

Going for a test drive? Some observations on the turn to informality in the laws of armed conflict

Citation for published version (APA):

Lijnzaad, L. (2022). Going for a test drive? Some observations on the turn to informality in the laws of armed conflict. *International Review of the Red Cross*, 104(920-921), 1930-1947. <https://doi.org/10.1017/S1816383122000807>

Document status and date:

Published: 24/10/2022

DOI:

[10.1017/S1816383122000807](https://doi.org/10.1017/S1816383122000807)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

Taverne

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Download date: 17 May. 2024

Going for a test drive? Some observations on the turn to informality in the laws of armed conflict

Liesbeth Lijnzaad*

Liesbeth Lijnzaad is a judge in the International Tribunal for the Law of the Sea, and a Professor of the Practice of International Law at Maastricht University, the Netherlands. A former Legal Adviser of the Netherlands Ministry of Foreign Affairs (2006–2017), she has participated in a number of informal lawmaking processes. Email: liesbeth.lijnzaad@maastrichtuniversity.nl.

Abstract

This contribution reflects on the development of informal expert manuals in the field of the laws of armed conflict. These manuals are presented as restating existing customary law, perhaps adding a few elements de lege ferenda but not having a straightforward normative intent. The authors of expert manuals state them to be non-binding, and their drafting takes place mostly in self-appointed groups. Although a normative intent may be absent when drafting such informal expert manuals, such rules may obtain normative effect nevertheless. While States are mostly absent in these processes, they seem to have a specific interest in the development of these manuals.

Keywords: Expert manuals, role of governments, development of international humanitarian law, informal lawmaking, military technology.

⋮⋮⋮⋮⋮

* I am indebted to the unknown reviewers of an earlier version of this article, as well as the editors of the *International Review of the Red Cross* for their helpful comments. Mistakes of course remain mine alone.

Introduction¹

Over the past twenty-five years, a great many projects aimed at updating, reinterpreting and clarifying the laws of armed conflict have appeared. These projects have produced compilations of rules – frequently called expert manuals – in areas where the law is either dated or not specifically tailored to contemporary military activity. Various sets of norms have been formulated in informal settings by groups of private experts dealing with distinct chapters of the laws of armed conflict. The development of these informal instruments in the laws of armed conflict appears to have started in the 1990s and has by now risen to an impressive number of instruments, also when compared to informal developments in other fields of international law.

When addressing informality in the laws of war, we tend to mostly look at a few aspects only: what are the substantive rules, who the law is addressed to and who is participating in the process of developing the law. The first question leads to reflections about whether and how newly formulated norms differ from existing law, what their content is and what this implies, as well as whether particular changes are perceived as progress. These substantive aspects will not be discussed here. The second question is about who is addressed by the expert manuals, whether norms have been formulated for use in non-international armed conflicts, and to which groups of fighters such norms apply. A third category of questions is essentially about who has been engaged in these informal processes formulating norms of international humanitarian law (IHL), how such groups operate, and what expertise participants bring. Participation will be looked at further below.

Other issues attract less interest, although they are at the heart of the informality discussion and the reflection about these developments: why does it look as though States are formally absent in these processes of drafting manuals? Will these norms have legal effect in spite of authors claiming that this is not intended? Beyond that lie further questions about the apparent trend towards the formulation of informal rules in the laws of armed conflict, as opposed to formal lawmaking through the negotiation of treaties and other formal legal instruments.

The matter of informal “lawmaking” would not be on our agenda if such documents did not have an impact on debates about the contemporary law of armed conflict. In one way or another, these documents have developed into being authoritative, both for practitioners and for academics. This seems to be a consequence of their existence, which has established them as the norm to argue against. It is necessary to reflect on their potential impact on the development of law. It is the intention for this contribution to make some comments about the turn to informality in the laws of war: what is happening and how to understand it.

1 This contribution is in part based on Liesbeth Lijnzaad, “The San Remo Manual on the Law of Naval Warfare – From Restatement to Development?”, in Natalie Klein (ed.), *Unconventional Lawmaking in the Law of the Sea*, Oxford University Press, Oxford, 2022.

Below, the appearance of informal manuals will be sketched, followed by an overview of the reasons for choosing this format for the formulation or restatement of rules for contemporary military activity. After that, attention will be drawn to the problems of formally changing IHL and the difficulty of newly developed norms that purport not to be legal norms in the traditional sense of international law. At the heart of the issue before us is the presumed absence of States in the process of formulating informal manuals, and an analogy with test driving a car presents itself.

The appearance of informal manuals

At the outset of this contribution it is necessary to define what is meant by informal manuals. The starting point is that international law is created by States – whether through the drafting and ratification of binding written instruments such as treaties and conventions which have been expressly accepted by the States concerned, or through the development of a particular practice that over time becomes accepted as customary law. Apart from these two sources of international law, other sources of international law, such as general principles of law, judicial decisions, and the teachings of eminent scholars of various nations, play a less prominent role. These categories are referred to in Article 38 of the Statute of the International Court of Justice (ICJ), which lists them as the applicable law on which the Court may base its decisions. However, this provision has grown to be understood as an overview of the sources of international law. The law is created by States in a voluntarist system, and the sources of international law have a formal nature. Particularly with respect to written law, the development of the law goes through a process of negotiations in which agreement about legal norms is translated into agreed text to which States adhere individually.

Over time, in the past twenty to thirty years, instruments have started to appear that contain rules that in many respects “look like law”, but are not law as such, as they lack crucial features that could qualify them as binding written norms. There have been extensive discussions in academic literature about the subject, starting out with informal instruments created by States, yet drafted without the intention to create binding law.² Pauwelyn provides a broader analysis, in distinguishing between different forms of informality.³ There may be the absence of an intention to formulate a binding instrument, as the authors simply had no wish for the instrument to become binding as law. This is known as output informality: whatever the content, the end product will remain informal as it does not satisfy the criteria for establishing binding international law. This is the case with expert manuals in the field of the law of armed conflict: all manuals

2 Anthony Aust, “The Theory and Practice of Informal International Instruments”, *International & Comparative Law Quarterly*, Vol. 35, 1986.

3 Joost Pauwelyn, “Informal International Lawmaking: Framing the Concept and Research Questions”, in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012, pp. 15–22. See also Natalie Klein, “Meaning, Scope and Significance of Informal Lawmaking in the Law of the Sea”, in N. Klein (ed.), above note 1, pp. 6–13.

state that the instrument is not meant to be binding, which is often repeated by their authors. The manuals discussed below are drafted by groups of experts that get together at their own volition out of concern for the absence of specific up-to-date law, rather than by State officials with a clear mandate from States to develop the law. This is a form of actor informality, the participants participating in their own right as private individuals and not as the representatives of States. Often hosted by academic institutions or research institutes, work on expert manuals takes place in an informal setting without rules of procedure, and the end product is drafted and edited by a small group of experts which tends to be understood as process informality.

Klein and Pauwelyn discuss informality in relation to the role of States in the development of informal norms. The expert manuals discussed below are informal in more ways than described by them: they are the work of private experts who meet informally to work on a subject of their choice without any visible participation by States. The role of States will be one of the aspects discussed in the following.

On various aspects of the law of armed conflict, informal restatements have been drafted in the past twenty-five years.⁴ The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, adopted on 12 June 1994 (1994 San Remo Manual), was probably the first such informal document, aimed at a reinterpretation of the law of naval warfare.⁵ It was followed by other collections of norms in specific domains: the 2006 *San Remo Manual on the Law of Non-International Armed Conflict*,⁶ the 2009 Harvard Manual on Air and Missile Warfare,⁷ the 2012 (first) Tallinn Manual⁸ and the 2017 Tallinn Manual 2.0⁹ on cyber and armed conflict. Also worth mentioning are the 2017 Leuven Manual on the International Law Applicable to Peace Operations,¹⁰ and the 2018 Oslo Manual on Selected Topics of the Law of Armed Conflict (an update of the 2009 Harvard Manual).¹¹ Work

- 4 All the informal documents listed here drafted by groups of experts bear the title of “Manual” (with the name of the city where discussions took place added), as opposed to more varied titles for ICRC documents.
- 5 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (1994 San Remo Manual).
- 6 Developed under the auspices of the San Remo International Institute of Humanitarian Law: M. N. Schmitt, C. H. B. Garraway and Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, Sanremo, 2006.
- 7 Program on Humanitarian Policy and Conflict Research at Harvard University, *HCPR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 15 May 2009, available at: <https://reliefweb.int/report/world/manual-international-law-applicable-air-and-missile-warfare> (all internet references were accessed in September 2022).
- 8 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.
- 9 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017. Technically this does not deal with the law of armed conflict but with attacks below the threshold of armed conflict.
- 10 Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations*, Cambridge University Press, Cambridge, 2017.
- 11 Yoram Dinstein and Arne Willy Dahl (eds), *Oslo Manual on Select Topics of the Law of Armed Conflict*, Springer Open, New York, 2020.

on the Woomera Manual on the International Law of Military Space Activities and Operations is apparently ongoing and nearing completion.¹²

During the same period, the International Committee of the Red Cross (ICRC) has produced the Customary Law Study¹³ and the Interpretative Guidance on the Notion of Direct Participation in Hostilities,¹⁴ as well as (more recently) documents on the law of occupation¹⁵ and guidelines on the protection of the natural environment in armed conflict.¹⁶ These are documents directly linked to the ICRC's role with respect to the interpretation and development of IHL. The 2008 Montreux Document on Private Military and Security Companies during Armed Conflict was produced in a State-led process with the support of the Swiss government.¹⁷ All in all, this makes for a long list of informal instruments, and perhaps it is not even complete.

In all of these informal instruments, the authors stress that it is not their intention to propose new law or argue for how the law should develop (*lex ferenda*). Rather, they see their work as being based on existing law (*lex lata*). These instruments are reformulations, restatements of the law for today's use based on discussions between experts who do not intend to change the law, but merely aim to restate it. The rules are intended to be a reflection of customary law, without any apparent normative intent. Such expressions of the intention to adhere to existing law are understandable in light of the rules concerning the development of international law in which States have a central role (as opposed to informal groups of experts).

The informal manuals discussed here should not be confused with regular military manuals or handbooks drafted as instructions to the armed forces under the authority of their States.¹⁸ Military manuals or handbooks are an interpretation of

- 12 Adelaide Law School, Australia, Woomera Manual, available at: <https://law.adelaide.edu.au/woomera/>.
- 13 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. This work was based on a decision by the 1996 International Conference of the Red Cross and Red Crescent Movement.
- 14 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.
- 15 ICRC, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory", 11 June 2020, available at: www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting.
- 16 ICRC, "Guidelines on the Protection of Natural Environment in Armed Conflict", available at: www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating. The International Law Commission (ILC) is working on a somewhat related project: protection of the environment in relation to armed conflicts; see ILC, Analytical Guide to the Work of the International Law Commission: Protection of the Environment in Relation to Armed Conflicts, General Assembly Action, Resolution 75/135 of 15 December 2020, available at: https://legal.un.org/ilc/guide/8_7.shtml#fout.
- 17 Swiss Federal Department of Foreign Affairs and ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Montreux, 17 September 2008, available at: www.eda.admin.ch/eda/en/dfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html.
- 18 On these two distinct types of military manuals, see Earle A. Partington, "Manuals on the Law of Armed Conflict", in *Max Planck Encyclopedias of International Law*, August 2016, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e326?rskey=QJAXqQ&result=>

the applicable law as understood by the State concerned, formulated as an instruction to the troops. Such national manuals are approved by the political and military authorities at the highest level of the issuing State. In contrast, the manuals discussed here provide generic norms in specific domains as drafted by groups of independent experts.

The aforementioned is a long list of informal engagements with distinct chapters of the law of armed conflict aimed at reformulating the law, and making the law more accessible for contemporary use. The term “manual” has an operational sound to it, suggestive of a handbook with action-oriented norms ready for use on the battlefield.

Quite remarkably, this series of informal manuals demonstrates a great resemblance in form and style when compared. The structure is one of a set of Rules (formulated on the basis of the work of the experts) which is accompanied by a Commentary that explains the Rules and why they have been formulated as they are. Interestingly, the Rules at the heart of a project are frequently referred to as “black letter rules”, a term with a familiar sound (compare with the notion of “black letter law” for positive rules of law). This structure of Rules and Commentary is user-friendly and undoubtedly helpful for those who want to rapidly access the rules and understand the norms. Also, the experts (irrespective of how they got together) invariably tend to call themselves an “independent group of experts”.

Another observation about this list of informal manuals is that they all seem to predominantly deal with the conduct of hostilities and the permissible methods and means of warfare (the so-called Law of The Hague), as distinct from IHL that seeks to protect those who do not, or no longer participate in, hostilities (the Law of Geneva).¹⁹ An explanation for this may be that the 1949 Geneva Conventions have in part been “updated” through the 1977 Additional Protocols and that a restatement of IHL is perhaps not necessary at this time (even if 1977 is a while ago). The current project on the revision of the (Pictet) Commentaries on the Geneva Conventions functions as an informal updating mechanism as well. Also, any project specifically related to the Red Cross Conventions would clearly depend on the ICRC’s participation.

Lastly, it is fair to say with respect to the rules on the conduct of hostilities that there has not been a general update of the Hague Conventions of 1899 and 1907, which are fragmented and patchy themselves. In 1977, in Part III of Additional Protocol I (AP I), some critical norms on the methods and means of warfare, and provisions on the conduct of hostilities were codified. However, the appearance of new military equipment, such as drones and unmanned aircraft,

¹ &pr=MPIL. About relying on an informal manual in order to formulate a formal manual, see Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared”, in Yoram Dinstein and Fania Domb (eds), *Israel Yearbook on Human Rights*, Vol. 36, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2006.

¹⁹ This distinction is a traditional one. With the 1977 Additional Protocols to the 1949 Geneva Conventions the distinction has to a certain extent disappeared as many rules on the methods and means of warfare have now been included in the Additional Protocols.

cyber or unmanned naval vessels, brought new questions with respect to their use in military operations for which no formal lawmaking has been undertaken by States. While it is correctly suggested that the norms of AP I and equivalent customary law apply, it must be considered whether more precise and specific rules of international law would not be more appropriate.

The growing number of informal manuals

What has been driving this growth in the number of informal manuals on the law of armed conflict? Concerns leading to the restatement of the law of armed conflict may be summarized as follows: the outdated character of (parts of) the existing laws of armed conflict; developments in other areas of international law; and the impact of new technology in militarily relevant areas. All of these concerns are easily understood reasons to revisit existing norms. It should be considered whether existing rules are still relevant, or require a rereading and reinterpretation in order to understand their applicability to contemporary questions. Yet, this does raise the question whether expert manuals are the right solution – or whether the development of new binding rules would be preferable. Let us have a brief look at these concerns.

The existence of legal instruments perceived as being dated, and thus inadequate for application in contemporary conflict, is an obvious concern. While such treaties continue to exist “on the books”, they serve little in the way of instruction to the military today. Such a situation may be perceived as a risk, a lack of clarity about applicable norms will create difficulties when a conflict arises and decisions need to be taken about what would be legitimate military action.

This is particularly the case with respect to the 1907 Hague Conventions regarding the laws of naval warfare: there has not been an update of this chapter of the law of armed conflict for a long time.²⁰ The need for up-to-date rules is clear with respect to the regulation of military technology and related changes in military equipment since the drafting of the original instruments. In more general terms, naval warfare has changed a great deal since 1907, which is not reflected in written law.²¹ Others would consider that naval warfare has not occurred very often since the Second World War, questioning whether any relevant and recent practice to speak of exists at all.

Further reasons for reflecting on the contemporary meaning of norms are substantive changes in related fields of law that may necessitate subsequent changes in the laws of armed conflict. Examples would be the impact of the 1982 Convention on the Law of the Sea on the law of naval warfare, or the question whether the development of detailed norms of international environmental law in the recent

20 Hague Convention (VI) on Enemy Merchant Ships, Hague Convention (VII) on Conversion of Merchant Ships, Hague Convention (VIII) on Submarine Mines, Hague Convention (IX) on Bombardment by Naval Forces, Hague Convention (XI) on Restrictions of the Right of Capture, Hague Convention (XIII) on Neutral Powers in Naval War, all 18 October 1907.

21 Apart from the adoption of Geneva Convention II in 1949 and some provisions in AP I and AP II in 1977.

past may have an impact on the interpretation of the more general norms in AP I (Arts 35(3) and 55(1)) or the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (also called the Environmental Modification, or ENMOD, Convention).²² This points to a more general question as to whether or how rules in a particular field of law – such as the laws of armed conflict – are able to move in step with development in other fields of law without formal amendments.

All law is written on the basis of the reality as perceived at the time of negotiations, and for the laws of armed conflict that includes aspects such as military capacity and military technology available at the time of drafting. Technology develops continuously, requiring a regular reflection on the legal consequences of the use of certain weaponry. This idea gave rise to Article 36 of AP I, which requires that, when developing, acquiring or adopting new weaponry or means or methods of warfare, it must be determined whether its use would be prohibited. Such evaluation of new weaponry can only take place against an understanding of what the law would require in this day and age.

An argument for developing an informal manual (as a fall-back option to formal lawmaking) would be the introduction of new technology if this had not been followed by lawmaking addressing the legal aspects of its use. Developments in the cyber domain are a case in point: as cyberspace and the internet developed, it became clear that this domain also potentially brought uses that could qualify as armed conflict. States did not appear to have the intention to embark on establishing a formal legal framework governing this new domain. If that does not happen, there is an obvious need to reflect on what rules could be deduced from existing law.

The reasons for engaging in the drafting of an informal manual, convincing as they may be, are directly related to the absence of governmental activity where this could have been expected within the international legal system. Many contemporary situations may require an analysis of the current applicability of existing norms, and suggest a need to revisit existing law. The heart of the matter is that States have not taken steps to update written law or to draft specific rules when this would have been necessary in situations where the law became outdated, or in situations that were new and different from those of the past on the basis of which the law of armed conflict was originally developed.²³

States are the primary custodians of the international legal system and formal rules of law developed by States will carry a different weight from those of informal lawmaking, especially when such informal lawmaking does not originate with States. States' reluctance to address current issues in the laws of armed conflict has given academia and groups of independent experts the space to step in and formulate or restate rules, in a domain where the role of the State has

22 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, New York, 10 December 1976, 1108 UNTS 151 (entered into force 5 October 1978).

23 There is some evidence that States have been aware of this issue, but have not persevered in taking it up. See J. Ashley Roach, "The Law of Naval Warfare at the Turn of Two Centuries", *American Journal of International Law*, Vol. 94, No. 1, 2000, p. 77.

traditionally been paramount. The initiative seems to have shifted from States to self-appointed groups of experts who have the freedom to set the agenda. Yet, it remains preferable for States to clarify and change the law of armed conflict if needed, rather than for groups of independent and self-appointed experts to do so.

Mechanisms of change and development

International law knows mechanisms of change, and it is not for lack of procedural possibilities to develop the law that the informal manuals exist.

First, treaties could be amended and updated; international law provides for rules to do so. The starting point is whether States parties to a treaty have established specific rules on an amendments' process for a particular treaty. If so, those rules take priority, and, if no specific rules are available, reference must be made to the general law of treaties. The 1949 Geneva Conventions do not contain specific rules with respect to amendments, nor do they contain rules establishing a regular meeting of States Parties that could be used to discuss questions regarding necessary updates. This means that the generic rules of the law of treaties in the 1968 Vienna Convention on the Law of Treaties (VCLT) provide the fall-back rules for amending treaties in its Articles 39 and 40.²⁴ The 1977 Additional Protocols, on the other hand, contain (identical) provisions on amendments in Articles 97 and 24, respectively, which would need to be followed if amendments were suggested.²⁵ Reading these provisions, it becomes clear that amending will be a burdensome process: a High Contracting Party may propose amendments, which are submitted to the depositary of the Protocols (Switzerland) who will consult with all Parties and the ICRC on whether to convene a conference to discuss the amendment. Once an amendment has been adopted, it will have to be accepted by each Party to a treaty individually. This may mean that for some time a difference may exist between the obligations of the Parties who have ratified an amendment, and those who have not. As a consequence, amendments may lead to a system with distinct rules applying to different States.

Second, some treaties provide for low-key methods for adaptation and change. In the law of the sea, so-called implementing agreements have appeared that, in spite of their name, rather supplement existing rules.²⁶ With respect to developing marine technology, improving safety at sea or preventing pollution, conventions of the International Maritime Organization, for example, often provide for the possibility to include more detailed technical rules in regulations

24 The matter of the (retroactive) applicability of the VCLT will not be elaborated upon here.

25 There are distinct rules with respect to revising Annex I of AP I in Article 98 of AP I which will not be discussed here. See Bruno Zimmermann, "Article 97 – Amendment", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, pp. 1093–7.

26 Such as the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; or the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

attached to the main instruments. Such mechanisms provide a possibility to implement normative change in a much more simple and fast manner. The absence of such low-key mechanisms for change in the laws of war limits the updating or further development of the laws of war, and pushes the debate in the direction of informal lawmaking.

And lastly, if formulating amendments would be too burdensome, States could also begin from scratch and draft treaties with new and updated norms. However, such approaches towards new and improved versions of legally binding texts are rare these days, as the risk of such efforts being counterproductive is perceived to be high.

Change, particularly of major legal instruments, does not really happen that often these days, even if tools are available to either draft new instruments, or to amend existing instruments. There may be good reasons for States to shy away from changing legal instruments. With the United Nations (UN) Convention on the Law of the Sea, for example, it is argued that any suggestion of reopening the Convention might be detrimental to the balance that was achieved during negotiations in the Third UN Conference on the Law of the Sea. With respect to IHL, it is the fear of levelling down the protection offered to victims of armed conflict that leads to a deadlock on even the idea of the development of law.

These are genuine risks indeed that have to be seriously weighed before steps are taken that may be detrimental to what already exists. Reopening substantive discussions on the law of armed conflict brings the awkward possibility that the debate will also be open to attempts to lower, rather than improve, protective standards. This is one of the main reasons why the modernization of the laws of war is difficult. There is an ingrained tension between military interests and humanitarianism, and concern about the balancing between these two poles. This situation is the diplomat's version of the maxim "be careful what you wish for": there is great hesitation about establishing something new and a sense of the possibility of losing more than there is to gain. This is known as the "Pandora's Box dilemma": do not suggest changing the law, because you may be worse off if you do. Others will also present proposals, yet those may prove to be detrimental from a protective perspective, and thus unacceptable. Pandora's Box is better left closed, for fear of demands that other negotiators may bring to the table. The highly politicized environment in which discussions about the laws of war take place, and the views of governments expressed at times of conflict suggest that – even if rationally there is a case to be made for a review – this would be a daunting and dangerous prospect. Such a risk-averse position is both understandable, as much as it is regrettable: it implies that States are withdrawing from their role as custodians of the laws of war.

Change may be legally possible, but is considered risky and thus politically unattractive. This reluctance to embark on change has consequences. When existing texts are considered to be closed to change, other ways of dealing with change will be needed to address new phenomena relevant to the implementation and application of IHL. Formal mechanisms of change may lay dormant; while they are available, it will require political will to embark on a process of change, updating and

improvement. It is against this background that the move to informality must be understood: if no formal steps can be taken, informality may provide what looks like a practical interim solution, particularly when the most pressing need is the clarification of existing norms.

The unwillingness of States to undertake new projects aimed at the formal development of the law limits the reflection on necessary updates and the need to address new phenomena. It pushes such activities into a space outside of governmental debate. The discussion, and indeed setting the agenda, ends up with self-appointed groups of individual experts in a field where the primary role of States used to be beyond doubt. The unwillingness, or the absence, of States not only stalls debate, but also drives it into the private sphere. Needless to say, these self-appointed groups of experts are not accountable for their work other than in the academic domain, nor will they be responsible for its implementation.

Key questions about informal manuals

In recent years, the role of *ad hoc*, informal and non-governmental groups in the process of the elaboration of international law has gained increased attention. A number of traditional non-State expert bodies have had their distinct roles in the development of international law, particularly by elaborating substantive rules for further discussion by States. In particular, the institutional role of the UN's International Law Commission, and the work of long-standing institutions such as the Institut de Droit International or the International Law Association have been important to substantive development.²⁷ However, they differ from the groups of experts that work on manuals, and have a role that is more defined in scope.

Let us take a better look at the key aspects of these informal manuals: their character as informal restatements of the law; the role of independent experts; and the apparent absence of States in the drafting of such manuals. The debate about informal lawmaking in the laws of war is about the nature of the activity, and where to locate it on the scale between formal lawmaking on the one side, and the (re-)interpretation or restatement on the other. When discussing informality in the laws of war it is necessary to determine what is understood as “informal lawmaking”. Types of informality have been referred to above, looking at the distinctions formulated by Pauwelyn.²⁸

Another way of looking at informality is the spectrum between the (absence of) normative intent and normative effect as presented by Klein.²⁹ When the notion of “informal lawmaking” is unpacked, what all of these informal documents have in common is that they formulate rules that purport to be general and authoritative.

27 Anton Orlinov Petrov, *Expert Laws of War: Restating and Making Law in Expert Processes*, Edward Elgar Publishing, Cheltenham, 2020, pp. 32–7.

28 J. Pauwelyn, above note 3.

29 N. Klein, above note 3.

The term “rules” does not necessarily imply that these are legal rules as such, although their origin as an interpretation or restatement of existing law suggests they may as well be. The idea about these processes is that they are not formally making law (as is repeatedly stressed by their authors), but rather restating the law or clarifying what outdated legal rules (such as the 1907 Hague Conventions) may mean in today’s context. “Authoritative” does not necessarily imply legally binding rules, although this may be the case if they are a restatement of earlier rules of law. As to “informality”, this may give the impression that rules have been drafted in a non-State setting (which is not always the case; States also create informal rules at times) and have been drafted without the intent to become binding as such. Formal rules would in international law be understood as rules established on the basis of the consent of States who had the intention to establish formally binding norms, which is not the case with expert manuals. After all, an informal group of experts does not have the authority to establish international law: there cannot have been normative intent *stricto sensu*.

The normative effect of a particular rule is a second stage; it is what happens after the formulation of the norm. The norms that have been formulated as an updated and perhaps elaborated version of older norms, or as a deduction from existing general norms, may become broadly accepted and may obtain normative effect over time irrespective of whether this was intended by their authors. A collection of norms and their publication make them more accessible to users and commentators, which in turn may lead to the development of practice based on such norms that may eventually attract *opinio iuris* and become customary law. Written norms start to shape practice, and the formulation of such informal yet authoritative norms contributes to unifying practice. Even if it may not have been the intention to create law, this may be the effect over time. These written norms may have a predictive impact on the law as it develops.

In practice, at the editorial stage much effort is taken to formulate the rules in an unambiguous manner: they tend to read as if they were legal rules already. Skillful editing has a certain predictive value, as this contributes to the use of the norms: it is all written down in a user-friendly manner. Presumably such processes facilitate newly formulated norms “slipping into” customary law, because of their availability and the clarity of a formulation of the norm. The informal documents have no overt pretention of being legally binding, yet their availability in an accessible form and format will shape and refine practice, and may trigger the development of *opinio iuris* about a rule in its contemporary updated and edited form. The development of normative effect is greatly helped by the formulation and availability of the norm in written form. The accessibility of the rules not only precedes their acceptance as rules of law; it also facilitates this process of acceptance to a large extent.

While the list of sources of international law enumerated under Article 38 of the ICJ Statute is generally accepted as a normative list of sources, the aforementioned article does not really describe how the development of international law takes place. Considering this, Michael Bothe has addressed the informal meetings creating normative documents that started to appear

particularly in the field of the law of armed conflict.³⁰ He discusses in particular the “privatization” of the development of the laws of war through a series of informal processes that address specific fields and concrete issues for which there appears to be no formal or explicit governmental wish for lawmaking. The overwhelming reluctance of States to embark on any formal normsetting in the field of the law of armed conflict leaves space for, as he calls it, “private normative entrepreneurs” (*private Normunternehmer*) to begin a discussion about the adequacy, clarification, refinement or improvement of existing norms.

While there are, at the current juncture, very good reasons for the reticence of States and their determination not to move to the formal development of law, this leaves space for private normative entrepreneurs who wish to address specific chapters of the law of their own choice and from their own perspectives. The organizers of such meetings determine the agenda, frame the project and will be largely responsible for its outcome, and all participants will participate in their private capacity. Not only does this lead to informal documents in specific domains of the laws of armed conflict where the law is treading new ground, but it also implies that setting the agenda is no longer in the hands of governments.

The presumed absence of States

The growth of informal manuals in the field of the laws of war is an intriguing phenomenon, and it is the aim to reflect on these processes, leaving aside a discussion of the substantive norms formulated in these instruments. Why have so many of these collections been formulated on an informal basis, by self-appointed groups of independent experts and what are the consequences of this?

First impressions are that States are absent in the processes of informal “lawmaking”, involving the drafting of a manual on a distinct chapter of the laws of armed conflict. This is in itself unusual, particularly in the laws of armed conflict where governments and the military traditionally claim a dominant role, and may be quite vocal if they do not like the content of such informal products.³¹ However, are governments really absent from the development of such informal manuals?

30 Michael Bothe, “Private Normunternehmer im Völkerrecht: Gedanken zur Fortentwicklung des Völkerrechts durch nicht-staatliche Institutionen”, in Holger H. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Vol. II, Martinus Nijhoff Publishers, Leiden and Boston, MA, 2012.

31 See, for example, John B. Bellinger III and William J. Haines II, “A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007; or Jane Dalton, “A Comparison between the San Remo Manual and the U.S. Navy’s Commander Handbook”, in Y. Dinstein and F. Domb (eds), above note 18, criticizing a number of rules of the San Remo Manual. Similarly, there has been criticism of the ICRC’s *Interpretative Guidance* (N. Melzer, above note 14), for example: W. Hays Parks, “Part IX of the ‘ICRC Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; and William Boothby, “Direct Participation in Hostilities – A Discussion of the ICRC Interpretative Guidance”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

Things may not be as they appear from a distance: in reality, there are many ties between governments and the processes that develop such informal manuals. Many of the independent experts participating in the debates and editing the rules and commentaries are senior civil servants or (retired) military officers.³² Their participation is relevant in view of their expertise and knowledge, and they provide valuable input as to the application of existing law in military practice. Yet, they may also serve as informal conduits to their authorities and keep them abreast of ongoing work. Also, States frequently assist projects by either providing funding (for a secretariat, for research, or for the dissemination of the insights and results) or practical support such as making conference facilities available.³³

In turn, these projects reach out to States with questionnaires, and ask States to comment on drafts of their documents with a view to being both transparent as well as inclusive. In a discussion on YouTube, organized by the Australian Attorney-General's office,³⁴ Marko Milanovic (speaking about current work on the Tallinn Manual 3.0) mentioned that the process of drafting these informal documents was an iterative one: academics discussing with States (e.g. State representatives), and States responding. Such informal processes in his view were a useful thing to do, as they "provided assistance to the international community". It is probably an exaggeration to say that governments would necessarily require outside experts to determine what the law is, when one considers the number of participants in these expert processes with a governmental background. Thus, even if their names do not end up on the cover of the book, in reality States do participate, albeit in a non-committal manner. They do so while subscribing to the mantra that nothing is binding or meant to change the law.

However, this does not mean that all States participate, or that participating States are represented at the same level of expertise or seniority. Participation tends to be by invitation only, which implies that specific attention to diversity in participation is required.³⁵ It is well understood that participation in such a process may have a positive impact on the acceptance of the final result.

32 This begs the question whether the idea of these being independent legal experts can be maintained. Looking back at the process that established the 1994 San Remo Manual, L. Doswald-Beck, above note 5, at p. 67, mentions that "Overall, about a third of the participants were academic personnel and the others were governmental personnel attending in their personal capacity". Not only do these groups work on the basis of Chatham House rules on confidentiality, but the experts concerned also make a point of stressing that their views should not be understood as their (former) employers' views. The composition of these groups is not always transparent, particularly when discussions end in discontent and a lack of consensus. Petrov, in discussing the fate of the ICRC's *Interpretative Guidance* (N. Melzer, above note 14), refers to this as "... Mainly Unrevealed Experts". A. O. Petrov, above note 27, pp. 46–8. Other publications give lists of participants and their affiliations; see, for example, L. Doswald-Beck (ed.), above note 5, pp. 47–55; or M. N. Schmitt (ed.), above note 8, pp. x–xiii.

33 See, for example, mentioning support from governments, academia and the Red Cross movement: L. Doswald-Beck (ed.), above note 5, pp. 64–6.

34 Dapo Akande and Marko Milanovic, "International Law and Contemporary Security Challenges", *YouTube*, 2 February 2021, at: www.youtube.com/watch?v=ITZ4Cc7mpU&feature=youtu.be. The discussion has now unfortunately been taken down.

35 This is not the place to discuss the composition of these groups of independent experts in detail. However, a number of people seem to participate in many (if not almost all) of these groups. While this is a

The final result of these projects is a non-committal offer to States; it is “take it or leave it”. Reflection on the state of the law in this day and age has taken place, and can be rejected by States at no cost. The informal nature of the norms once finalized provides States with the possibility of either embracing the end results, or of rejecting these texts with fairly predictable yet convincing arguments.

For acceptable and good texts, the drafters will be congratulated with their fine description of the rules in this domain, and how these rules are a good description of the contemporary law in an area where – regrettably – no formal law exists at this point. The rules, even if informal, will provide useful guidance in the near future. The argument will clearly be that the experts have managed to do a superb job in formulating these norms, also taking into account the excellent credentials of these scholars. On the other hand, when rejecting certain norms or perhaps even all of the results, criticism will underline the misinterpretation of norms, their lack of a customary law character, the absence of a full picture of how a norm should be understood (as the authors have not been privy to classified information), or mistakes made with respect as to who is bound by which norms. Rejection may additionally take the shape of underlining the non-legal and informal character of the process and the absence of a normative effect: States would not have been bound by these rules anyway.

As an aside, informality has an additional advantage for those national systems where the government is under some domestic obligation to announce its intention to negotiate a particular treaty, or indeed to obtain prior parliamentary approval for doing so. Starting out with an informal project is clearly nothing more than starting an informal project, and thus will not require any specific parliamentary oversight. On the other hand, it must be noted that some States have relied upon the content of some of the informal manuals as they have worked on updating their own military manuals.³⁶

Taking a test drive?

The trend towards informal manuals is not necessarily negative for governments. The current pattern in which informal manuals have gained a central role in the development of the law of war is in fact useful for States. What is it that States actually do when they (informally) participate in an informal process leading to

testament to their impressive expertise, it also suggests a lack of inclusiveness as the development of these instruments thus seems to lie in the hands of a limited number of (mostly Western) men. Observing that the outcome of an expert process depends mainly on the individual group members, A. O. Petrov, above note 27, p. 79 at footnote 397, lists four experts who have participated in many processes. This list is perhaps not complete, and frequent participation does not necessarily imply having an impact during group discussions.

36 Such as reliance on the 1994 San Remo Manual by Germany, the United Kingdom and the United States; see Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War*, Vol. I, 3rd ed., ICRC, Geneva, 2011, footnote 289, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-0739-part-i.pdf>.

the formulation of informal rules that are explicitly not intended to be binding (but that do look very much like potential formal legal rules)?

The analogy that comes to mind is that of a test drive: one goes to the car dealership and selects a particular car for a test drive – a particular brand, a type, an engine and a favourite colour (you may have been saving for that car for years!). You take the car for a spin, just to see if you like it, how it works and whether it is fast enough or alternatively whether its green credentials do not have a debilitating effect on the performance. If the test drive is unsatisfactory, you will drop the idea of buying this car altogether, and perhaps look around and select another car, a different brand with a better performance. If, on the other hand, the car is a good and satisfactory one, you will negotiate with the car dealer about the price, the colour, the motor and the date of delivery.

It is this type of approach that is used implicitly by States when they work on informal law, and start to apply these rules once the drafting has been concluded. “I am not buying, only looking ...” (“These rules are not legally binding”), and “I just want to see how this car performs” (building up State practice, otherwise known as *usus*). Once the decision has been taken to buy the car, there must have been very good reasons for doing so: “anyone can see that it is a great car”, “it has passed the consumers’ test” (“my allies and friends also agree with these rules”). On the other hand, if we do not like the car and decide to drop the idea of buying it, it is easy to claim that the development of norms was only informal, and that – as anyone knows – it is States and not academic institutions or independent experts that make international law. (“Hey, it was only a test drive, not a commitment to buy.”)

For States, this “test drive” approach to newly formulated rules is an attractive one. It provides a possibility to see how norms will turn out to function in practice, as well as within strategic debates with other States. There is no need to precisely identify their legal status at an early stage, and there is always a possibility of retreating or disavowing; these norms were formulated by experts, not by States. Embracing new norms, or distancing themselves from these new norms, is relatively simple and inexpensive for States, which puts them in a comfortable position. Distancing tends to be fairly explicit and visible, as it should be. There have been clear examples of States, and senior State officials, speaking out against informal documents when the need arose.³⁷ The reason for that is clear: this is not just expressing disagreement with newly formulated rules, it is also the expression of an objection that is intended to preclude that the new norms, if and when they develop into customary law, are opposable to that particular State. This in itself suggests that States are well aware of the possibility of such norms “slipping into” customary law; it is exactly why they may seek to prevent such developments. It is never too early to become a persistent objector.³⁸ Or would one consider that States really require outside assistance to determine what the law is? Sitting back, and following developments is not an uncomfortable position for States.

37 See above note 31.

The starting point may have been the absence of normative intent, as the effort was only one of reformulating and restating rules that existed before but have become unclear or now lack specificity in respect of a contemporary situation or new technology. However, by the time the norms appear to gain normative effect and may become binding, States will be observing this and may want to assert the position of a persistent objector if they do not agree with this development. A further observation is that, for those who have an (implicit) wish for the newly formulated rules to indeed develop normative effect and who understand these processes, there is a pathway as to how to engineer this. It is, after all, not a given that the stated absence of normative intent will prevent the development of normative effect over time.

Conclusions

Informal processes in which contemporary rules of the laws of war are reformulated or restated suggest that these are independent expert processes at a distance from governments, with no intent and no possibility of creating legal rules. Informal expert processes have no place in the theory of the sources of international law, and the authors of the informal manuals are aware that their formal role is limited; these processes are not diplomatic negotiations, but informal discussions that are to a certain extent non-committal.

Yet, governments are aware of them, and to a certain extent participate in these projects. While the formal development of the laws of war appears to have mostly come to a halt, these processes addressing contemporary legal issues on the basis of a review of existing but outdated law are valuable to governments. First, because of the expert reflection on these issues, investigating the application of existing legal rules on newer issues is useful. This discussion is followed by the (tentative) formulation of new norms with additional commentaries clarifying the background of these norms and how they are related to the broader system. If formulated in a sufficiently clear and acceptable manner, such norms will probably be picked up in practice, and may be the basis for the development of customary law. A clearly formulated rule brings with it the potential to be referred to, and to become understood as a legally binding rule. Thus, while normative intent may be absent amongst the legal experts working on these manuals, the effect may be that normative effect will occur over time. The formulation of a new norm may foreshadow its future development.

The development of military technology may touch on the limitations of the existing laws of war, and this is what Article 36 of AP I addresses. In order to evaluate the legitimacy of new weaponry one must understand what the law requires at that point in time. This is difficult in areas where the law is dated, and

38 On the persistent objector, see Olufemi Elias, "Persistent Objector", in *Max Planck Encyclopedias of International Law*, September 2006, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1455?rskey=DAqgHS&result=1&prd=MPIL>.

military developments have moved well beyond the perspectives as they were when the law was formulated. Reinterpreting rules drafted for conflicts and weapons that no longer exist, towards rules appropriate for contemporary military technology implies both interpretation of underlying principles as well as imagination and creativity.

It could be suggested that informal manuals are perhaps an interim solution, for want of formal legal rules, and in anticipation of governmental steps towards formal lawmaking. They could be understood as a temporary solution in a situation in which contemporary rules are necessary and States remain hesitant about embarking on formal lawmaking. However, the existence of these informal documents restating or identifying contemporary law on the basis of pre-existing norms seems to obviate the need for the drafting of formal instruments.

It is unlikely that such informal documents will ever be recast as formal written law; at any rate, no examples come to mind of where this may have happened so far. Once an expert manual has been agreed upon, that is it. The expert manuals do not seem to trigger a more formal inter-State process of lawmaking; in fact, they appear to take the urgency to do so away. Expert manuals and the research undertaken are not considered as input for a future lawmaking process, because there is none. The reasons for this are the reasons that have led to the use of these informal procedures in the first place: hesitation about the wisdom of embarking on the formulation of norms of the law on armed conflict, together with a certain acceptance of the expert process and the resulting manual as satisfactory. What may happen though is an informal update of an informal instrument which obviates the need for any formal drafting.³⁹

It looks as though the formulation of new norms for new situations, albeit in an informal manner, is more or less the end of the road: the availability of norms in a clear and accessible manner makes the drafting of a formal legal instrument unnecessary. The authority of expert manuals in terms of substantive persuasiveness appears to be sufficiently important. Thus, if the question is whether there will be a treaty or some other kind of formal legal instrument as a follow-up, the answer is probably no. Informality seems to have been creeping into the laws of armed conflict, no so much because of the formulation of the informal manuals, but as a consequence of the absence of States.

39 See the plans to update the 1994 San Remo Manual (started in 2019). The Oslo Manual is an update of the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare. Also there is the current updating process of the Tallinn Manual 2.0 on Cyber Operations. See, for example, an invitation by the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence (CCDCOE) calling for comments on Tallinn Manual 2.0 in preparation of the Tallinn Manual 3.0, asking for “experts to share their comments and suggestions on how the rules and accompanying commentary of the Tallinn Manual 2.0 should be revised in the light of emerging State practice”. CCDCOE, “The CCDCOE Invites Experts to Contribute to the Tallinn Manual 3.0”, available at: <https://ccdcoe.org/news/2021/the-ccdcoe-invites-experts-to-contribute-to-the-tallinn-manual-3-0/>.