

A collection of military medals and a compass on a wooden surface. The medals include a red ribbon medal with a circular emblem, a white star medal with a central emblem, and a blue ribbon medal with a circular emblem. A pair of glasses is also visible. A compass is in the bottom left corner.

Law Formation and Development: Non-State Actors

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Manuals: Historic Lineage

- ◆ 1874 **Brussels Declaration** & 1880 Institut de Droit International, Manual on the Law and Customs of War (**Oxford Manual**) serve as basis for 1899 **Hague Convention II** and 1907 **Hague Convention IV**
- ◆ 1913 **Oxford Manual of the Laws of Naval Warfare**, very influential

Modern Trend

- ◆ 1995 San Remo Manual (naval warfare)
- ◆ 2006 **San Remo Manual on NIAC**
- ◆ 2010 **Harvard AMW** (air and missile)
- ◆ 2013 **Tallinn Manual** (cyber)
- ◆ 2017 **Tallinn Manual 2.0** (cyber)
- ◆ 2017 Leuven Manual (peace ops)
- ◆ 2020 Oslo Manual (various)
- ◆ 2023 Newport Manual (naval warfare)
- ◆ Ongoing, MILAMOS and Woomera (space)
- ◆ Ongoing (Tallinn 3.0)





Influence of Manuals

- ◆ **Influence = State understanding** of int'l law
 - Only States **make/identify/interpret** int'l law

- ◆ **3 modes of influence**
 1. **Existence** of a rule itself
 - Question often, “does treaty rule reflect a CIHL rule” (e.g., environment special protection, doubt re civilian status)
 2. **Interpretation** of extant rules
 - E.g., comment on US “war sustaining approach” to mil obj
 - Most common
 3. Identify new **interpretive issues**
 1. E.g., meaning of cyber “attack,” data as an “object”

Influence

- ◆ Not necessarily positive or negative
- ◆ **Positive**
 - Experts at greater liberty to examine law **objectively**, free from nat'l interests & policy constraints
 - Many bring **expertise** that many States lack
- ◆ **Negative**
 - May be **biased** (e.g., space manuals)
 - Participants may **lack expertise or experience**
 - **Deference to academics** leads to the unquestioning adoption of views





De Jure Status

- ◆ **Art 38(1)(d)**, ICJ Statute, “most highly qualified publicists,” subsidiary means
- ◆ Once highly significant, **less so today**
 - **Proliferation** of treaties
 - **Cacophony** of scholarly commentary due to modern publication opportunities
 - **Growing size** of int’l law scholarly community
 - Difficult to **separate analytical wheat from chaff**



But see...

- ◆ **Case law**

- E.g. *Targeted Killings* & NIAC Manual

- ◆ **State military manuals**

- E.g., Canada LOAC Manual & SR Manual
- E.g., Danish Manual & TM 2.0, AMW, NIAC, SR M

- ◆ ***State opinio juris***

- E.g., frequent TM 2.0 references by Australia, Canada, Columbia, France, Germany, Netherlands, Eur. Parliament, etc.



Particular Weight for Manuals?

◆ Yes

- The **more experts** concur on position, the more persuasive (numbers matter)
- Properly run proceedings allow **give and take**
- **Time** involved allows reflection

◆ No

- Only “**most highly qualified**” publicists qualify
- Scholars sometimes seek **progressive development** (aka, *their views*)
- A **dominant voice** in proceedings



Case Study: TM 2.0

- ◆ Very influential on law development
- ◆ **TM 1.0** – initially kept **arms length**
 - States nervous scholars get out ahead of them
 - Mistaken as NATO legal doctrine
- ◆ **TM 2.0**: Strong State **involvement/embrace**
 - Hague Process
 - States use in practice & for *opinio juris*
 - State-supported global capacity-building



Case Study: TM 2.0

- ◆ **States see as beneficial**
 - Identified **uncontroversial** law
 - Identified **fault lines**, allowing States to focus
 - E.g., thresholds for sovereignty, use of force, armed attacks, armed conflict, attack; data
 - Developed **concepts**
 - E.g., “functional” damage
 - **One-stop shopping**: from sovereignty to IHL



TM's Unique Influence

1. **Land of the blind**, the one-eyed man is king... (**timing** matters)
2. States must **buy into** the process
 - TM actively engaged States: Hague Process, NATO observers, experts in personal capacity, State-supported capacity building
 - All reasonable views reflected; trusted us
3. Participant **diversity**
 - But not at expense of competency
4. Robust **peer review**



Other Non-State Efforts: Factors on Influence

- ◆ State hesitancy to express *opinio juris*
- ◆ **Human Rights NGOs**
 - Seen as lacking balance between military necessity & humanitarian concerns
- ◆ **ICRC** (CIHL, Commentaries, DPH, etc)
 - Exceptional expertise
 - Concern about “progressive development”
- ◆ **Scholarship**: influence declining
 - Too much, too many (scholarship for scholars)
 - Accessibility and time: blogs v. articles
 - Often lack of understanding of warfare



Conclusions

- ◆ Balance between **military necessity and humanitarian considerations** will always drive IHL formation and development
- ◆ **States** enjoy a **dominant position**
- ◆ **Non-State entities** will step in if **States hesitate**
- ◆ Applied IHL ultimately **determines** the law

Discussion

