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Informal international law-making: A way around the deadlock of international humanitarian law?

Pauline Charlotte Janssens and Jan Wouters
Pauline Charlotte Janssens is a PhD Researcher and Teaching Assistant at the Institute for International Law of Katholieke Universiteit Leuven (KU Leuven) and Junior Researcher at the Leuven Centre for Global Governance Studies. Her research focuses on the making of customary international humanitarian law and the role of the ICRC and non-State armed groups in this process. She obtained her Master of Law with a specialization in international law at KU Leuven and an LLM in international humanitarian law and human rights at the Geneva Academy.

Jan Wouters is Full Professor of International Law and International Organizations at KU Leuven, Jean Monnet Chair *ad personam* EU and Global Governance, and Founding Director of the Institute for International Law and of the Leuven Centre for Global Governance Studies at KU Leuven. He is also President of KU Leuven's International Policy Council and Visiting Professor at Sciences Po (Paris), Luiss University (Rome) and the College of Europe (Bruges).

Abstract
Over the last two decades, international humanitarian law (IHL) has seen a stalling with regard to States' willingness to adopt treaties or to be formally involved in the development of IHL. This raises the question of whether holding on to the doctrine of sources as laid down in Article 38 of the Statute of the International Court of

Justice is the only way to meaningfully further develop IHL. Indeed, in recent years IHL instruments have often dispensed with certain formalities that are traditionally linked to (the formal sources of) international law; this phenomenon is also called "informal international law-making" (IIL). The present contribution will analyze IIL as an alternative way forward in light of the current "deadlock" caused by States' unwillingness to conclude new IHL treaties or to recognize customary IHL. In this article, we will investigate and assess the opportunities, shortcomings and pitfalls offered by informality by looking into examples of IIL within IHL. More concretely, we will look into State practice in relation to (1) the Safe Schools Declaration, (2) the Tallinn Manual and Tallinn Manual 2.0, and (3) the Montreux Document. Most importantly, our findings will assess whether IIL can overcome one of its alleged main disadvantages: its lack of effectiveness.

Keywords: armed conflict, international humanitarian law, law-making, Montreux Document, Safe Schools Declaration, Tallinn Manual, effectiveness, informal international law-making, State practice.

Introduction

Over the last two decades, international humanitarian law (IHL) has witnessed an increasing reluctance on the part of States to adopt or amend treaties, recognize customary international rules or even become formally involved in the further development of IHL. According to Kessing, this is due to the fact that many States regularly involved in, or affected by, armed conflicts have not ratified any of the Additional Protocols to the four Geneva Conventions of 1949, making other States and the International Committee of the Red Cross (ICRC) hesitant to initiate diplomatic processes for the development of new rules of IHL.[1] At the same time, however, it is well known that the "hard law" regulating today's armed conflicts, especially concerning non-international armed conflicts (over 95% armed conflicts nowadays),[2] is outdated and inadequate in many respects.[3] Therefore, the question arises as to whether sticking to the traditional sources mentioned in Article 38(1) of the Statute of the International Court of Justice (ICJ) is the only way forward to meaningfully develop IHL.

In 2010, US president Barack Obama highlighted in his National Security Strategy that "[w]e need to spur and harness a new diversity of instruments,

1 Peter Vedel Kessing, "The Use of Soft Law in Regulating Armed Conflict: From Jus in Bello to 'Soft Law in Bello'?", in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, Oxford, 2016, p. 130.

2 See, *inter alia*, Marco Sassòli, *International Humanitarian Law*, Edward Elgar, Cheltenham, 2019, p. 16; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 1; Kendra Dupuy and Siri Aas Rustad, *Trends in Armed Conflict, 1946–2017*, Conflict Trends No. 5, Peace Research Institute Oslo, 2018, p. 1.

3 P. V. Kessing, above note 1, p. 129.

alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability".[4] The Strategy added that "strengthening bilateral and multilateral cooperation cannot be accomplished simply by working inside formal institutions and frameworks".[5] Similarly, in Germany, today's code of conduct for federal ministries stipulates that, with regard to international treaties, ministries must consider whether drafting and concluding such treaties is absolutely necessary, or whether the objective concerned can also be achieved by other understandings below the threshold of an international treaty.[6] These citations seem to indicate a desire on the part of States to move away from the formalities traditionally associated with (certain sources of) international law. Indeed, in recent years quite a few IHL instruments have dispensed with some of these formalities. Furthermore, the involvement of non-governmental organizations (NGOs) and international organizations in the development of IHL is on the rise.[7] Moreover, since the 1949 Geneva Conventions and their Additional Protocols "are an exception among international treaties in that they do not provide that States will meet on a regular basis to discuss issues of common concern and perform other functions related to treaty compliance",[8] alternatives for such inter-State meetings as a way to develop IHL have to be found.

The present contribution examines "informal international law-making" (IIL) as an alternative way forward in light of the current deadlock. In this article, we will investigate and assess the opportunities and pitfalls offered by informality by looking into States' positions regarding examples of IIL within IHL. Most importantly, we will assess whether IIL can overcome one of the alleged main disadvantages that are associated with soft law or informal normative processes: the non-binding character and lack of enforceability, or in short, the alleged lack of effectiveness. In the first section, we will introduce the notion and conceptual framework of IIL. The second section will delve into three examples of informality within IHL: (1) the Safe Schools Declaration, (2) the Tallinn Manual and Tallinn Manual 2.0, and (3) the Montreux Document. While touching upon the Tallinn Manuals, we will also briefly reflect on another recent development in the sphere of cyber warfare, the Oxford Process on International Law Protections in Cyberspace. In the third section, we will evaluate the effectiveness of informality in IHL as an alternative to new treaties or customary international law.

4 White House, "National Security Strategy", 27 May 2010, available at: https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (all internet references were accessed in July 2022).
5 *Ibid.*
6 German Federal Government, "Gemeinsame Geschäftsordenung der Bundesministerien", 22 January 2020, para. 72(1), available at: https://tinyurl.com/bde23rw2.
7 Marten Zwanenburg, "Keeping Camouflage Out of the Classroom: The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict", *Journal of Conflict and Security Law*, Vol. 26, No. 2, 2021, pp. 274–277.
8 ICRC and Swiss Federal Department of Foreign Affairs, *Fourth Meeting of States on Strengthening Compliance with International Humanitarian Law: Background Document*, Geneva, March 2015, p. 3.

The concept of informal international law-making

The notion of informal international law-making was developed in a book by Pauwelyn, Wessel and Wouters in 2012.[9] As further elaborated in an article in the *European Journal of International Law*,[10] these three authors developed the concept of IIL in order to capture the decline in formal international law-making (in particular multilateral treaty-making) that has been noticeable over the past two decades, and to detect and analyze new forms of law-making that do not fit into the traditional toolbox of public international law.[11] The present contribution relies on the following definition of IIL given in these publications to analyze the three instruments referred to above:

> Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality).[12]

In this definition, three forms of informality are distinguished: output informality, process informality and actor informality. Often these forms overlap, and in fact, the three instruments studied below classify as informal in all three aspects. Output informality occurs when the instrument generated does not qualify as one of the traditional sources of international law as listed in Article 38(1) of the ICJ Statute. Often this concerns memoranda of understanding, guidelines, standards, declarations etc.[13] Process informality refers to international cooperation that does not take place in a traditional international organization, such as the United Nations (UN), or at a traditional diplomatic conference; it instead takes place in a loosely organized network or forum. Having said this, process informality might nevertheless still take place in close relation to a more formal organization.[14] Finally, actor informality refers to cases in which traditional diplomatic actors that have full powers to represent and bind a State under Article 7 of the Vienna Convention on the Law of Treaties are not (solely) engaged in the cooperation at hand. Actor informality in this sense roughly entails two types of informality. On

9 Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012.

10 Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking", *European Journal of International Law*, Vol. 25, No. 3, 2014, p. 733.

11 See also Jan Wouters, "International Law, Informal Lawmaking and Global Governance in Times of Anti-Globalism and Populism", in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline? Approaching Current Foundational Challenges*, Oxford University Press, Oxford, 2019, p. 242.

12 Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions", in J. Pauwelyn, R. A. Wessel and J. Wouters (eds), above note 9, p. 22.

13 *Ibid.*, pp. 15–17.

14 *Ibid.*, pp. 17–19.

the one hand, in addition to the traditional State actors, other actors such as NGOs or international organizations might be welcomed at the negotiation table and may be involved in the drafting process, or could even sign up to the output document. On the other hand, actor informality could also entail that States send a different representative than the diplomatic actor as foreseen in Article 7 – for instance, a representative who does not have the power to negotiate and sign a binding treaty but merely a non-binding document, or a semi-independent domestic agency or different minister than the foreign affairs minister.[15]

Examples of informal international law-making within IHL

The Tallinn Manuals

The *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual) and its successor, the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn Manual 2.0), are an academic study conducted by experts – i.e., international lawyers and jurists – at the invitation of the North Atlantic Treaty Organization's (NATO) Cooperative Cyber Defense Centre of Excellence (CCDCOE). Despite the link with NATO, the project was neither State-led nor an official NATO project.[16] However, as many of the experts and reviewers involved were current or former State legal advisers – Sassòli refers to them as "independent" experts[17] – we see it as a form of cooperation between public authorities. In addition, the drafting process of the Tallinn Manual 2.0 involved extensive consultations with States, therefore providing them with the opportunity to have an active role in the process. To facilitate this, the government of the Netherlands and the CCDCOE organized the Hague Process, a series of meetings that brought together legal advisers from fifty States in The Hague to discuss the draft Tallinn rules.[18]

The original Tallinn Manual was published in 2013. It was the work of twenty-three experts, four of whom were observers, and was then reviewed by thirteen different experts. Most of the latter were Anglo-American experts and past or present members of the ICRC. This limited diversity in experts and over-reliance on Western legal sources triggered strong criticism of the 2013 Tallinn Manual,[19] and this criticism in large part drove a revision and expansion of the Manual, which was conducted by a second, more diverse group of

15 *Ibid.*, pp. 19–20.
16 Brian J. Egan, "International Law and Stability in Cyberspace", *Berkeley Journal of International Law*, Vol. 35, No. 1, 2017, p. 171.
17 M. Sassòli, above note 2, p. 534.
18 Asser Institute Centre for International and European Law, "The Tallinn Manual 2.0 and The Hague Process: From Cyber Warfare to Peacetime Regime", available at: www.asser.nl/media/2878/report-on-the-tallinn-manual-20-and-the-hague-process-3-feb-2016.pdf.
19 Dieter Fleck, "Searching for International Rules Applicable to Cyber Warfare – A Critical First Assessment of the New Tallinn Manual", *Journal of Conflict and Security Law*, Vol. 18, No. 2, 2013, pp. 335–336; Kristen Eichensehr, "Review of *The Tallinn Manual on the International Law Applicable to Cyber*

experts.[20] Under the leadership of Michael Schmitt, twenty-one experts, including one observer, and fifty-nine reviewers completed and published the Tallinn Manual 2.0 in 2017.[21]

The aim of the experts was to give an account of the *lex lata*, not the *lex ferenda*.[22] The Tallinn Manuals are a non-binding study which assesses how existing international law, particularly IHL, applies to cyber warfare.[23] Rather than developing an entirely new legal paradigm, the experts tried to extend the scope of existing rules of IHL to new circumstances by way of interpretation and analogy.[24] Besides, the Manuals do not exclusively focus on IHL: they include rules on State responsibility and *jus ad bellum*, but also rules of international law applicable to cyber operations which are not of a scale or effect sufficient to constitute a prohibited use of force, or which are executed outside the context of an existing armed conflict. The Tallinn Manual 2.0 includes 154 rules, most of which address the issue of cyber operations in the context of use of force, both *jus ad bellum* and IHL.

Apart from the criticism mentioned above, both the Tallinn Manuals have been subject to considerably academic controversy[25] and mixed reactions by States. Most States approach the Manuals very cautiously or remain silent on the matter. Even during the Hague Process, some States involved in cyber operations did not present their legal position, presumably to maintain a high level of operational flexibility.[26] Only a few States have issued public national cyber security doctrines;

Warfare (Michael N. Schmitt ed., 2013)", *American Journal of International Law*, Vol. 108, 2014, pp. 588–587.

20 Michael Adams, "A Warning about Tallinn 2.0… Whatever It Says", *Lawfare*, 4 January 2017, available at: www.lawfareblog.com/warning-about-tallinn-20-%E2%80%A6-whatever-it-says; Papawadee Tanodomdej, "The Tallinn Manuals and the Making of the International Law on Cyber", *Masaryk University Journal of Law and Technology*, Vol. 13, No. 13, 2019.

21 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), pp. xii–xviii; Dan Efrony and Yuval Shany, "A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice", *American Journal of International Law*, Vol. 112, No. 4, 2018, p. 587.

22 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013 (Tallinn Manual), p. 19.

23 M. Sassòli, above note 2, p. 534; P. Tanodomdej, above note 20, p. 69.

24 D. Efrony and Y. Shany, above note 21, p. 583.

25 See, for example, Oliver Kessler and Wouter Werner, "Expertise, Uncertainty and International Law: A Study of the Tallinn Manual on Cyberwarfare", *Leiden Journal of International Law*, Vol. 26, No. 4, 2013; Lianne Boer, "Restating the Law 'As It Is': On the Tallinn Manual and the Use of Force in Cyberspace", *Amsterdam Law Forum*, Vol. 5, No. 3, 2013; D. Fleck, above note 19; K. Eichensehr, above note 19; Michael N. Schmitt and Sean Watts, "The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare", *Texas International Law Journal*, Vol. 50, No. 2–3, 2014; Terence Check, "Book Review: Analyzing the Effectiveness of the Tallinn Manual's Jus ad Bellum Doctrine on Cyber-Conflict, a NATO-Centric Approach", *Cleveland State Law Review*, Vol. 63, No. 2, 2015; Rebecca Ingber, "Interpretation Catalysts in Cyberspace", *Texas Law Review*, Vol. 95, No. 7, 2017; Dinah PoKempner, "Squinting Through the Pinhole: A Dim View of Human Rights from Tallinn 2.0", *Texas Law Review*, Vol. 95, No. 7, 2017; Gary Corn, "Tallinn Manual 2.0 – Advancing Conversation", *Just Security*, 15 February 2017, available at: www.justsecurity.org/37812/tallinn-manual-2-0-advancing-conversation/; M. Adams, above note 20; P. Tanodomdej, above note 20.

26 D. Efrony and Y. Shany, above note 21, p. 588.

some of these doctrines, though, include customary international law as incorporated in the Manuals, or refer explicitly to the Manuals.

For instance, the German Federal Government's 2021 position paper mentions the Tallinn Manual 2.0 as an indirect source that was taken into account for the drafting of the position paper and explicitly refers to many of the Manual's rules in its sections on obligation of States under IHL. In a footnote, though, Germany explicitly states that

> [t]he Tallinn Manual 2.0 is a paper created by independent experts and constitutes neither a document stating NATO positions nor a position paper by States. In the following, references to the Tallinn Manual 2.0 are made for information purposes only and do not necessarily constitute an endorsement of the referenced text by the German government.[27]

This clearly illustrates the inspiration purpose that IIL can fulfil (see below). As the US Department of Defence noted in 2020, "resources such as the Tallinn Manual … can help guide discussions and policies related to cybersecurity strategies".[28] Similarly, the French Ministry of the Armed Forces' statement on international law in cyberspace calls the Tallinn Manual 2.0 the most comprehensive statement to date on the applicability of IHL to cyberspace: "The development of this summary also takes into account the reflections currently undertaken in this area by academics and independent experts. Among these, the Tallinn Manual 2.0 represents the most exhaustive work carried out in this field so far." The same statement, however, immediately challenges the Manual's authority with the following caveat: "Even if [the Manual's] authority *remains strongly dependent on the authority awarded to the experts behind this publication*, [the Manual] nevertheless is of a nature that stimulates international reflection on the international law applicable to cyberspace."[29]

Some States seem to attach more importance to the Manuals than mere illustrative purposes. For instance, the letter by the Dutch minister of foreign affairs to the president of the House of Representatives of 5 July 2019 on the international legal order in cyberspace states that "IHL also lays down specific

27 German Federal Government, *On the Application of International Law in Cyberspace*, Berlin, March 2021, pp. 2, 7–10.

28 US Department of Defence, *Cybersecurity Reference and Resource Guide*, Washington, DC, 20 February 2020, p. 10.

29 French Ministry of the Armed Forces, *International Law applied to Operations in Cyberspace*, Paris, October 2019, p. 5 (authors' translation, emphasis added). Original text: "L'élaboration de cette synthèse tient également compte des réflexions actuellement conduits dans ce domaine par des universitaires et des experts indépendants. Parmi ces dernières, le Manuel de Tallinn 2.0 représente le travail le plus exhaustif mené dans ce domaine jusqu'à present"; and caveat: "Si son autorité demeure étroitement tributaire de celle reconnue aux experts à l'origine de sa publication, cette initiative est toutefois de nature à stimuler la réflexion internationale sur le droit international applicable aux cyber-opérations". For a more substantive analysis of the similarities and divergences between the Manuals and France's statement, see Michael N. Schmitt, "France Speaks Out on IHL and Cyber Operations: Part I", *EJIL: Talk!*, 30 September 2019, available at: www.ejiltalk.org/france-speaks-out-on-ihl-and-cyber-operations-part-i/; Michael N. Schmitt, "France Speaks Out on IHL and Cyber Operations: Part II", *EJIL: Talk!*, 1 October 2019, available at: www.ejiltalk.org/france-speaks-out-on-ihl-and-cyber-operations-part-ii/.

rules regarding attack aimed at persons or objects, which apply equally to cyber operations carried out as part of an armed conflict".[30] Interestingly, the footnote to this statement refers not only to Article 49 of Additional Protocol I, but also to Rule 92 of the Tallinn Manual 2.0, without including a caveat similar to the German one.[31] Also, Volume 4 of New Zealand's *Manual of Armed Forces Law* explicitly refers on numerous occasions to the Tallinn Manuals without any statement that reduces them to mere sources of inspiration or illustration.[32]

Nevertheless, States often avoid explicit references to the Tallinn Manuals. For instance, in a speech of 2018, UK attorney general Jeremy Wright confirmed the application of IHL to cyberspace by stating that "the application of international humanitarian law to cyber operations in armed conflicts provides both protection and clarity", and that "even on the new battlefields of cyber space, the UK considers that there is an existing body of principles and rules that seek to minimize the humanitarian consequence of conflict".[33] However, no mention whatsoever was made to the Tallinn Manuals in the speech. Similarly, Harold Koh, then the legal adviser to the US Department of State, delivered a speech at the USCYBERCOM Inter-Agency Legal Conference on the Roles of Cyber in National Defense which did not refer to the draft of the first Tallinn Manual at all, despite the draft being released less than three weeks before.[34] However, many concordances can be found between the remarks of Koh and the Manual, as explained by Schmitt.[35]

Certain States go further and reject some of the principles incorporated in the Manuals.[36] In 2016, US State Department legal adviser Brian Egan stated with regard to the (then future) Tallinn Manual 2.0 that "the Tallinn Manuals will make a valuable contribution to underscoring and demonstrating this point [that existing international law applies to State behaviour in cyberspace] across a number of bodies of international law, even if we do not necessarily agree with every aspect of the Manuals".[37] In 2020, US admiral Mike Gilday explicitly stated that "we're not fighting a war where international norms exist" in the cyber realm,[38] implying that there are no proper rules that govern armed conflict in

30 Stef Blok, "Letter to the Parliament on the International Legal Order in Cyberspace", 5 July 2019, available at: https://tinyurl.com/mu6ubvzp.

31 *Ibid.*

32 New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4, 2008, Section 1 fn. 23, 31, 82, 86, Section 2 fn. 1, Section 4 fn. 122, Section 10 fn. 165, 166–178, 180–182.

33 Jeremy Wright, "Cyber and International Law in the 21st Century", 23 May 2018, available at: www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century

34 Harold Koh, "International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012", *Harvard International Law Journal*, Vol. 54, 2012

35 Michael Schmitt, "International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed", *Harvard International Law Journal*, Vol. 54, 2012.

36 D. Efrony and Y. Shany, above note 21, pp. 584–585.

37 Brian Egan, "Remarks on International Law and Stability in Cyberspace", Berkeley Law School, 10 November 2016, available at: https://www.law.berkeley.edu/wp-content/uploads/2016/12/egan-talk-transcript-111016.pdf.

38 US Cyber Command, *Twitter*, 19 February 2020, available at: https://twitter.com/us_cybercom/status/1229926329254064134?s=21.

cyberspace. A similar stand may have been taken by UN Secretary-General António Guterres, who in 2020 referred to cyberspace as the "Wild West".[39] A more nuanced position can be seen in the French Ministry of the Armed Forces' statement on international law in cyberspace, which attaches some importance to the Tallinn Manuals, as noted above, but at the same time explicitly states that it does not adhere to their definition of cyber attack, nor to their interpretation of the principle of distinction.[40]

In their renowned article "A Rule Book on the Shelf?", Efrony and Shany observe that in the eleven cases of inter-State cyber operations that they studied since the adoption of the first Tallinn Manual, not a single State assumed responsibility for the cyber operations or cyber attacks in question.[41] Although the cases and the surrounding discussions rather situate themselves in the realm of *jus ad bellum*, it is interesting to note that the authors claim that the current uncertain and ambiguous state of international law governing cyber operations grants States significant leeway in terms of applying or disapplying international law to their operations.[42] The underlying point seems to be that the Tallinn Manuals did not remedy this alleged legal vacuum.[43] Furthermore, Efrony and Shany describe only two situations in the realm of *jus in bello*. Firstly, they refer to the Shamoon and Triton cyber attacks against Saudi Arabia between 2012 and 2017.[44] Secondly, they discuss the cyber attacks against the Ukrainian power grids by Russia between 2015 and 2016;[45] the power grid cyber attack of 23 December 2015 was publicly acknowledged as a cyber operation taking place in the context of an armed conflict.[46] In neither incident, though, did government officials talk about IHL or the Tallinn Manuals. Efrony and Shany therefore conclude that State support for key rules as enshrined in the Tallinn Manuals is rather limited.[47] As stressed by the Estonian president Kersti Kaljulaid, in order to advance interpretative efforts in the cyber context and for condemnation to have meaningful normative value, "States do not only have to condemn other States for conducting hostile cyber operations, but they also need to call them violations of international law and specify which specific rule" of international law has been breached.[48]

39 António Guterres, "Remarks to the General Assembly on the Secretary-General's Priorities for 2020", New York, 22 January 2020, available at: www.un.org/sg/en/content/sg/speeches/2020-01-22/remarks-general-assembly-priorities-for-2020.
40 French Ministry of the Armed Forces, above note 29, pp. 13–15.
41 D. Efrony and Y. Shany, above note 21, p. 594.
42 *Ibid.*, p. 604.
43 Nicholas Tsagourias, "Symposium on Dan Efrony and Yuval Shany, 'A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice': The Slow Process of Normativizing Cyberspace", *American Journal of International Law*, Vol. 113, 2019, p. 74.
44 D. Efrony and Y. Shany, above note 21, pp. 620–622, 647.
45 *Ibid.*, p. 624.
46 Samuele De Tomas Colatin, "Power Grid Cyberattack in Ukraine (2015)", *Cyber Law Toolkit*, 4 June 2021, available at: https://cyberlaw.ccdcoe.org/wiki/Power_grid_cyberattack_in_Ukraine_(2015).
47 D. Efrony and Y. Shany, above note 21, pp. 585, 647.
48 Michael N. Schmitt, "Estonia Speaks Out on Key Rules for Cyberspace", *Just Security*, 10 June 2019, available at: www.justsecurity.org/64490/estonia-speaks-out-on-key-rules-for-cyberspace/.

The lack of acknowledgement of the serious effects of cyber operations on the civilian population and civilian property could also, according to Efrony and Shany, indicate that States only have a limited interest in upholding IHL as interpreted by the Tallinn Manuals, or that they consider the analogous application of IHL to cyber operations as not fit for purpose.[49] Similar statements are echoed elsewhere – for instance, according to Lamensch, despite the consensus regarding the applicability of international law to cyber operations,[50] there is a certain amount of "cherry-picking" by States of the specific rules of IHL applicable to the cyber realm.[51] Nevertheless, in relation to later cyber incidents during the armed conflict between Russian and Ukraine, referred to as the Petya and NotPetya attacks in 2016 and 2017 respectively, one notices that some State officials have used IHL terminology. For instance, the White House press secretary depicted the NotPetya attack as not only reckless, but also indiscriminate.[52] UK defence minister Gavin Williamson stated that "Russia is ripping up the rulebook" – although without explaining what "rulebook" he was referring to exactly – and that Russia wrecked "livelihoods by targeting critical infrastructure".[53]

Despite their best efforts, the Tallinn Manuals may not have persuaded States, even though Michael Schmitt calls them the "'go to' source for cyber practitioners around the world".[54] According to Boer, this failure is due to the form of the Manuals. By calling themselves a "manual" which restates existing "rules", any discrepancy between the Manuals' content and State behaviour or lack of reference to the Manuals may make the Manuals fall into desuetude.[55] Tsagourias offers a persuasive explanation for the lack of State interaction with the Tallinn Manuals: he reminds us that States, "as the primary normative engines of international law, … refuse to delegate this function fully to others, even if those other actors may influence States' thinking and actions".[56] Perhaps the fact that the documents are called "manuals" discourages States from explicitly accepting them. Maybe States' acceptance of the Tallinn rules is more

49 D. Efrony and Y. Shany, above note 21, pp. 585, 647.

50 See, for example, UNGA Res. A/68/98, 24 June 2013; UNGA Res. A/RES/68/243, 9 January 2014; European Commission, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, Brussels, 7 February 2013, p. 16; NATO, *Wales Summit Declaration*, Wales, 5 September 2014, para. 72.

51 Marie Lamensch, "Cyberspace Has Rules: It's Time to Enforce Them", *Centre for International Governance Innovation*, 20 October 2021, available at: www.cigionline.org/articles/cyberspace-has-rules-its-time-to-enforce-them/.

52 White House, "Statement from the Press Secretary", 15 February 2018, available at: https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-25/.

53 Sarah Marsh, "US Joins UK in Blaming Russia for NotPetya Cyber-Attack", *The Guardian*, 15 February 2018.

54 Michael N. Schmitt, "Norm-Skepticism in Cyberspace? Counter-Factual and Counterproductive", *Just Security*, 28 February 2020, available at: www.justsecurity.org/68892/norm-skepticism-in-cyberspace-counter-factual-and-counterproductive/.

55 L. Boer, above note 25.

56 N. Tsagourias, above note 43, p. 74.

subtle than the indications of acceptance that Efrony and Shany investigated.[57] Furthermore, one has to recall that the cyber sphere is characterized by what Mačák calls the "glass house dilemma": the most powerful States in the cyber realm are also those most vulnerable to cyber attacks.[58] This causes a regulatory dilemma for these States as to whether to allow a lot of leeway in order to conduct their own cyber operations, or whether to strictly regulate cyber operations in order to protect their own cyber infrastructure.[59]

Nevertheless, when one looks at the instances of State practice cited over time, one could conclude that there seems to be a positive movement of States towards not only referring to and relying on rules of IHL in the cyber context in a similar manner as the Tallinn Manuals do, but also to actively and explicitly referring to the Manuals themselves. Schmitt observes, although in more cautious terms, that there are positive signs which "include the readiness of States to discuss voluntary, non-binding norms of responsible behaviour when they cannot reach agreement over the legal status of a purported rule, as well as effort to craft confidence building measures in regional fora such as the OSCE, Organization of American States, and ASEAN".[60] Furthermore, Efrony and Shany argue that since cyber operations seem to have resulted in only limited loss of life and injury due to their design, States are presumably adhering to certain restraining rules of IHL in their use of cyber operations.[61]

A more recent development in the sphere of cyber warfare concerns the Oxford Process on International Law Protections in Cyberspace. This was an initiative started up in 2020 by the Oxford Institute for Ethics, Law and Armed Conflict at the Blavatnik School of Government. Co-sponsored by Microsoft and the Japanese government, it is a study comparable to the Tallinn Manuals which aims at identifying and classifying the rules of international law applicable to cyber operations and at articulating how international law applies to specific sectors and objects.[62] The Oxford Process publishes Oxford Statements on International Law Protections which articulate how international law, including IHL, applies to the cyber context, both prohibiting and prescribing State behaviour; to date there have been five of these Statements. Contrary to the Tallinn Manuals, the Oxford Process takes a contextual approach and examines international law as it applies to specific objects of protection, focusing on the

57 *Ibid.*, p. 74. In 2018, for instance, the Dutch minister of foreign affairs Stef Blok called the Tallinn Manual a "roadmap" for State accountability. Government of the Netherlands, "Speech by Minister Blok on First Anniversary Tallinn Manual 2.0", 20 June 2018, available at: https://perma.cc/XMB5-GTCC.

58 Kubo Mačák, "Symposium on Dan Efrony and Yuval Shany, 'A Rule Book on The Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice': On the Shelf, but Close at Hand: The Contribution of Non-State Initiatives to International Cyber Law", *American Journal of International Law*, Vol. 113, 2019, pp. 82–84.

59 *Ibid.*

60 M. N. Schmitt, above note 54.

61 D. Efrony and Y. Shany, above note 21, p. 650.

62 Oxford Institute for Ethics, Law and Armed Conflict, "The Oxford Process on International Law Protections in Cyberspace", available at: www.elac.ox.ac.uk/the-oxford-process-on-international-law-protections-in-cyberspace#/.

most pressing needs of the international community.[63] The impact of the Oxford Process remains to be seen.

The Safe Schools Declaration

The Safe Schools Declaration is an intergovernmental political commitment developed among UN member States, under the leadership of Norway and Argentina, in 2015. It offers a framework for collaboration and exchange. Endorsement entails a commitment to meet on a regular basis to review the implementation of the Declaration and to use the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (the Guidelines), which provide clear and simple guidance for armed actors.[64] The Guidelines themselves are a non-binding tool[65] that is intended to change armed actors' behaviour in order to increase the protection of schools and universities during armed conflict.[66] The Declaration and Guidelines go beyond current IHL and aim to prevent armed forces from using schools and universities to support their military efforts. Current treaty and customary IHL do not contain a similar prohibition.[67]

Similar to the Tallinn Manuals, the Safe Schools Declaration constitutes an instance of all three forms of informality. Regarding output informality, the Declaration concerns a non-binding political commitment in the form of a "declaration", not a treaty as defined by Article 2 of the 1969 Vienna Convention on the Law of Treaties. Process informality, meanwhile, is evident in several ways. Despite being an initiative among UN member States, the Declaration is not a UN instrument, nor was it developed under the auspices of the UN. The four International Conferences on the Safe Schools Declaration, which were only organized after a limited number of States drafted the Declaration (see below), qualify as academic conferences during which the issue was touched upon by speakers representing States, NGOs and international organizations, rather than a process that leads to the adoption of a document. In addition, the reports of the Conferences do not indicate any political negotiations taking place.[68] Finally,

63 *Ibid.*

64 Global Coalition to Protect Education from Attack (GCPEA), "The Safe Schools Declaration: An Inter-Governmental Political Commitment to Protect Students, Teachers, Schools, and Universities from the Worst Effects of Armed Conflict", 2021, available at: https://ssd.protectingeducation.org/; M. Zwanenburg, above note 7, pp. 256, 274–275.

65 The commentary to the Guidelines explicitly minimizes their role as being "intended to serve as a guidance" and states that "they are not legally binding in themselves and do not affect existing obligation under international law": GCPEA, *Commentary on the "Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict"*, New York, 2019, pp. 4–5. See also GCPEA, above note 64.

66 P. V. Kessing, above note 1, p. 146.

67 The Guidelines, however, while not reflecting existing IHL, do rely on evidence of good practices which are already applied by some parties to an armed conflict: M. Zwanenburg, above note 7, pp. 256, 258–266.

68 Norwegian Ministry of Foreign Affairs, *The Oslo Conference on Safe Schools: Protecting Education from Attack*, Oslo, 28–29 May 2015; GCPEA, *Second International Conference on Safe Schools: Chair's Summary*, Buenos Aires, 28–29 March 2017; Spanish Agency for International Development Cooperation, *Third International Conference on Safe Schools*, Palma de Mallorca, 27–29 May 2019; GCPEA, *Fourth International Conference on the Safe Schools Declaration*, Abuja, 25–27 October 2021.

actor informality is evident as well: in addition to States, various NGOs and international organizations participated in the drafting process of the Declaration.[69] Moreover, these organizations were prominently represented during the four subsequent International Conferences.

The drafting of the Declaration and Guidelines involved a limited number of States, but from geographically diverse parts of the world.[70] Only sixteen States were consulted and involved in the drafting of the Guidelines.[71] Despite the rather limited number of States involved in the drafting process, to date, 114 States have joined the Declaration.[72] The substantial number of endorsing States suggests that both the Declaration and Guidelines are seen as important and legitimate by States. Moreover, the Declaration is supported by many actors and organizations at the international and regional level. For instance, the UN Secretary-General called upon States to endorse and implement the Declaration in 2017, 2018 and 2020.[73] The Special Representative of the Secretary-General for Children and Armed Conflict echoed this call in 2017.[74] The UN Department of Peacekeeping also includes the Declaration in its list of references as an international norm or standard on children's rights.[75] The issue has been on the UN's agenda since 2000.[76] At the regional level, the Peace and Security Council of the African Union has repeatedly encouraged its member States to sign the Declaration since 2016.[77] Also, the European Union (EU) "recognizes and supports the work of the Global Coalition to Protect Education from Attack and will support initiatives to promote and roll out the Safe Schools Declaration".[78] When taking these observations together, one could say that the support base for the adoption of the Declaration and Guidelines was already present long before the drafting process was initiated, unlike with other informal law-making instruments.

69 With regard to the international organizations, the drafting process involved UNHCR, UNICEF and UNESCO, which are all part of the GCPEA steering committee: M. Zwanenburg, above note 7, pp. 255, 273–274, 276.

70 The commentary to the Guidelines includes an account of the drafting process: GCPEA, above note 65, pp. 6–8.

71 Argentina, Canada, Côte d'Ivoire, France, Finland, Germany, Liberia, Luxembourg, Nepal, the Netherlands, Norway, the Philippines, Qatar, Senegal and Switzerland: see Norwegian Ministry of Foreign Affairs, above note 68, p. 20.

72 For the most up-to-date list of endorsing States, see: www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/; GCPEA, above note 65.

73 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2017/414, 10 May 2017, para. 14; *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/72/865, S/2018/465, 16 May 2018, para. 122; *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/74/845, S/2020/535, 9 June 2020, para. 232.

74 *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/72/276, 2 August 2017, paras 13, 53.

75 UN Department of Peacekeeping, *Operations Policy on Child Protection in United Nations Peace Operations*, 2017, p. 23.

76 For a brief summary of the increasing attention being paid to this issue, particularly within the context of the UN, see M. Zwanenburg, above note 7, pp. 270–272.

77 GCPEA, above note 65.

78 European Commission, *Communication from the Commission to the European Parliament and the Council on Education in Emergencies and Protracted Crises*, COM (2018) 304 final, 18 May 2018, p. 9.

Interestingly, States are not merely endorsing both documents; they appear to be conforming to the commitments in the documents as well. The Global Coalition to Protect Education from Attack (GCPEA) noted that there was an overall strong decline in the reported use of schools and universities in armed conflicts between 2015 and 2018.[79] Still, the GPCEA noted that out of the fifty-one States that endorsed the Declaration in 2015, twelve experienced at least one reported incident of military use of schools and/or universities during the same period.[80] Though this may seem to indicate that the Declaration was violated in more than 20% of the endorsing States, the GCPEA does not specify when exactly these instances took place, or notably whether the incidents from 2015 dated from before or after the endorsement of the Declaration.

There are many examples of States issuing domestic statements, adapting their military manuals or doctrine. According to a review conducted by Human Rights Watch, which assessed the protection of schools against military purposes in certain States, the following States already have legislation in place to protect schools and universities from military use: Argentina, Bangladesh, Croatia, Ecuador, Greece, India, Malaysia, Montenegro, Nicaragua, Nigeria, North Macedonia, Pakistan, Peru, the Philippines, Poland, Singapore, Sri Lanka and Venezuela.[81] The following States have incorporated such protection into their military policy or doctrine: the Central African Republic, Colombia, the Democratic Republic of the Congo, Denmark, Ecuador, Nepal, New Zealand, Norway, the Philippines, South Sudan, Sudan, Switzerland, the United Kingdom, the United States and Yemen.[82] Also, the trainings provided in Côte d'Ivoire's military schools, academies and training centres include a specific module on the prohibition of occupation of schools and training institutions.[83]

Lastly, many other States give direct orders to the military in order to put the Declaration into practice as required by Guideline 6.[84] For instance, in 2015, after the Central African Republic endorsed the Declaration, the UN peacekeeping mission active on that country's territory, MINUSCA, issued a directive which restated much of the Guidelines' text, although it does not refer to the Declaration or the Guidelines explicitly.[85] In 2016, the Afghan Ministry of Education called upon the Ministry of Interior and the National Security Council for the evacuation of schools by the security forces.[86] In the context of the conflict with Boko Haram, the minister of basic education of Cameroon referred

79 GCPEA, *Practical Impact of the Safe Schools Declaration*, New York, October 2019, p. 1.
80 GCPEA, "Safe Schools Declaration Endorsements", New York, 2022, available at: https://ssd.protectingeducation.org/endorsement/; GCPEA, above note 79.
81 Human Rights Watch, *Protecting Schools from Military Use: Law, Policy and Military Doctrine*, New York, 27 May 2019, available at: www.hrw.org/report/2019/05/27/protecting-schools-military-use/law-policy-and-military-doctrine.
82 *Ibid.*
83 GCPEA, above note 79, p. 2.
84 Article 36, *The Safe Schools Declaration: Reflections on Effective Post-Agreement Work*, London, July 2021, pp. 7–8.
85 *MINUSCA Directive on the Protection of Schools and Universities against Military Use*, UN Doc. MINUSCA/OSRSG/046/2015, 24 December 2015.
86 GCPEA, above note 79, p. 2.

to the Declaration in November 2017 to encourage military personnel working as teachers in schools to carry out their educational activities in civilian clothes and without weapons; he also called upon the governor of the Far North Region to respect the Declaration.[87] Sudan issued an order in 2017 that prohibited all divisions from using schools for military purposes.[88] Furthermore, Italy, Luxembourg and Slovenia have announced their intention to update their military manuals and doctrine in order to incorporate the commitments of the Declaration.[89]

The Montreux Document

In 2008, an intergovernmental consultation initiated by the ICRC and Switzerland resulted in the adoption of the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military Companies during Armed Conflict* (Montreux Document) by consensus.[90] Even though the process primarily involved the seventeen States most affected by the use of private military and security companies (PMSCs) or with direct experience in dealing with them, it also enjoyed the input of industry representatives, academic experts and NGOs.[91] Allegedly this high degree of expertise also resulted in a high degree of support from State delegates.[92] In Asia, Africa and Latin America, the Montreux Document was disseminated by the ICRC and the Swiss government through bilateral delegations and regional information and follow-up seminars during 2009 and 2010.[93] Apart from the Document itself, the process also triggered the creation of the Montreux Document Forum in 2014. This platform aims to provide support for the national implementation of the Montreux Document and to increase the active support for the Document. It allows the participants of the Montreux Document to share good practices, receive contextualized support packages and discuss the challenges that they are facing in regulating PMSCs.[94]

The Montreux Document constitutes a non-binding intergovernmental instrument which guides States in the use and tolerance of PMSCs during armed conflict. The Document also characterizes itself in its introduction as a non-binding instrument by stating that it seeks to "provide guidance on a number of

87 Human Rights Watch, *"These Killings Can Be Stopped": Government and Separatist Groups Abuses in Cameroon's Anglophone Regions*, New York, July 2018, p. 31; Human Rights Watch, above note 81.
88 GCPEA, above note 79, p. 2.
89 *Ibid.*, p. 2.
90 P. V. Kessing, above note 1, p. 140.
91 ICRC and Swiss Federal Department of Foreign Affairs, *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, August 2009, p. 41.
92 James Cockayne, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", *Journal of Conflict and Security Law*, Vol. 13, No. 3, 2008, p. 421.
93 *Ibid.*, p. 427.
94 See the Montreux Document Forum website, available at: www.montreuxdocument.org/about/the-forum.html.

thorny legal and practical points".[95] In its first part, it provides an account of the international legal obligations of the contracting States, territorial States, home States, and all other States in relation to PMSCs and their personnel. The second part contains good practices for States to ensure respect for, *inter alia*, IHL in their relationships with PMSCs.[96] However, the Document merely provides guidance on a number of ambiguous legal and practical points based on existing law; it does not establish new rules.[97]

As with the Tallinn Manuals and Safe Schools Declaration, the Montreux Document is a prime example of informality in all three forms. Similarly to the Safe Schools Declaration, it concerns a non-binding intergovernmental guiding instrument, and thus exhibits output informality. The involvement of actors other than States, with notably the ICRC playing a prominent role, entails actor informality. No traditional diplomatic conferences were hosted to negotiate and adopt the Montreux Document, nor did it come into existence under the auspices of an international organization, thus indicating process informality.

As stated above, the Montreux Document was accepted by consensus by seventeen States on 17 September 2008,[98] although the Russian delegation refused to endorse the Document on the same day. Cockayne submits, however, that it was precisely a Russian diplomat who had previously defended the Montreux Initiative in reaction to the question posed by another diplomat of whether the adoption of the Document would trigger a legitimization of the use of PMSCs during armed conflict.[99] According to Cockayne, who participated in the drafting, one of the US government participants called the Montreux Document "a significant achievement of historic importance" during the drafting process, since it remedied existing legal uncertainty.[100] Allegedly, some States called the Document "pragmatic, modest and therefore realistic", a "stepping stone", a "milestone on the way to further discussion", and "just a start".[101]

To date, fifty-eight States support the Montreux Document by virtue of diplomatic consultations of the ICRC and Swiss Department of Foreign Affairs with the non-participating States in the third quarter of 2007.[102] Additionally, three regional organizations have signed up to the Montreux Document with a communication of support: the EU, the Organization for Security and Cooperation in Europe, and NATO.[103] Furthermore, the Parliamentary Assembly of the Council of Europe has recommended

95 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 5.
96 *Ibid.*, p. 8; M. Sassòli, above note 2, pp. 544–546.
97 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, pp. 5, 9.
98 Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine, and the United States. See P. V. Kessing, above note 1, p. 140; ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 31.
99 J. Cockayne, above note 92, pp. 419–420.
100 *Ibid.*, p. 403.
101 *Ibid.*, p. 426
102 *Ibid.*, p. 419.
103 For a complete list of the States and regional organizations supporting the Montreux Document and the date of their communication of support, see: www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html.

> that the Committee of Ministers support, on behalf of the Council of Europe, the Montreux Document on Private Military and Security Companies which sums up legal obligations under existing international law and best practices related to PMSCs' activities, and call on member states that have not already done so, to endorse it.[104]

Several Latin American States have signed up to the Document,[105] though no Latin American or Caribbean States participated in the drafting process.

A 2013 study analysed State practice in relation to the Montreux Document and concluded that "in terms of demonstrated compliance with legal obligation and the implementation of Good Practices, progress has been mixed. Some States have done well in some areas, whereas other lag behind."[106] Five years after the adoption of the Document, the study noted that States which have not yet committed to the Document are in particular States that are politically instable, have PMSCs present on their territories, or whose citizens are working for PMSCs.[107] Therefore, the question arises as to whether the Montreux Document has had much of an impact on the battlefield. However, the study also concluded that no firm conclusions could be made on the effectiveness of the Montreux Document since no comprehensive data to allow such conclusions were available.[108]

The alleged lack of effectiveness of informal IHL

As explained in the introduction to this article, the flexibility of the studied cases of informal IHL comes with a major downside: their non-binding character at both the international and domestic level, and their consequential lack of effectiveness. Some authors, such as Aust, define an "informal instrument" of international law as "an instrument which is not a treaty because the parties to it do not intend it to be legally binding".[109] Eric Westropp refers to informal legal documents as merely a "'bible' – a source of extensive doctrine and normative guidance, but with no real implementation or enforcement arrangements to give it teeth".[110] However, though soft or informal at the international level, the domestic implementation of international cooperation might be either hard or soft law.[111] According to

104 Parliamentary Assembly of the Council of Europe, *Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force*, Recommendation 1858, 2009, para. 15.
105 Ecuador, Chile, Uruguay, Costa Rica and Panama have all joined the Montreux Document: János Kálmán, "The International Regulation of Private Security Providers – a Brief Analysis", in János Kálmán (ed.), *Legal Studies on Contemporary Hungarian Legal Systems*, Universitas-Győr, Győr, 2014, p. 162.
106 American University Washington College of Law, Center for Human Rights and Humanitarian Law, Initiative for Human Rights in Business and International Institute for Nonviolent Action, "Montreux Five Years On: An Analysis of State Efforts to Implement the Montreux Document Legal Obligations and Good Practices", 2013, p. 157.
107 *Ibid.*, p. 158.
108 *Ibid.*, p. 157.
109 Anthony Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly*, Vol. 35, No. 4, 1986, p. 787.
110 As referred to in J. Cockayne, above note 92, p. 428.
111 J. Pauwelyn, R. A. Wessel and J. Wouters (eds), above note 9, pp. 30–31.

Cockayne, though, significant efforts may be needed by civil society actors to turn the informal instruments discussed above into "an *ad hoc* yardstick against which to measure, criticize or even litigate the conduct of States".[112] In the present section, we will investigate this suggestion.

First of all, all informal IHL instruments which restate existing law highlight and, therefore, remind States of their obligations under IHL. This is in and of itself useful. For instance, the Montreux Document, as pointed out by its commentary, enhances protection of civilians in armed conflict by "raising awareness of the humanitarian concerns at play whenever PMSCs operate in armed conflict", and it reminds States of their obligations,[113] even if not everyone agrees that it enhances or goes beyond existing law.[114]

Furthermore, informal IHL instruments such as the Montreux Document and the Safe Schools Declaration's Guidelines provide States with guidance on how to sensibly deal with the issues at hand.[115] Very often State officials look to these instruments for inspiration and guidance on how to meet their international obligations, as can be deduced from the State practice cited above in relation to the Tallinn Manuals.

Nevertheless, the commentary to the Montreux Document also recognizes that, ultimately, enhanced protection is a matter of implementation.[116] Amnesty International and the International Commission of Jurists have rightly noted that, "for the Swiss Initiative ultimately to be successful, the content will have to be accepted and applied by all of those who would be expected to make use of its guidance", and that "if these actors consider that the document falls below standards already established in international law, the document could be discounted and other sources of law invoked, a consequence which no doubt would devalue the currency of the initiative".[117] As can be seen from the State practice presented above, most States implement informal IHL instruments that they have endorsed into domestic legislation and practice. Neither the modest number of States involved in the drafting of the instruments nor the question of their geographical representativeness was considered a reason for non-implementation by non-participating States.

Similar to what can be observed in the past with traditional treaties, if matters have already been on the international agenda for a long time, such as with the protection of schools and universities, States seem more readily willing to endorse or implement the outcome of the informal IHL process. The same holds true for events which shock the international community, such as needless massacres, which seem to spur States' readiness to commit themselves to endorsing and implementing informal IHL instruments. This has been observed

112 *Ibid.*
113 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 40.
114 See for example J. Kálmán, above note 105, p. 160.
115 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 40.
116 *Ibid.*, p. 40.
117 J. Cockayne, above note 92, p. 423, referring to Amnesty International and International Commission of Jurists, *Comments on the Swiss Initiative Draft Text Dated 13 August 2008*, 29 August 2008.

for both the Montreux Document and the Safe Schools Declaration.[118] The same dynamic was at play with the adoption of traditional international law sources such as the 1949 Geneva Conventions and their Additional Protocols, and many treaties banning specific means or methods of warfare. In the case of the Tallinn Manuals, such shocking events were not yet present to induce their endorsement and implementation; States do endorse and implement informal IHL instruments in these circumstances, but the process seems to take longer.

Concerning the Tallinn Manuals and the Montreux Document specifically, as has been seen above, they are in themselves not binding, but give an account of existing international law and how it applies in a particular context. Therefore, while the informal IHL instruments themselves are not binding, the legal obligations that they incorporate are.

Furthermore, in light of the ICJ's 1974 judgment in the *Nuclear Tests* case, one may wonder whether unilateral endorsements or support statements by States may not in the end turn out to be legally binding for them and render them accountable for violations of these informal IHL instruments[119]; this question also arises when taking into account Principle 1 of the International Law Commission's Guiding Principles on Unilateral Declarations, which were largely inspired by the aforementioned case.[120] On the other hand, States are nowadays very much aware of such possible consequences. For that reason, they may have become rather reluctant to endorse informal instruments, or may be inclined to add statements that their signature "does not create new commitments".

It is important to note that within IHL one is faced with an inherent lack of compliance mechanisms, contrary to most branches of international law. There is no central body that is competent to monitor compliance and render binding decisions or take persuading measures to force States into compliance, and nor do the general IHL treaties foresee regular meetings of the States Parties, as indicated in the introduction to this contribution. However, with regard to the Safe Schools Declaration, States commit themselves to meet regularly to review the implementation of the Guidelines, and similarly, the Montreux Document was accompanied by the creation of the Montreux Document Forum. Such fora for the international scrutiny of the implementation of an informal IHL document are quite rare; to date, no informal human rights instrument foresees the establishment of a forum comparable to the Montreux Document Forum.[121] Therefore, informal IHL instruments might offer advantages that traditional sources of IHL do not possess. For Ferelli, when analyzing the protection of schools and universities during the Syrian armed conflict, it was clear that the

118 M. Zwanenburg, above note 7, p. 256; J. Cockayne, above note 92, p. 428.
119 ICJ, *Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, *ICJ Reports 1974*, paras 43, 46, 49.
120 Principle 1 states: "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected." International Law Commission, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2006, p. 370.
121 P. V. Kessing, above note 1, p. 150.

Guidelines, in particular Guideline 6, are an adequate means to strengthen legal standards by promoting to implementing them into "national doctrine, military manuals, rules of engagement, operational orders and other means of dissemination".[122]

Concluding remarks

This article has provided an account of current State practice related to three informal law-making instruments in the field of IHL: the Tallinn Manuals, the Safe Schools Declaration and the Montreux Document. We have observed that States are endorsing and even implementing these instruments into national legislation without being internationally obliged to do so. Furthermore, regarding their practice on the ground, States are making attempts to abide by the rules and principles as incorporated into these instruments, including those which are not legally binding under current treaty and customary IHL. However, with regard to the Tallinn Manuals, one can observe more hesitancy in their implementation and endorsement, accompanied by a high degree of cherry-picking by States. Nevertheless, when States' reactions are analyzed over time, they seem to approach the Manuals more favourably and have even started to refer to them directly.

When combining all concerns and observations, it turns out that the alleged "non-binding" character and consequential lack of effectiveness so often ascribed to informal instruments does not entirely hold true. The very existence of these instruments reminds States of their obligations under international law and therefore enhances protection during armed conflict. Additionally, informal instruments sometimes trigger the creation of corresponding implementation review mechanisms. "Naming and shaming" is a very valuable tool within international relations for enhancing compliance with norms. Furthermore, recalling the *Nuclear Tests* judgment of the ICJ, it can be questioned whether endorsing informal instruments will truly not have any legally binding consequences for States.

Interestingly, we have seen that the same dynamics under which States endorse or implement treaties or customary international law are at play for informal IHL instruments. Prior international support bases or events which shock the international community trigger a higher willingness by States to implement or endorse these instruments. Even if such factors are not at hand, as in the case of the Tallinn Manuals, informal IHL instruments are still endorsed or implemented into national legislation, albeit more gradually.

In conclusion, informal international law-making in the field of IHL seems to be, in the present international context, a valuable – albeit imperfect – alternative for fostering the further development of the law.

122 Ashley Ferrelli, "Military Use of Educational Facilities during Armed Conflict: An Evaluation of the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict as an Effective Solution", *Georgia Journal of International and Comparative Law*, Vol. 44, No. 2, 2016, p. 363.