of enforcement bodies employed in the territory. By applying these qualifications, the authors argue, we can transcend the futile focus on a formal declaration of annexation, shifting attention to the legal and bureaucratic practices of control.

Together, the four papers consider the past, present, and future of the law of armed conflict, examining its presuppositions and how it develops over time and responds to new challenges. They examine the interactions between humans, social structures, and military developments, suggesting ways to reshape our understanding of the role of law in war.

Cultural Evolution: Protecting "Digital Cultural Property" in Armed Conflict

By LTC Ronald Alcala[*]

The ubiquity of digital media and the increasing popularity of digital creations raise important questions about the nature of cultural works and their protection in armed conflict. Various instruments provide for the protection of cultural property in armed conflict, including the Lieber Code, the 1907 Hague Regulations, the Additional Protocols to the Geneva Conventions, and the 1954

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Hague Convention for the Protection of Cultural Property. These instruments, however, were drafted before the advent of digital technologies, when only tangible works could be considered cultural property. In an age of digital creation and reproduction, it is important to reevaluate how we understand the nature of cultural property. Can digital creations ever constitute cultural property? If so, what digital works might qualify as digital cultural property? And how must states safeguard and respect digital cultural property in the event of armed conflict?

The 1954 Hague Convention for the Protection of Cultural Property is the instrument most commonly associated with the protection of cultural property in armed conflict, but arguably, its definition of cultural property is now superannuated. Today, works of art and culture can be originally created or exactingly reproduced in digital formats, and some of these works might constitute digital forms of cultural property. The law as interpreted, however, seems to presume that only singular works, usually in a physical form, can be cultural property, leaving digital creations either under-protected or not protected at all. This discrepancy exposes a gap in the law.

Understanding the cultural significance of certain physical creations can be relatively intuitive. Famous works of art such as the *Mona Lisa*, *The Great Wave Off Kanagawa*, and Michelangelo's *Pieta* are unquestionably entitled to protection as cultural property. In contrast, no work created entirely in a digital format has yet achieved the same universal recognition as these masterpieces. Nevertheless, the potential exists for digital works to attain a comparable cultural status and, consequently, to compel consideration as cultural property.

Public interest in digitally created works is already on the rise. In 2021, for example, Christie's sold a work by the digital artist known as Beeple called *Everydays: The First 5000 Days*. The work sold at auction for $69.3 million, making it the third most expensive artwork ever sold by a living artist. The current popularity of NFTs (non-fungible tokens) is also an indicator that digital creations have value. Might some works composed entirely in a digital format—including digital photographs, digital films, digital audio recordings, and even computer code—someday be recognized as digital cultural property? And if so, which version of the digital work would be entitled to protection?

Physical and digital works are created, exist, and are experienced in starkly different ways. Because they are not perfect analogues, applying concepts conceived for the protection of physical objects to digital creations will be inadequate and will require a thoughtful reevaluation of the law. For example, physical works of art are hard to reproduce, so we generally know which is the original. The Hague Cultural Property Convention protects these originals—these singular examples. It does not protect copies, generally speaking. Digital creations, however, can be reproduced *ad infinitum* and with perfect fidelity. In other words, it may be difficult, if not impossible, to identify the "original" version of a digital work. When considering digitally reproducible works, however, should it even matter which is the "original"?

In the early twentieth century, Walter Benjamin tackled the question of reproductions in his influential essay, "The Work of Art in the Age of Mechanical Reproduction." At the time, he was addressing the then-new technologies of lithography and photography, but the questions he raised are just as applicable today to digitally created works. Benjamin discussed two characteristics valued in physical works, what he called "authenticity" and "aura." He defined the "authenticity" of a thing as "the essence of all that is transmissible from its beginning, ranging from its substantive duration to its testimony to the history of which it has experienced." The patina of an ancient bronze statue, therefore, is not only a sign but a constituent of its authenticity. Similarly, the graffiti inscribed inside the Temple of Dendur at the Metropolitan Museum of Art is evidence of its authenticity. Aura, meanwhile, refers to the "authority possessed by a unique and original work."

Benjamin observed that art forms designed for reproducibility had unsettled our understanding of the power of authenticity and aura. He said this of photography: "From a photographic negative, . . . one can make any number of prints. To ask for the 'authentic' print makes no sense."

Imagine, then, what this means for digitally created works. If we have passed from an Age of Mechanical Reproduction to an Age of Digital Reproduction, what does this mean for the identification and protection of digital culture? Should we really be concerned whether a digital work is the "original" work? Or should we be more focused on preserving the cultural information or value encoded in a digital work?

The *Tallinn Manual 2.0*, which restates the public international law governing cyber warfare and peacetime cyber operations, acknowledges that "digital cultural property" must be protected in armed conflict. However, the discussion of the rule arguably does not fully capture the innate difference between digital cultural property and physical or material cultural property.

The commentary actually uses the *Mona Lisa* as an example. It suggests that a high-resolution digital copy of the *Mona Lisa* could qualify for cultural property protection if the original were destroyed or became inaccessible *and* if the number of digital copies that could be made is limited. The *Tallinn Manual 2.0* explains, "due to the high speed and low cost of digital reproduction, once such a digital image has been replicated and widely downloaded, no single digital copy of the artwork would be protected by this Rule."

If the point of cultural property protection is to preserve works of art and culture for future generations, then why place these artificial limitations on what can be legally protected? The law places the onus and responsibility on states to declare what constitutes national cultural heritage of "great importance for all peoples of the world"—in other words, what is cultural property. Accordingly, should states not decide whether and what digital works constitute digital cultural property? Critically, states must make these declarations before the outbreak of armed conflict. Otherwise, the obligation of identifying an adversary's cultural property will fall to military forces, which clearly—at least currently—do not have the requisite cultural or art historical knowledge and expertise. Identifying cultural property can already be challenging with respect to physical works. That is partly why the Hague Convention provides for the marking of such objects. Identifying digital cultural property will be even more challenging—and there is currently no digital equivalent of the Hague Convention's protective emblem.

Lastly, while the issue of protecting digital culture in armed conflict may seem overly theoretical, the conflict in Ukraine suggests that it is not. Last year, Quinn Dombrowski, the head of a group called Saving Ukrainian Cultural Heritage Online (SUCHO), indicated that her group had archived nearly 50TB of data from nearly 5,000 Ukrainian cultural institutions. In an exchange of emails, she confirmed that some of the material that SUCHO preserved was entirely digital and did not exist in the physical world. Ultimately, states must start thinking about this issue and working to resolve it now, before we lose our digital cultural heritage in war.

A Social Ontological Approach to Regulating the Use of Force Against Individuals in War

By Ka Lok Yip[*]

I am very grateful for the Lieber Society Book Prize awarded to my book, *The Use of Force Against Individuals in War under International Law: A Social-Ontological Approach*, and for this opportunity to share with you a bit more about this book.

I am currently reading an interview given by the French philosopher, Jean-Paul Sartre, entitled "The Itinerary of a Thought" in which he traced the evolution of his controversial idea that human

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beings are condemned to be free—that we have no choice but to choose. That interview inspired me to share with you the itinerary of a thought of mine that has now developed into this book.

In 2009 when I first started studying the law of armed conflicts (LOAC), I attended a public lecture given by Jeff McMahan, the revisionist just war theorist. He was discussing NATO's high altitude bombing over Belgrade during the Kosovo crisis in 1999 and the potential argument that the legal calculus of the collateral damage caused by that bombing campaign could be relaxed because it was pursuing a very "just" cause. The audience was captivated—perhaps due to the gravity of the subject matter or the somewhat hypnotizing effect of the long and delicate chain of reasoning that analytic philosophers tend to employ. I myself was struck by the image he painted of this rational, reflexive soldier surging up from the morass of competing political forces, heated emotions and deep-seated convictions to evaluate whether ten as opposed to one life is the appropriate price to pay for saving however many people the bombing was supposed to save. I could not put my finger on the cause of it but an odd feeling stayed on with me.

It was not until a few years later during my PhD, when I stumbled upon what in the social sciences is called the agent-structure problem that I began to figure out the oddity I had felt listening to the revisionist just war theorists' account of wartime behavior and what makes it wrongful in law or ethics. The agent-structure problem is not properly an academic problem but describes what, at a rock bottom level, is the everyday experience of any ordinary human being: that we do not always have our way, that our actions and our reasons for these actions are not merely our own creation, and that therefore our freedom is limited. What had struck me as odd about the rational soldiers portrayed by the revisionist just war theorists is that their agency to act in the fog of war is virtually unlimited, not unlike the radically free human envisioned by Sartre—they always have a choice. Sartre went so far as to say that:

> Thus there are no *accidents* in a life; a community event which suddenly bursts forth and involves me in it does not come from the outside. If I am mobilized in a war, this war is my war; it is in my image and I deserve it. I deserve it first because I could always get out of it by suicide or by desertion; these ultimate possibles are those which must always be present for us when there is a question of envisaging a situation. For lack of getting out of it, I have *chosen* it. This can be due to inertia, to cowardice in the face of public opinion, or because I prefer certain other values to the value of the refusal to join in the war (the good opinion of my relatives, the honour of my family, etc.) Any way you look at it, it is a matter of choice.[1]

The reckoning of this highly agential view of the human opened my eyes to an often unspoken, but deeper disagreement that undergirds the most prominent disagreement by the revisionist just war theorists with traditional just war theory—that ordinary soldiers fighting for an aggressor could qualify for combatant immunity so long as they comply with LOAC. That unspoken, underlying disagreement is about the human agency of the individuals who fight for an aggression. The objection by some revisionist just war theorists to combatant immunity implies a presupposition that ordinary human individuals can surge above the structure and culture in which they are embedded and resist joining a military campaign that lacks a just cause and committing what are essentially criminal acts but for combatant immunity. Revisionist just war theorists' frequent analogy of wartime hostilities with actions governed by domestic criminal law (which presupposes a normal level of agency in a normal community) provoked its dismissal by Michael Walzer as "a careful and precise account of what individual responsibility in war will be like if war were a peacetime activity."[2] Even though the revisionist just war theorists' concern that LOAC might be used to whitewash wrongful actions is well-founded, to address that concern by either modifying

[1] Jean-Paul Sartre, Being and Nothingness: An Essay on Phenomenological Ontology 574–75 (2003).

[2] Michael Walzer, *Response to McMahan's Paper*, 34 Philosophia 43, 43 (2006).

LOAC or denouncing its usefulness implicitly demands from the individuals engaged in war a level of agency that they are not traditionally anticipated to have under LOAC, while ignoring their structural constraints, which are created by internationally wrongful acts addressed elsewhere in the international law system.[3] The insufficient attention to this unspoken, underlying disagreement about human agency leaves also underexplored the key differential between war and peace intended to be captured by LOAC: the increased structural constraints on human agency in war compared to peace, in correspondence to the lower standards of conduct accepted by LOAC, which precisely evidences LOAC's regulatory focus on agential conduct.

The focus on human agency is only one in a long line of features that would uncover a social ontological layer that underlies LOAC: what LOAC presupposes to exist in the world, what are their powers and propensities and how LOAC is to regulate them. LOAC is separated from *jus ad bellum* such that the determination of its compliance or breach is independent from the broader frame of *jus ad bellum*. LOAC contains numerous specific prescriptions for individuals' conduct in war. Historically, LOAC has been enforced primarily through criminal sanctions against individuals. All these disclose the ontological presuppositions of LOAC: that the world it regulates is made up primarily of individuals, that these individuals have agency but only up to a certain level below that concerning the just cause for inter-state armed conflicts, that the matters it regulates fall within the domain of human agency of the relevant individuals, despite their structural constraints.

Recognizing these ontological presuppositions of LOAC also serves to highlight its distinction from other bodies of law that harbor different ontological presuppositions, notably international human rights law (IHRL). Instead of drawing the line between conduct that could lead to criminal prosecution and other conduct, general IHRL conventions require the adoption of laws or other measures as may be necessary to give effect to the rights recognized in their provisions. While these measures may include criminalization and punishment, they are for a violation of the right recognized in those provisions, not a violation of those provisions themselves. The compliance with these provisions would require much more than individuals' human agency to refrain from committing crime—it would require structural measures of protection, fulfillment and promotion, which are beyond the capability and responsibility of identifiable individuals and can only be accomplished by collective entities with the necessary structural power, e.g., states. These features disclose very different ontological presuppositions of IHRL: that the world it regulates is primarily made up of structures, that these structures affect how individuals behave and that the matters it regulates need not fall within the domain of human agency.

Contrasting the different regulatory foci of LOAC and IHRL puts into serious question the widespread beliefs that the two bodies of law should be made to converge by the legal techniques of *lex specialis* or systemic integration—the former would imply that rules dealing with agential conduct are more "special' than rules dealing with structural conditions (or less frequently, vice versa); the latter would potentially obscure the distinctions between agency and structure and thereby deny the powers and propensities of both.

Other commentators have sometimes used the term "conflation" to describe the current approaches to the relationship between LOAC and IHRL, without actually naming what exactly

[3] The international wrongfulness of the actions taken in pursuance of an aggressive war is already addressed by *jus ad bellum*, provided we avoid the trap of misconstruing the separation between *jus ad bellum* and LOAC as the insulation of their respective scopes of application (which would indeed allow LOAC to whitewash these actions by carving out a space for them to be exempt from the scrutiny of *jus ad bellum*), and instead construe it as the insulation of the respective results of their application (which allows *jus ad bellum* full scrutiny over acts that are also subject to the regulation of LOAC). *See* Ka Lok Yip, *Separation Between* Jus ad Bellum *and* Jus in Bello *as Insulation of Results, Not Scopes, of Application*, 58 MIL. L. & L. WAR REV. 31 (2020).

is being conflated. This book concludes that what is being conflated in these current approaches is social ontology: human agency versus structural conditions, their respective powers and propensities and their susceptibility to regulation by different legal norms. Since these under-analyzed ontological presuppositions by different protagonists on the debate concerning the relationship between LOAC and IHRL underlie their differences, it is also hoped that making explicit these social ontological presuppositions will create more scope for these protagonists to find common ground. For those who maintain their presupposition about human agency to the Sartrean level, it might be worth noting Sartre's acknowledgement later in life that his earlier conclusion that "in any circumstances, there is always a possible choice" is false.[4] He nonetheless elaborated what remained in freedom: "the small movement which makes of a totally conditioned social being someone who does not render back completely what his conditioning has given him. Which makes of Genet a poet when he had been rigorously conditioned to be a thief."[5] That small movement may be the kind demanded by LOAC from individuals rigorously conditioned to be war criminals.

The Evolution of IHL and New Military Technologies

By Yahli Shereshevsky [*]

Hello everyone, I am really excited to be here and wanted to thank the Lieber Society for awarding me the Lieber Prize for an Outstanding Article in the Field of the Law of Armed Conflict, it means so much to me. In the short time that I have, I will offer a very brief overview of my paper, "International Humanitarian Law-Making and New Military Technologies,"[1] and then will focus on one of its parts.

The paper is part of an issue of the *International Review of the Red Cross* that explores the question of how international humanitarian law (IHL) develops.[2] The issue includes many great papers that address various aspects of the development of IHL, including historical accounts on the development of IHL, diverse global viewpoints on IHL, the role of states and various non-state actors in the development of IHL, and a forward-looking assessment of the issue. My paper focuses on one specific area of the development of IHL—new military technologies. New military technologies have always posed significant challenges to the regulation of warfare. Today we face an era in which technological changes occur at a rapid pace, and a heated debate over the regulation of new military technologies takes place. This debate involves technologies such as cyber warfare, military AI with a special focus on autonomous weapon systems, and military human enhancement. The paper addresses various features that are relevant to the development of IHL in the context of new military technologies. Some of these features are not unique to new military technologies but are relevant to other cases where old laws (existing IHL) are applied to new realities. One example of such features is the evolution or revolution question—namely, to what extent existing IHL is sufficient for the regulation of new technologies. In some areas, such as the

[4] Jean-Paul Sartre, *Itinerary of a Thought*, 0 New Left Rev. 43, 44 (1969).

[5] *Id.* at 45.

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[1] Yahli Shereshevsky, *International Humanitarian Law-Making and New Military Technologies*, 104 Int'l Rev. Red Cross 2131 (2022).

[2] *How International Humanitarian Law Develops*, 104 Int'l Rev. Red Cross (2022), *at* https://www.cambridge.org/core/journals/international-review-of-the-red-cross/issue/3E8FA7DEB819673A7324C1A6564480C3?sort=canonical.position%3Aasc&pageNum=1&searchWithinIds=3E8FA7DEB819673A7324C1A6564480C3&productType=JOURNAL_ARTICLE&template=cambridge-core%2Fjournal%2Farticle-listings%2Flistings-wrapper&hideArticleJournalMetaData=true&displayNasaAds=false.

application of the principle of distinction to targeting by drones (fully operated by humans), the new technology does not necessarily present significant challenges for the application of IHL, while in other areas, such as the question of meaningful human control in relation to fully autonomous weapons, it raises complicated novel questions. In many cases of new military technologies, the majority of issues could be adequately addressed by existing laws, while a small number of issues lie at the heart of the debate over the need for new laws.

Other features are especially relevant for new military technologies. For example, the extent that skepticism or fear of new technologies, and on the other side optimism regarding the effects of such technologies influence the legal debate over their regulation. These attitudes have the potential to skew the normative discussion toward over-restrictive or over-permissive regulation of new technologies. The paper suggests that the current discussions of these technologies include more representation of the fear of technology than optimism about its promise. Another example is the uncertainty and secrecy that are associated with the development of new military technologies. Often, there is much uncertainty regarding the full potential implications of new military technologies and in addition, secrecy surrounds its development. The paper addresses various potential implications of such uncertainty and secrecy on the development of IHL norms. Thus, it discusses the costs and benefits of the timing of the regulation of new military technologies taking into account the need for clarity about the effects of the technologies on the one hand and the significant risks that such technologies pose on the other. In addition, it discusses the choice between hard and soft norms based on the dynamic nature of the development of these technologies.

As mentioned, I will focus here on what is perhaps the heart of the paper—the informal regulation of new military technologies. The starting point of the paper is that the prospect of creating new treaties that govern such technologies is very low. In highly contested areas of international law such as contemporary IHL, the contracting costs are extremely high, and thus it is not surprising that in the last few decades there is a significant decline in the creation of new treaties to regulate contested IHL issues. New military technologies are not equally distributed creating a significant divergence in the interests of relevant actors and thus contributing to the difficulty of reaching an agreement over their regulation. The paper discusses one potential exception to this tendency—the regulation of weapons—and addresses in this context the prospect of a treaty that will ban autonomous weapons. The general decline in new IHL treaties and the fierce debate regarding new military technologies suggest that the main path for the regulation of new military technologies is informal lawmaking. Indeed, much of the attempts to regulate new military technologies do not focus of treaties but on other processes such as the *Tallinn Manual on the International Law Applicable to Cyber Operations*, the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (GGE LAWS), and statements by states and non-state actors such as the French Ministry of the Armies statement regarding the international law applicable to operations in cyberspace and the ICRC Position on Autonomous Weapon Systems.

The paper addresses two main issues in this regard. The first continues my earlier work to examine the relationship between states and non-state actors in the context of informal lawmaking. While the paper suggests that states have good reasons to be reluctant to openly express their positions on the regulation of new military technologies, it also recognizes the importance of their participation in the debate over these technologies to effectively promote their positions. States understand that as merely one state (or a limited number of states) the power of their formal lawmaking authority is limited, and therefore must play the persuasion game to increase the influence of their positions. As a result, states seem to adopt techniques that are often used by non-state actors to promote their IHL positions. For example, to increase the visibility of the Israeli position on the application of international law to cyber operations, it was presented in a keynote speech by the

Israeli deputy attorney general at the Naval War College's Conference on Disruptive Technologies and International Law, and later was published in a leading international law blog, EJIL:*Talk!*, and an important international law journal, *International law Studies.* In addition, the speech was actively promoted by the deputy attorney in advance through his professional Twitter account.

This brings me to the second issue regarding informal IHL lawmaking. While we are all familiar with the significant discussion regarding the choice between formal and informal or hard and soft law, there is much less discussion about the form and substance of different types of informal lawmaking. Even if we focus only on the regulation of new military technologies, we see many different choices regarding the forum, form, and substance of informal initiatives. The paper recognizes various aspects of the lawmaking initiatives that can influence their effectiveness and should be further explored. These include the platform or forum of the lawmaking initiative that ranges from semi-formal processes such as the GGE LAWs to expert manuals such as the *Tallinn Manual*. And what I call the micro-processes of persuasion such as the type of legal argumentation and various techniques that are used to enhance the accessibility, visibility, and authority of the initiatives, including the choice of language (mostly English), presentation at international conferences and special academic events. In addition, they use various techniques to increase the legitimacy and authority of their texts. These techniques are mainly intended to strengthen the perceived neutrality and legal soundness of the position. The initiatives try to demonstrate a wide participation of states and relevant experts in the drafting process and often use a quasi-academic form including in-depth legal reasoning. The paper calls for an in-depth exploration of these micro-processes in order to better understand their potential to shape the future regulation of the battlefield.

Finally, the paper explores the effect of power differences on informal IHL making. It is well established that powerful states have a greater influence on formal international lawmaking, and it is not different in relation to informal processes. Powerful states should be understood in this context as those states who can invest significant resources in international lawmaking. Still, the paper suggests that informal settings have some promise for more inclusion given the lower lawmaking costs in such settings. And indeed, it was recently suggested that states from the global South significantly participate in the law-making process under the GGE on LAWS.

I would like to thank you again for the prize and I am very grateful for the opportunity to present the paper and similarly to the micro-processes of informal lawmaking initiatives, increase its exposure.

What Statehood Can Teach Us About Annexation

By Ronit Levine-Schnur,[*] *Tamar Megiddo,*[**] *Yael Berda*[***]

The theory of statehood expressed in the 1933 Montevideo Convention breaks down the concept of statehood into four qualifications: a permanent population; a defined territory; a government; and the capacity to enter into international relations.[1] When working with this definition we are usually called on to evaluate whether an entity in fact possesses these qualifications following

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[1] Montevideo Convention on the Rights and Duties of States, Art. 1, *opened for signature* Dec. 26, 1933, 165 LNTS 19 (*entered into force* Dec. 26, 1934).

its declaration of independence. In other words, it is an entity's *claim* for independence that requires states to consider its status and determine whether they should recognize it as a state, or not.

This theory of statehood, we argue, may also be used to shed light on the related concept of annexation. How should we evaluate a situation of annexation?

In the context of annexation, declarations are the exception. States are reluctant to declare that they are annexing a territory (or otherwise imposing their sovereignty), and rightfully so: annexation is a violation of the prohibition on the use of force. It is an acquisition of territory by force, which is recognized as a *jus cogens* prohibition.[2] It carries international responsibility for states and generates individual criminal responsibility for leaders.[3] It further gives rise to a duty on other states to refrain from recognizing the annexing state's attempt to change the status of the territory, and to avoid any form of relationships or dealings with it with respect to the territory annexed.[4] There is no incentive for states to formally and publicly declare annexation. Absent such declaration, how could we assess whether a situation is indeed an annexation of territory contrary to international law?

This problem with defining annexation has not gone unnoticed. Scholars have long worked with the concept of *de facto* annexation.[5] Thus, they have created lists of indicators which aim to identify whether a certain territory has been annexed.[6] Cumulatively, these indicators are intended to show that a situation has transformed—usually from a situation of legitimate occupation—into one of annexation.

The difficulty with this concept of *de facto* annexation is that it is missing an organizing theory. There is no theoretical elaboration of what it means for a territory to be annexed. In our *Theory of Annexation*, we propose to break down the concept of annexation—as was done in the case of statehood—into qualifications that will allow us to organize the different factual indications and evaluate whether a situation is one of annexation.[7]

Two contemporary events, which at least raise the suspicion that annexation has taken place, trigger this conversation today. One is, of course, the occupation of the eastern part of Ukraine by Russia, since 2014, but more so since February 2022. The second is the occupation of the Palestinian Territories, particularly the West Bank, by Israel, since 1967 but—as we suggest—especially following the rise to power of the new Israeli government in December 2022.[8]

We suggest that in order to define and evaluate whether an annexation has taken place, three qualifications must be assessed. The first is the *normative organizing framework*: What theory is the state working with when it is managing this territory? Is it perceiving the territory as its

[2] International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, 77–78, 86–87 (2022).

[3] United Nations General Assembly, Definition of Aggression, Art. 5, UN Doc. 3314(XXIX) (Dec. 14, 1974); Rome Statute of the International Criminal Court, Art. 8*bis*, July 17, 1998, 2187 UNTS 90.

[4] Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ Rep. 16, paras. 121–25 (June 21); YAEL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 71 (2011).

[5] Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERK. J. INT'L L. 551 (2005); AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION (2017).

[6] ELIAV LIEBLICH & EYAL BENVENISTI, OCCUPATION IN INTERNATIONAL LAW 30 (2022).

[7] Ronit Levine-Schnur, Tamar Megiddo & Yael Berda, *A Theory of Annexation* (2023), *at* https://papers.ssrn.com/abstract=4330338.

[8] Tamar Megiddo, Ronit Levine-Schnur & Yael Berda, *Israel Is Annexing the West Bank. Don't Be Misled by Its Gaslighting*, JUST SECURITY (2023), *at* https://www.justsecurity.org/85093/israel-is-annexing-the-west-bank-dont-be-misled-by-its-gaslighting.

own, integral to its sovereign territory? Does it apply its domestic law to the territory? Or does it manage it using a separate legal framework, such as the international law of occupation? The point of view to be assessed here is not that of an external observer but rather that of the state under scrutiny.

The second qualification is the *organizational structure* of control over the territory. In this context, we seek concrete evidence relating to the administration and bureaucracy used to manage the territory under control. Is the territory's management assimilated into the bureaucratic structures of the state in control? Or is it managed independently? Is there a separate administration in place for the territory, distinct from that of the state?

Finally, the third qualification is the *symbolic performance of power*. Is there evidence that the state employs national symbolic representations to reflect its view of the territory as integral to its own (expressing, in other words, a normative framework of annexation)? Are other defining symbols, such as other flags, allowed to fly in that territory? Is the territory managed by uniformed military soldiers (which is to be expected under the law of occupation), or is it managed for instance by the national police (which is more likely in an annexed territory)?

The lists of indicators developed in the scholarship remain crucial. But this conceptualization and these qualifications help us point out what it is that indicators need to show.

One may consider several contemporary examples: for instance, passportization[9] contains a strong symbolic element attesting to annexation. The removal of children from Ukrainian orphanages and placing them within adoptive families in Russia[10] indicates a domestic perspective with respect to the territory occupied: Russia is treating it as an integral part of Russia. This allows domestic office holders, such as the Children's Commissioner, to exercise their authority in occupied Ukraine by transferring children into Russia and placing them in adoptive families.

The fact that Israel has recently restructured its management of the civilian life in the occupied West Bank, so that decision making is no longer in the Israel Defense Forces (IDF) Central Command but now moved into the hands of a civilian minister (who is formally situated as an independent minister at the Ministry of Defense), indicates a change in the organizational structure of control in the West Bank.[11] This organizational change executes the shift in the organizing normative framework that Israel is now working with vis-à-vis the West Bank. The new government shifted from a normative perspective of military government operating under the law of occupation, to formally extending Israeli domestic law and legal bureaucracy to the territories. The shift further reflects its strongly-held belief in Israel's legitimate claim to these territories.

It should be noted that this move in Israel is part of the Israeli government's plan to overhaul the judicial system and speed toward autocracy.[12] But the change of perspective and control structure over the territories has gained much less attention.[13] It is, however, clear to internal observers that

[9] Human Rights Watch, *Russia Threatens Ukrainians Who Refuse Russian Citizenship* (2023), *at* https://www.hrw.org/news/2023/05/16/russia-threatens-ukrainians-who-refuse-russian-citizenship.

[10] Micaela Del Monte & Nefeli Barlaoura, *Russia's War on Ukraine: Forcibly Displaced Ukrainian Children*, (2023), *at* https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)747093; Situation in Ukraine: ICC Press Release, ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (2023), *at* https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[11] Memorandum of Understanding and Division of Responsibility and Authorities Between the Minister of Defense and the Additional Minster in the Ministry of Defense, Sec. 2 (Feb. 23, 2023) (on file with authors)

[12] The Israeli Law Professors' Forum for Democracy, *The Revolutionary Regime Transformation: A Summary Opinion #5* (Jan. 20, 2023), *at* https://www.lawprofsforum.org/post/the-revolutionary-regimetransformation-a-summary-opinion-.

[13] *See* The Israeli Law Professors' Forum for Democracy, *Implications of the Agreement Subordinating the Civil Administration to the Additional Minister in the Ministry of Defense Position Paper No. 24* (Mar. 5, 2023), *at* https://wvww.lawprofsforum.org/post/pp24-e.

these changes, entrenched in the coalition agreements and already underway, reflect an intention to annex the West Bank in all but name. The coalition agreements commit to apply Israeli sovereignty to the West Bank but defer the declaration of such move to a more opportune moment that will accord with the international and national interests of the State of Israel. This manipulation exemplifies the importance of looking beyond a declaration of annexation, which may never come.

In conclusion, contrary to statehood, whose qualifications are assessed upon a claim of independence, there is no justification to condition the evaluation of annexation on a formal declaration. A new theory for defining annexation independently of declarations is much needed.