1. Introduction: Just another instance of expert rule?

1.1 AN OMNIPRESENT PHENOMENON IN INTERNATIONAL HUMANITARIAN LAW

Experts do not make law. A quick look into Article 38(1) of the International Court of Justice (ICJ) Statute reveals that expert manuals are not a source of international law. So why should there be a legal monograph on them? In view of this book, the apodictic statement that experts do not make law is as true as it is misleading. International groups of legal experts have developed ways to compensate for the lack of formal status and established their manuals as central reference points in international humanitarian law (IHL).\(^1\) This has been considered ‘a positive development’.\(^2\) The following refutes this narrative.

When the present author commenced his clerkship at the German Federal Ministry of Defense he saw the motivation for this book being confirmed: the Tallinn Manual 2.0 was prominently placed on the desk of his supervisor. The present book investigates the reasons for a manual of private experts having made its way into a governmental executive body. At the same time, it aims to show that expert manuals are problematic. They showcase larger shifts in IHL following technological, doctrinal and sociological developments. Drawing from a variety of perspectives, the goal is to shed light on the implications of these prominent, yet largely unquestioned, expert processes. Already their raison d’être of clarifying the law for practical purposes while only reflecting the law as it exists, is based on a false assumption: international law can hardly be restated without additions or modifications. This book will explain why the

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\(^1\) The alternative term law of armed conflict is often associated with a traditional understanding of the laws of war, IHL with a modern approach. Generally, IHL appears more common among continental Europeans and law of armed conflict among Anglo-Americans. It boils down to a matter of taste and a question of which aspect of the law one wishes to emphasize. See also Schäfer, ‘History of Division(s)’ in Baade et al. (eds), IHL in Areas of Limited Statehood (Nomos 2018) 43–58, 46–8.

\(^2\) Boothby, Conflict Law (Asser 2014) 91; cf. Ratner, ‘Sources of IHL and ICL’ in Besson and d’Aspremont (eds), Sources of International Law (Oxford University Press 2017) 912–35, 919.
expert manuals are nonetheless often taken as the law itself. Unlike formal law, however, such informal arguable restatements of it do not allow for discerning those responsible and ensuring accountability for the exercised authority.

As expert manuals have spread in the practice of international law, the *HPCR AMW Manual* was also in the supervisor’s bookshelf. In 2003, 37 so-called experts had been asked to provide an ‘accurate mirror-image’ of international law applicable to air and missile warfare. Existing law was to be ‘presented with no attempt to conceal any blemishes or inadequacies’. Truly knowing what the law is would allow the illumination of a potential need for developing IHL in this area. If the mirror that the expert process was, showed the law to be inadequate, law-makers could react and adjust it accordingly. Eventually, after six years, the 37 experts had produced 301 pages with 175 rules and accompanying commentaries published as the *HPCR AMW Manual*. The presented state of the law must have pleased the responsible law-makers as there is still no new international treaty pertaining to aerial or drone warfare.

In 2005, the International Committee of the Red Cross (ICRC) published its *Customary IHL Study*. The authors claim to have produced a ‘photograph’ of existing customary law and the *Study* has been compared to a still life picturing the customary rules applicable to armed conflict. This book objects to the notion of mirroring or photographing international law because mirror-images and photographs presuppose a fixed object and tools to duplicate or depict it. After all, law is, however, a normative construct, which, at least in the case of customary international law, is nowhere physically visible. How far, then, are expert processes capable of ‘accurately articulat[ing] customary international law’, as its authors are claiming?

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3 *HPCR AMW Manual* 2.
4 Ibid.
7 Sandoz speaks of a ‘still photography’, *Customary IHL Study* xxiii.
Accurate or not, these expert works on various aspects of IHL are omnipresent and widely used. When, in 2010, the so-called Gaza Freedom Flotilla invoked humanitarian purposes to break through the Israeli naval blockade of the Gaza strip, the *San Remo Manual on Naval War* was the primary reference point for the legal assessments put forward by all sorts of actors. In the fierce controversy around the legality of the blockade and the Israeli operation enforcing it, the Israeli government justified its action as legal under international law with reference to the *San Remo Manual on Naval War* and both the Turkish and the Israeli commissions of inquiry applied the manual as reflective of international law without further own assessments.

Various other actors have frequently turned to expert manuals in diverse settings as well. In judicial proceedings, expert work has been a welcome determinant of the applicable law. Judges at the International Criminal Tribunal for the former Yugoslavia (ICTY) readily referred to the *Customary IHL Study* for the existence and content of customary rules. On the domestic level, the Israeli High Court of Justice used the *Customary IHL Study* to establish a customary status of the rule codified in Article 51(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949 (AP I) despite fierce resistance of the Israeli government, which had argued that, as a deliberate non-signatory, it would not be bound by any such rule. States such as Germany and Denmark

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14 Turkel Commission [Israel], *Report – Part One* para. 33.


16 High Court of Justice [Israel], *Public Committee against Torture in Israel et al. v Government of Israel et al.* (Judgment of 14 December 2006), ‘Targeted Killings’, HCJ 769/02, para. 30.

17 Ibid. para. 12. The argument was that the customary rule would not contain the treaty clause ‘for such time’ limiting the temporal scope of targetability, see below 2.5.2.
have incorporated the notion of a *continuous combatant function*, developed in an ICRC expert process to bridge the dichotomy of combatants and civilians,\(^\text{18}\) into their updated military manuals.\(^\text{19}\)

Not treaties, case-law or treatises, but expert manuals have become central in IHL. Their black-letter rules resembling an international treaty and accompanying commentaries provide a handy, allegedly authoritative\(^\text{20}\) instruction on contentious legal questions. Expert processes have in many respects replaced diplomatic state conferences. There have not been new treaties or amendments to existing treaties on specific issues in non-international armed conflicts or drone warfare. Even modest propositions for basic informal compliance mechanisms are not endorsed sufficiently in the state community to become binding law.\(^\text{21}\) Though ‘state-driven’ processes are publicly praised as the way to go,\(^\text{22}\) states emphasize that it is important not to make premature commitments.\(^\text{23}\)

\(^{18}\) See Recommendations II, VII and X of the *Interpretive Guidance*.


\(^{21}\) An example is the Swiss/ICRC initiative for strengthening compliance with international humanitarian law, see www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm (accessed 9 February 2020), and in particular the background document in preparation of the fourth meeting of all states available at the same site.


\(^{23}\) Just consider the debate on lethal autonomous weapons systems in the framework of the Convention on Certain Conventional Weapons (CCW). The preliminary Meetings of Experts on Lethal Autonomous Weapons Systems (LAWS) showed the cautious approach on the side of many states, particularly the statements of Israel on 11 April 2016, Japan on 13 May 2014, Korea on 13 May 2014 and 13 April 2015 and of
Although states concur that IHL needs to be strengthened with regard to the treatment of detainees in non-international armed conflict, they categorically ruled to draft new rules. For a lack of political will to this end states emphasized the decisive importance of the already existing rules and decided to work on something non-legally binding in a deliberately ‘non-politicized’ manner. As a consequence of states not discussing and negotiating new rules, expert processes are flourishing instead and addressing pressing – or sometimes not-so-pressing – issues.

So-called cyber warfare is a case in point: during the Russo-Georgian war in 2008, cyber operations targeted state and private computer networks in Georgia. At that time, there was no treaty or document specifically addressing cyber operations under IHL. Today, there is still no treaty. Yet, the 2013 *Tallinn Manual on Cyber Warfare*, expanded by the 2017 *Tallinn Manual 2.0 on Cyber Operations*, despite not being binding, now comprehensively address the relevant legal cyber warfare issues and allow the appraisal of whether similar incidents today would be subject to IHL. The next manuals are already under way: in the MILAMOS and *Woomera Manual* projects, experts are addressing armed operations in outer space. Have experts, hence, taken over pushing the law ahead?
1.2 DEFINITION OF EXPERT MANUALS

This book addresses expert processes in IHL today.

An expert process is a deliberative process of experts participating in individual capacity, which produces a non-binding document containing a set of rules and commentary that the authors regard as reflecting binding law.30

Expert manuals, on the one hand, are not legally binding themselves, but, on the other hand, stipulate that their content is. There is an inherent ambivalence and potential contradiction between non-binding form and binding content.

Their numbered collections of provisions resemble international treaties, notably their written form,31 but do not enjoy their formal ratification. Expert processes also do not conclude in treaty drafts or other proposals of how the law should be. Their expert manuals are final. Their collective effort resulting in a consensual outcome distinguishes them from ordinary scholarship.32 Even multi-authored commentaries and handbooks do not share this collective element and are actually specific sorts of edited volumes.33

Expert manuals do not compare to most forms of so-called soft law either.34 In particular, expert manuals differ from deeds of commitment in which stakeholders reiterate their existing obligations and pledge to comply with them. Such commitments are traditionally known from the field of human rights to improve business conduct.35 More recently, deeds of commitments have been

30 The definition proposed by Partington, ‘Manuals’ in MPEPIL (August 2016) para. 3 is based on the undefined notion of a restatement and misses the importance of the collective element. See also Boothby, Conflict Law 65–6.

31 See the definition in Article 2(1)(a) VCLT.


33 Boothby, Conflict Law 66.


used to incentivize the behavior of non-state armed groups. In contrast, expert manuals are premised on experts’ independence and their participation in a personal capacity. Their involvement can, therefore, not be considered an endorsement or commitment by any entity.

Finally, the crucial ambition of expert groups is to restate existing law in a practical manner that can be used by those who have to apply the law. Expert processes result not simply in a report containing legal arguments, but in a comprehensive and comprehensible presentation of the law in a particular area. This is known in the domestic sphere from the tradition of restatements in the United States. The expert groups allude to this and introduce their manuals as rather technical, purely legal accounts of where the law stands. This approach forms the base for their objective to be of practical use, not least as indicated by the regularly used term manual. Though not all expert processes conclude in a product titled ‘manual’ – it is, hence, not a defining criterion – it illustrates that the purpose is to provide instructions on how to act in compliance with IHL.

1.3 NO JUSTIFICATION IN HISTORY

Expert manuals are not an invention of our times. The work of experts is not novel – neither to IHL, nor to international law generally. Eminent modern
predecessors in IHL date back to the second half of the nineteenth century.\textsuperscript{43} Indeed, recent manuals situate themselves – it is argued here: unjustifiably – in the immediate tradition of the manuals of the turn of the nineteenth to the twentieth century. The \textit{San Remo Manual on Naval War}, for instance, sought to update the 1913 \textit{Oxford Manual on Naval War} of the Institut de Droit International (IDI),\textsuperscript{44} and the \textit{HPCR AMW Manual}, the 1923 \textit{Hague Rules of Air Warfare}, written by a state-installed Commission of Jurists.\textsuperscript{45} Even the \textit{Tallinn Manuals} on cyber warfare imagine themselves to be in the ‘footsteps of [these] earlier efforts’.\textsuperscript{46} In general, expert groups claim that there would be nothing new or innovative in their work – neither as regards its content\textsuperscript{47} nor its form.\textsuperscript{48}

Closer comparison, however, shows that today’s experts are unjustified in situating themselves in the tradition of the early IHL manuals drafted about a century ago. While there certainly are parallels in their appearances and significant overlap in material scope, the circumstances have changed and the relationship of the expert manuals vis-à-vis the law itself is crucially different today. It is not the sheer amount of expert manuals today that calls for a scholarly study, but their particular characteristics. This book is motivated not by the quantitative – although the recent flood seems unique in history – but the qualitative differences.

From providing drafts for treaties (1.3.1), experts have turned to accounting for existing law (1.3.2). The early manuals pronounced ‘certain principles of justice which guide the public conscience’,\textsuperscript{49} but were not yet reflected in international law. Today’s manuals, in contrast, limit themselves to rules of law and exclude anything that could be considered ‘\textit{lex ferenda}, best practice, or

\textsuperscript{43} Scholarship generally considers the Lieber Code, General Order No. 100 (24 April 1863) as the first codification of the modern IHL, Alexander, ‘History of IHL’ (2015) 26 EJIL 109, 112. The first international manual prepared by experts is the 1880 \textit{Oxford Manual on War on Land}.
\textsuperscript{44} \textit{San Remo Manual on Naval War}, introductory note, p. 5.
\textsuperscript{46} \textit{Tallinn Manual} at 1; \textit{Tallinn Manual} 2.0 at 1.
\textsuperscript{47} E.g. \textit{HPCR AMW Manual} 2; \textit{Tallinn Manual} at 5.
\textsuperscript{49} \textit{Oxford Manual on War on Land} preface.
preferred policy’.\textsuperscript{50} From engines in the codification era expert manuals have
turned into ends in themselves as a reaction to a halt in treaty-making.

1.3.1 The Original Oxford Manuals as Lex Ferenda in the Codification Era

Modern efforts to provide manuals on how to legally engage in warfare can be
traced back to the Lieber Code of 1863. Subsequently, the IDI moved forward
with its Oxford Manuals on land (1880) and naval warfare (1913). As influ-
ential as these manuals were, they were proposals of what the law should be.
As such, they were preludes to international treaties, written with the rationale
of providing a basis for successive state conferences to formally adopt new
rules. These manuals did not come with a claim to know what international law
demands from parties to a conflict.

Private and public efforts, expert manuals and international treaties stood in
a fruitful and cross-fertilizing exchange. The Lieber Code, written by the jurist
and philosopher Francis Lieber, was passed by US President Abraham Lincoln
as General Order No. 100 in 1863, the same year the Committee of Geneva
which later became the ICRC held its first conferences.\textsuperscript{51} Its 157 articles served
as the basis for the Declaration of Brussels (1864) which later facilitated the
drafting of the Hague Conventions II and IV in 1899 and 1907.\textsuperscript{52} In between,
the 1880 Oxford Manual on War on Land built upon the Brussels Declaration\textsuperscript{53}
and proved key for the development of IHL.\textsuperscript{54} Though the authors of the 1880
Oxford Manual on War on Land hesitated to call it a draft treaty,\textsuperscript{55} it practically
‘formed one of the groundworks’\textsuperscript{56} for the Hague Regulations adopted by
states in 1899 and 1907.\textsuperscript{57}

\textsuperscript{50} Tallinn Manual at 5; similarly Tallinn Manual 2.0 at 2–3.
\textsuperscript{51} Cavendish, ‘Red Cross Movement’ (2013) 63 History Today 8, 8.
\textsuperscript{52} Emanuelli, IHL (Bruylant 2009) 59.
\textsuperscript{53} The drafters of the 1880 Oxford Manual took direct recourse to the Brussels
Declaration in the preface.
\textsuperscript{54} Löhnig and Preisner, ‘Kriegsvölkerrecht’ in Löhnig et al. (eds), Kriegsvölkerrecht
(Rechtskultur 2014) 9–24, 11.
\textsuperscript{55} According to the manual’s preface, ‘[t]he Institute … does not propose an inter-
national treaty’.
\textsuperscript{56} G. Fitzmaurice, ‘Institute of International Law’ (1973) 138 RdC 203, 227, who
also provides a more general account of the Institute’s role in this regard.
\textsuperscript{57} UN Secretariat, ‘United Nations Documents Concerning Development and
Codification of International Law’ 144; Boothby, Conflict Law 92; E. Crawford, Enemy
(Oxford University Press 2015) 32; G. Fitzmaurice, ‘Institute of International Law
(1973) 138 RdC 203, 235; Macalister-Smith, ‘IDI’ in MPEPIL (February 2011) para.
20.
The experts drafting the 1880 *Oxford Manual* were aware of the attention the manual would attract and provided ‘statements of the reasons [for the rules], from which the text of a law may be easily secured when desired’, as the preface specifies. Similarly, the 1913 *Oxford Manual on Naval War* explicitly offered elements *de lege ferenda*. In the introductory paragraph, the IDI ‘declared itself in favour of firmly upholding its former Resolutions on the abolition of capture and of confiscation of enemy private property in naval warfare’, though acknowledging ‘that this principle is not yet accepted’.

After World War I had surpassed any treaty-making efforts and made new agreements impossible, states started a new initiative in 1922 and installed the Commission of Jurists to consider amendment of the laws of war to examine whether ‘existing rules of international law adequately cover new methods of … warfare’ and ‘[i]f not so, what changes in the existing rules ought to be adopted’.\(^{58}\) The members from six states, including technical and legal advisers to ensure the appropriate mix of idealism and pragmatism,\(^{59}\) did not consider themselves a diplomatic body.\(^{60}\) Despite the clear belief that their outcome, which has become known as the *1923 Hague Rules of Air Warfare*, did not yet reflect existing law,\(^{61}\) the Commission did not explicitly recommend the rules to be adopted in a multilateral convention. In light of the difficulties to reach a compromise within the Commission of Jurists,\(^{62}\) the final results remained ‘draft *Rules of Aerial Warfare*’\(^{63}\) without a claim to restate the current state of the law at their time.

These three projects have in common that they were pushing for legal development. The rules were *lex ferenda*, statements of what the law ought to be. These expert manuals were drafted during dynamic times in which public discourse was marked by the search for binding rules on warfare.\(^{64}\) After natural law had largely been replaced by positive law,\(^{65}\) largely unwritten


\(^{60}\) Cf. Moore, *International Law* 188.


\(^{63}\) Emanuelli, *IHL* 61.

\(^{64}\) Löhnig and Preisner, ‘Kriegsvölkerrecht’ in Löhnig et al. (eds) 11 make this point for the 1880 *Oxford Manual on War on Land*. Consider in this regard also Rodgers, ‘Aviation and Radio’ (1923) 17 AJIL 629, 630. The preface of the *Oxford Manual on War on Land* likewise refers to public demands.

positive law was successively being transformed into codified positive law.\textsuperscript{66} Treaty-making was widely favored\textsuperscript{67} and expert manuals provided support under the premise that existing legal rules did not provide the necessary guidance to conduct warfare.\textsuperscript{68}

Of course, the experts did not freely invent the rules. In fact, they wanted to account for the accepted customs of war of their time.\textsuperscript{69} Providing a collection of what is deemed accepted practice in warfare, was meant to serve states by practical guidance on how to carry out military operations. In so far, contemporary expert manuals in IHL are akin. The early expert manuals, however, had the concurrent declared purpose of enabling states to legislate based upon the presented rules.\textsuperscript{70} Actual practices were included because it ‘would be well to fix and make [them] obligatory’.\textsuperscript{71}

1.3.2 Today’s Manuals Restating Lex Lata in Times of Deadlock in Treaty-Making

The circumstances of expert manuals are fundamentally different today. There is a widespread deadlock in multilateral treaty-making.\textsuperscript{72} Expert processes are not trying to overcome this stagnation in IHL by supplying draft treaties to states.\textsuperscript{73} Quite to the contrary, expert groups are seeking to restate the law that already exists. Expert groups have arranged themselves with the state of IHL. Today’s expert manuals are about reinforcing the existing legal regime, not working toward its formal amendment.\textsuperscript{74}

\begin{thebibliography}{9}
\bibitem{67} Just consider the solemn conclusion of Oppenheim, ‘Science’ (1908) 2 AJIL 313, 357.
\bibitem{68} Dissemination, which requires some form of writing, has always been a key concern in IHL; see already \textit{Oxford Manual on War on Land} preface, as well as the mandate of the ICRC, particularly Article 4 ICRC Statutes.
\bibitem{69} \textit{Oxford Manual on War on Land} preface.
\bibitem{70} Ibid.
\bibitem{71} Ibid.
\bibitem{72} Pauwelyn et al., ‘Shackles’ (2014) 25 EJIL 733, 734–8.
\bibitem{73} Henckaerts, ‘ICRC and CIHL’ in Geiß et al. (eds) 83 recently observed with regard to the ICRC that ‘[f]or the major part of its 150-year existence it is best known for its efforts in preparing for the development of new treaty law’. This is currently not the case.
\bibitem{74} The reader of Boothby, \textit{Conflict Law} 92 wonders how, after having traced the origins of treaty rules in the early expert manuals as described above, he puts today’s expert manuals in the same tradition.
\end{thebibliography}
of expert processes is that the applicability of an existing set of legal rules is unjustifiably being questioned and requires reaffirmation. The necessity of expert processes no longer comes from states’ need of assistance in how to draft new rules, but from the impression that the already existing, arguably sufficient rules are not understood properly.

The 1994 San Remo Manual on Naval War commenced the era of today’s expert manuals in IHL as a ‘contemporary restatement’. It was ‘considered necessary because of developments in the law … which for the most part ha[d] not been incorporated into … treaty law’. This approach has more recently been taken into the realm of cyber warfare: the drafters of the Tallinn Manuals worked on the premise that ‘cyber operations [do not] exist in a normative void’ and international law applies to them, the task of the expert group being to ‘determine how such law applied, and to identify any cyber-unique aspects thereof’. The Tallinn Manuals would be no place for rules without a legal basis in existing international law.

Today’s manuals claim simply to reflect existing rules that do not need further formal adoption. The HPCR Air and Missile Warfare Manual, for example, was born out of the so-called Alabama Process in which states sought to elucidate the adequateness of existing law and the potential need for new international rules on air and missile warfare. The HPCR Manual itself was not supposed to form the basis for a new international treaty – quite to the contrary, the experts were mandated simply to restate the existing rules in a conservative and technical manner that could stand for itself. In the words of its authors, ‘the HPCR Manual must not be confused with a draft treaty, prepared as the ground-work for a future diplomatic conference’.

The deadlock in international treaty-making is not ubiquitous. Some branches of international law have been witnessing a growth of treaties in the past decades, such as investment law as well as trade law and its megaregionalists – though there certainly is increasing backlash against free trade and

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75 See HPCR AMW Manual 1; Interpretive Guidance 11–12; Tallinn Manual at 5.
77 San Remo Manual on Naval War 5.
78 Ibid.
79 Tallinn Manual at 5; Tallinn Manual 2.0 at 3.
81 This is so because, in the experts’ view, their writings are informative, not performative, cf. Meder, Ius non scriptum (Siebeck 2009) 37–8.
83 HPCR AMW Manual 1.
investment regimes as well. Even in the area of armed conflict some legal aspects have been codified in international treaties, weapons law being a case in point. It is difficult to speculate about the underlying reasons and it is also beyond the scope of this book. For the purpose of the present inquiry it is necessary and sufficient to note that weapons law was codified recently – without an expert process providing a draft and without expert manuals restating and interpreting those treaties later. Today, unlike at the turn of the nineteenth to twentieth centuries, on a legal matter relating to armed conflict there tends to be either an expert restatement or formal development in a treaty rather than a subsequence of theirs.

It could be argued that, now and then, there is a perception of international law not providing the rules necessary to sufficiently constrain the conduct of warfare and protect those who deserve it. Yet, the fundamental difference is that expert groups used to share this perception and provided the early expert manuals to illustrate ways how the existing rules could be supplemented with additional treaty provisions. In contrast, the contemporary impetus of expert processes is to rebut such an insufficiency claim. The answer expert manuals supply today is rather that the already existing rules actually suffice. Instead of pointing to areas where new rules are needed and proposing such rules, the message nowadays is that existing rules satisfactorily apply to the phenomena requiring regulation by IHL – at least, by way of interpretation.

1.3.3 More Than an Auxiliary Service for States

One could object to the present narrative by arguing that in both instances, now and then, the purpose of expert processes was and is to assist states. Indeed, expert manuals today are marketed as a service for states by providing information on what law demands and how it can be applied and complied with in battlefield practice. Such an idea of service is obvious when experts supply drafts for state conferences. In both cases, expert groups need their products to get accepted by states. States and other potentially law-making

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87 The ongoing MILAMOS project is announced as a ‘signpost to States’, www.mcgill.ca/milamos/about (accessed 9 February 2020).

88 This is a general characteristic of expertise, cf. Stehr and Grundmann, Experts 39–40.
and law-applying bodies must be convinced. Are all manuals, hence, not that distinct after all?

It is submitted that the nature of these relationships of persuasion varies significantly: inducing someone politically to create certain rules is different from convincing him with legal arguments that the chosen legal view is the, arguably only, correct one. Expert groups differ in how they relate to states: the earlier expert manuals express subordination by offering drafts or collecting practice without any claim to legal bindingness. Now, in contrast, expert groups are still servants in the sense of assistance, but they claim to know the law. Thus, the relation has changed to telling states what the law is.

Stating *lex lata* is very different from making proposals *de lege ferenda*. There is a clear and exclusive power of the law-maker to create rules as he deems fit. With a view to existing law, there is generally no privileged position of the creator when it comes to accounting for and interpreting it. The object comes into being and develops its own existence. Its creator does not have a monopoly, or even a privilege, on describing its state years later. Thus, evading the discipline of law-making which falls under the principally exclusive jurisdiction of states for the realm of *lex lata*, experts arguably level the playing field, potentially elevating themselves above states thanks to their claimed expertise.

### 1.4 A SUCCESSFUL POLITICAL PROJECT – CONDITIONS AND CONCERNS

The argument in this book is that changes in the political landscape in which IHL operates have invited this shift in the nature of expert work. In recent years, IHL has been marked by a triad of deadlock in treaty-making, public expectations that warfare *is* being regulated by law and changes in how wars are actually fought. Unlike in its early days, international law today is expected to provide wide-reaching regulation. In particular, there is a demand that law

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89 This is a central axiom of positivism, namely that the legal rule must be detached from its constitutive act and entity, cf. Ago, ‘Positive International Law’ (1957) 51 AJIL 691, 730–2; de Visscher, *Problèmes d’interprétation* (Pedone 1963) 55; Krawietz, *Positive Recht und Funktion* 69–70. See also Court of First Instance [European Union], *Artegodan and Others v Commission* (Judgment of 26 November 2002), T-74/00, para. 124; Bundesverfassungsgericht [Germany], Order of 17 December 2013, 1 BvL 5/08, 135 BVerfGE 1, para. 48. It has, however, been challenged in history, see on this Kästle-Lamparter, *Kommentare* (Siebeck 2016) 304–7.

90 The rule’s emancipation of the rule does not exclude that the creator changes it subsequently through his law-making powers.

91 For instance, then UN Secretary-General Ban Ki-Moon demanded that ‘armed drones, like any other weapon, should be subject to long-standing international
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regulates war.92 Today, the idea of humanity is much more present than in the early days of IHL.93 The original rationale of IHL was to introduce some minimum rationality into the heat of the battlefield.94 Punctually outlawing specific means and methods of warfare fulfilled this purpose.95 In contrast, pulling considerations of humanity to the forefront requires a legal regime that provides more than sporadic legal rules.96

At the same time, changes in warfare and in approaches to its legal regulation have set the traditional rules of armed conflict under pressure:97 treaty rules were drafted without possibly foreseeing those changes raising doubts whether they can still be applied effectively. This has called into question whether international law is able to unfold its normative force98 in times of
war. Nonetheless, the specific political momentum necessary for international treaty-making, particularly in IHL, has not been in sight. This has led, inter alia, to a reshaping of the relationship between international humanitarian and human rights law. The absolute idea of IHL replacing all other regimes as the lex specialis in times of armed conflict can hardly be sustained today; instead, more nuanced concepts examine whether there is a rule of IHL governing the specific question. These are not only doctrinal questions of conflict of laws, but part of a struggle between legal regimes and their underlying values and structures.

1.4.1 A Backward-Looking Political Project

Expert manuals are a political project in a struggle over influence, relevance and normative power. They consolidate the legal field and thereby perpetuate the original foundations of IHL. A presentation of IHL as addressing all sorts of new means and methods of warfare satisfies demands that armed


103 On the notion of ‘field’ with regard to international humanitarian law, see Mégrèt, ‘International Humanitarian Lawyers’ in Werner et al. (eds), International Lawyers (Cambridge University Press 2017) 265–96, 269–72, who founds it in Bourdieu’s work.
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Conflicts do not take place in a legal vacuum. Expert processes counter challenges that the existing regime would not be able to normatively capture actual conduct of warfare today and in the future. They arguably prove that existing IHL applies equally to conventionally known and new forms, at least by way of interpretation de lege artis.

The answer of expert groups comforts: IHL as it exists suffices. Notably, not only the ICRC is responding to increased humanitarian expectations, but also the other factions consisting more of military lawyers. As their task is regularly to identify any need for new rules, it is a clear statement that no expert group has flagged a gap in the law. A technical restatement of IHL governing cyber warfare producing 76 rules with commentaries sends the message that the law is already quite comprehensive and dense. This way, IHL can remain the dominant legal field through which to conduct and assess warfare which also ensures that the public discourse takes IHL as its point of reference.

The form of an expert manual is a suitable instrument to make the otherwise unwritten rules of customary international law and the uncodified interpreta-

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104 The term ‘legal vacuum’ is frequently used as regards new means of warfare or new domains altogether, such as cyber space, e.g. Demeyere, ‘Missile Warfare’ in MPEPIL (March 2011) para. 5; Geiß, ‘Cyber Warfare’ (2013) 89 International Legal Studies 627, 631; ICRC, ‘No legal vacuum in cyber space’, interview with Droge, 16 August 2011, www.icrc.org/eng/resources/documents/interview/2011/cyber-warfare-interview-2011-08-16.htm (accessed 9 February 2020); Wollag, ‘Cyber Warfare’ in MPEPIL (August 2015) para. 10. This idea is also reflected in the expert manuals, see e.g. Tallinn Manual at 5.


107 Seventy-six of the Tallinn Manual’s 95 rules address IHL.


tions and applications of treaty rules visible.\textsuperscript{110} Absent amendments in treaty law and an active judiciary, people turn to what groups of legal experts have said that the law is. In a sense, the scope of applicable IHL is turned into physical fact.\textsuperscript{111} Denials or rebuttals of this physical fact are preempted by the label of a restatement: if the content is just a ‘mirror-image’\textsuperscript{112} of existing IHL, dissent is limited. Reflecting the collective expertise of the field’s leading individuals makes objection particularly difficult. Short of formal law-making power, expert groups need to rely on such a purely cognitive concept of their work.\textsuperscript{113} In essence, by way of cognition expert groups claim to produce facts that cannot be rebutted.

As existing IHL arguably does not require amendments, its rules, and particularly its foundational legislative choices made some decades to more than a century ago, are passed on into contemporary international law. Every legal regime has some underlying values and structures emanating from the foundational decisions made at its creation.\textsuperscript{114} In case of IHL, this includes seminal decisions, such as the restriction of the combatant privilege to state forces\textsuperscript{115} and a rather unrestricted\textsuperscript{116} right to kill non-civilians during armed conflict.\textsuperscript{117} The same political choices would be hardly made today were IHL to be created \textit{de novo}.\textsuperscript{118} Expert processes keep these structural decisions in place and are in this sense backward-looking.

\textsuperscript{111} Cf. Cryer, ‘Interpretive Guidance’ in Geiß et al. (eds) 137.
\textsuperscript{112} HPCR AMW Manual 2.
\textsuperscript{113} Implicitly, expert groups rely on an understanding of international law as a proper science of finding the truth which is the law as it exists, cf. Kammerhofer, ‘Hans Kelsen’ in d’Aspremont and Kammerhofer (eds), Positivism (Cambridge University Press 2014) 81–113, 85.
\textsuperscript{114} In case of IHL, this includes seminal decisions, such as the restriction of the combatant privilege to state forces and a rather unrestricted right to kill non-civilians during armed conflict. The same political choices would be hardly made today were IHL to be created \textit{de novo}.
\textsuperscript{115} Article 43(2) AP I.
\textsuperscript{116} On a contentious restriction, see Goodman, ‘Kill or Capture’ (2013) 24 EJIL 819.
\textsuperscript{117} Gasser and Dörmann, ‘Protection’ in Fleck (ed.), Handbook of IHL (Oxford University Press 2013) 231–320, 232.
\textsuperscript{118} For a contemporary proposal of how the combatant privilege could be extended to non-state actors, see Melzer, ‘Protection’ in Cassese (ed.), Utopia (Oxford University Press 2012) 508–18, 515–18. With regard to the structure of international law generally, see Weller, ‘Constitutional Order’ in Armstrong (ed.), International Law (Routledge 2009) 179–94, in particular 193.
1.4.2 Inherent Contradictions

The phenomenon of expert processes in IHL is one full of contradictions.\textsuperscript{119} IHL itself is already founded on a paradoxical idea,\textsuperscript{120} namely that of regulating the irregular:\textsuperscript{121} law, which is order,\textsuperscript{122} is applied to the extraordinary state of war. The expert groups carry this inherent tension much further by translating specific prohibitions into a legal system that addresses all aspects of all forms of warfare. Armed conflict has largely been stripped of its extraordinary nature and made subject to legal regulation like any other matter of international concern.\textsuperscript{123} Presenting IHL as a fairly comprehensive regulation of armed conflict, however, stands in stark contrast to this field’s original concept of a limited set of basic prohibitions\textsuperscript{124} in the heat of chaos.

1.4.2.1 Finding practical guidance in a mirror

Expert processes are born out of the contradictory ambition to account for existing law solely, but provide practical guidance simultaneously. A manual, however, that effectively wants to be of practical use necessarily has to go beyond what is prescribed by law.\textsuperscript{125} Practical guidance can only be given in the concrete.\textsuperscript{126} Yet, international law, and IHL in particular, exist only in the fairly abstract.\textsuperscript{127} Their elusive claim that restating and interpreting the law \textit{de}

\begin{footnotesize}
\begin{enumerate}
\item D’Aspremont and de Hemptinne, \textit{Droit International Humanitaire} (Pedone 2012) 13.
\item This term is borrowed from E. Crawford, ‘Regulating the Irregular’ (2011) 18 U.C. Davis Journal of International Law and Policy 163.
\item Cf. already Aristotle, \textit{Politics} (first published around 350 B.C.) 266.
\item Cf. Kennedy, \textit{War and Law} 13 describes war as a ‘legal institution’.
\end{enumerate}
\end{footnotesize}
lege artis would produce their manuals is built on a wrong premise, namely the idea of being able to mirror-image concrete interpretations of existing law.\textsuperscript{128} Since IHL is found in vague treaty provisions as well as ‘notoriously imprecise’\textsuperscript{129} unwritten customary law and case-law is sparse at the same time, concrete interpretations are nowhere to be reproduced, but have to be produced in the first place.\textsuperscript{130}

In this regard it becomes most apparent why contemporary expert manuals cannot rely on the earlier manuals to justify their work. The early expert manuals in IHL followed a quite pragmatic approach: their authors took into account principles of justice and public conscience when ‘rendering a service to military men themselves’\textsuperscript{131} The reason for this handling was not only that IHL did not yet contain detailed provisions, but because the practical service stood at the forefront – without any claim to restate only existing law.

1.4.2.2 Privileged expertise to know universal positive law
Irrespective of their manuals’ substantive content, expert processes and underlying premises are largely at odds with contemporary beliefs of universal and codified international law based on sovereign equality.\textsuperscript{132} Today’s international law rests on a net of treaties; it is soaked with the idea of consensual law-making\textsuperscript{133} and the ideal of international treaties.\textsuperscript{134} The very idea of positivism and positive law is closely linked to states positing\textsuperscript{135} it in treaties by virtue of their sovereign equality.\textsuperscript{136} Codifying international law in multilateral

\textsuperscript{128} This will be addressed in the methodological sections below, particularly 4.1.1. Suffice it for now to stick to the metaphor of a mirror and to point out that the image it makes visible depends on the viewer, von Jhering, \textit{Geist des Rechts} 24–5.

\textsuperscript{129} Abdul G. Koroma in his foreword to the \textit{Customary IHL Study} xviii.

\textsuperscript{130} See Stehr and Grundmann, \textit{Experts} 12.

\textsuperscript{131} \textit{Oxford Manual on War on Land}, preface.


\textsuperscript{133} Etymologically, \textit{positive} stems from the past participle of the Latin word \textit{ponere} meaning to put or place.

conventions was a sign of progress and a promise for peace and cooperation.\textsuperscript{137} Scholarship could assist punctually in their understanding and systematize their interplay. Indeed, the emergence of scholarly commentaries as an interpretive aid is a response to the codification of law.\textsuperscript{138} Yet, a need for private actors to restate for states the law itself goes against this premise of a sovereign equality of states as the cornerstone of the codification era.\textsuperscript{139} Such an idea of exclusive expertise does not correspond to the idea of universal law.\textsuperscript{140} International law today has incorporated a certain claim to universality,\textsuperscript{141} whereby global rules apply to all states and all states have created them. This is the community of sovereign equal states.

There were, of course, times in the history of international law when private individuals played crucial roles in forming the law. Great thinkers, such as Hugo Grotius,\textsuperscript{142} took up the enterprise of writing down the laws of that time.\textsuperscript{143} Oppenheim even asserted that ‘writers on international law … have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not’.\textsuperscript{144} This appraisal of law-identification by private individuals, however, was made in 1908. Singular scholars and treatises could exercise such influence when international law was largely unwritten law, founded in custom or even natural law, as for Grotius.\textsuperscript{145} Those authors pushed and framed the law governing international relations, which was primarily a matter of inter-state diplomacy.\textsuperscript{146} The times of a European international law, a \textit{jus publicum europaeum},\textsuperscript{147} made for and by European states are past. The eminence of natural law and only some few jurists being able to identify it\textsuperscript{148} has seen its decay as well. Universal, consensual international law becomes most apparent in the form of international treaties. An exclusive group of

\begin{thebibliography}{99}
\bibitem{note137} This was the underlying theme of the codification project as reflected in the references in notes 65–6 above.
\bibitem{note138} Kästle-Lamparter, \textit{Kommentare} 293–6.
\bibitem{note139} Macalister-Smith, ‘IDI’ in MPEPIL para. 20 makes this point already for IDI’s role in the interwar period; cf. Bothe, ‘CIHL’ (2005) 8 YbIHL 143, 144.
\bibitem{note142} The ‘father of international law’, Preiser, ‘History to 1648’ in MPEPIL (August 2008) para. 80.
\bibitem{note143} Keene, ‘Grotius’ in Armstrong (ed.) 129–31; Preiser, ‘History to 1648’ in MPEPIL paras. 79–81.
\bibitem{note144} Oppenheim, ‘Science’ (1908) 2 AJIL 313, 315.
\bibitem{note145} Lachenmann, ‘Positivism’ in MPEPIL para. 28.
\bibitem{note146} Koskenniemi, ‘Nineteenth Century’ in Armstrong (ed.) 146–7; Scupin, ‘History to World War I’ in MPEPIL (May 2011) para. 1.
\bibitem{note147} Kämmerer, ‘Colonialism’ in MPEPIL (March 2008) para. 16.
\bibitem{note148} Koskenniemi, ‘Nineteenth Century’ in Armstrong (ed.) 147.
\end{thebibliography}
experts issuing collections of otherwise unwritten law is at odds with this conception of international law based on sovereign equality.  

Moreover, the principle of equality, originally limited to equal formal power among sovereign states, has increasingly been developed into maxims of participatory law-making. In fact, the traditional values and structures of IHL contradict many contemporary standards in international law, such as the principles of universality and participative law-making. Neither does an exclusive privilege of specific experts correspond to these modern understandings. While international law is witnessing a growth of participants in law-making processes, expert groups in IHL appear as a step back into ancient times when a handful of privileged jurists steered international law’s development.

1.4.3 Simply Scholarship?

If the contemporary expert manuals in IHL are not the successors of the earlier manuals, particularly the 1880 and 1913 Oxford Manuals, can they not simply be considered scholarship? It could be the envisaged role for scholarship to structure international law and give meaning to it as a legal system. Indeed, Article 38(1)(d) ICJ Statute provides for academic writings to be used to determine rules of international law. This provision pays tribute to scholarship having always been there and figuring prominently in international law. Today’s specialized, arguably fragmented international legal world may just breed experts and require their efforts to be joined in group processes because no individual can handle the complexity of contemporary legal questions alone.

Indeed, scholarship has different functions. One of these functions is to comment on the law and improve its doctrinal understanding. Such scholarship does not necessarily seek to lay the ground for state conferences and does not

149 In general, positivism has marginalized the role of scientific law, Payandeh, Judikative Rechtserzeugung (Siebeck 2017) 65–9.
152 HPCR AMW Manual 2.
153 von Bernstorff, ‘Cooling Medium’ (2014) 25 EJIL 977, 990 distinguishes between first order scholarship which ‘help[s] the legal system to run smoothly by supporting the various actors (plaintiffs, defendants, judges)’ and second order scholarship which ‘reflects on the law and its societal context’.
Introduction

always aim to make its way into formal law. In so far, expert manuals do not differ categorically. Nevertheless, there are differences in how they relate to existing international law. Conventional doctrinal legal scholarship comments on the law and its practice; it stands next to it, mingles sometimes with it, but keeps a distance between formally existing law and itself as a scholarly comment on it. Expert groups, in contrast, implicitly put their products in place of the law: they claim to solely restate the law as it stands. The content of their manuals is – arguably – the law, at least its mirror. In light of unwritten customary and indeterminate treaty rules, expert processes regularly not only serve to comment on those, but write the rules themselves in the first place.

1.5 THE PRESENT INQUIRY

This book strives to provide a thorough understanding of the phenomenon of expert processes in contemporary IHL. The goal is eventually to allow for an evaluation from a normative perspective, for instance as to their legitimacy, which itself, however, is beyond the scope of the book. Grasping the complexity of their prominence requires a process of discerning various layers which will also be reflected in the structure of the book.

First, expert processes are diverse, but also share specific characteristics that distinguish them from other non-binding work, such as fact-finding missions or scholarly handbooks (Chapter 2). Their common approach can be subjected to a legal critique (Chapters 3 and 4). The methodology of international law, in principle, allows for such work, but not in the way the expert groups carry it out. Their actual influence, despite the non-binding nature of their manuals and the – in some regards – deficient methodology, requires an explanation that a purely legal perspective cannot supply. It is the largely informal setting of IHL which opens space for expert processes. The expert groups fill a gap in the IHL community and exercise an ordering function in it (Chapters 5 and 6). Their perceived expertise vests them with the necessary authority. This leads to the ultimate question why states cede so much power to private expert groups (Chapter 7). In fact, it is generally rather a relationship of mutual interests, not one of dominance.

1.5.1 Situating the Book among Existing Scholarship

The issues this book engages with are new and old: expert processes in IHL as a phenomenon have not yet received adequate scholarly attention. At the same time, the book asks fundamental questions of interpretation and takes up recently proliferating inquiries into informal paths of law-making. The goal is to provide original research and analyses of the legal expert processes in IHL and embed them into a theoretically informed framework.
Expert processes have, of course, not gone unnoticed in academic literature. There have been special issues on the ICRC Interpretive Guidance\(^1\) and the Tallinn Manual on Cyber Warfare;\(^2\) scholars have praised\(^3\) or attacked\(^4\) them. Almost all these commentators\(^5\) engaged with the expert manuals on a doctrinal level focusing on whether the presented views were correct. Little has been written on the particular form of expert manuals.\(^6\) These authors too readily accepted the experts’ claim that the manuals would only restate the law as it is. In general, scholars in international law are not sufficiently questioning whether a restatement of lex lata solely is at all possible.\(^7\) Assertions to the end that restating the law would be a purely legal endeavor without a political dimension are too often condoned. It has even been deplored that an expert manual could ‘be caught up in policy quarrels’.\(^8\) William Boothby, a regular participant in the expert processes, concludes that ‘[i]t is difficult to see how a process [that only restates lex lata] can be the subject of legitimate criticism by anyone’.\(^9\)

\(^{154}\) The (2010) 42 NYUJILP dedicated its Issue 3 with five articles to it.

\(^{155}\) The (2012) 15 YbIHL dedicated its Part I with three chapters to it.


\(^{158}\) An exception is E. Crawford, Enemy 86–8, who supplemented her discussion of the Interpretive Guidance with some brief meta-reflections.

\(^{159}\) Boothby, Conflict Law 10, 65–95; Partington, ‘Manuals’ in MPEPIL.


\(^{162}\) Boothby, Conflict Law 91.
Only few scholars have taken a critical stance toward restatements and their role in international law. Santiago Villalpando has examined how informal codifications of the International Law Commission (ILC) have made their way into formal law through decisions of the ICJ.163 With regard to expert manuals in IHL, the most articulated articles are by Oliver Kessler and Wouter Werner164 as well as by Lianne Boer,165 though they are limited to the Tallinn Manual. Building upon their findings, the present book strives for an original account of the expert manuals and thereby draws from scholarship on related topics.

In this regard, some preliminary remarks are expedient concerning terminology and where this book is situated.166 It is based on what is often called a positivist concept of international law.167 Whether this is (still)168 ‘mainstream’169 or the theory of ‘dinosaurs’,170 is not decisive. The premise is that there is a division between law and non-law,171 and that there is some inherent value172 in making this binary distinction.173 This theory of international law is reflected

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166 They may be necessary in the view of some, self-evident in the eyes of others.
167 However, consider that ‘[t]he debate concerning legal positivism is characterized by notional uncertainties’ and ‘there is much dissent about what positivism signifies’, Lachenmann, ‘Positivism’ in MPEPIL paras. 1–2; on the differences between Hartian and Kelsenian positivism, see Kammerhofer, ‘Positivism’ in Orford and Hoffmann (eds), Theory of International Law (Oxford University Press 2016) 407–26. Nonetheless, it seems justified to refer to ‘the positivist explanation of international law’, Brunnée, ‘Consent’ in MPEPIL para. 20 and to consider positivism the ‘lingua franca’ of international lawyers, Ratner and Slaughter, ‘Methods’ (1999) 93 AJIL 291, 293.
170 Cf. Jacobs, ‘Genocide Case (part II)’, Spreading the Jam, 17 February 2015.
171 Lachenmann, ‘Positivism’ in MPEPIL para. 4.
172 Fundamentally, Fuller, Morality of Law (Yale 1964) 41–4 on what he terms the ‘inner morality of law’; see also Hart, Concept of Law 203–7. For Payandeh, Judikative Rechtserzeugung 137, bindingness is a conceptual necessity of law.
in Articles 38 ICJ Statute and 31–3 of the Vienna Convention on the Law of Treaties (VCLT). It is commonly called positivism and, for the purposes of this book, it means largely the same as formalism. Particularly the theoretical framework of Hans Kelsen and his reinvigoration today provide fruitful insights beyond a too simplistic understanding of legal positivism. With recourse to his concept of interpretation it can be shown what experts are in a position to do in legal terms and why their manuals are not law. Upholding this distinction is essential.

However, this purely legal perspective is too limited to account for the role of legal expert groups in the practice of IHL. The largely informal setting of IHL makes it necessary to look for alternative categories to law and non-law. Going beyond this dichotomy does not imply giving up law as an order in itself, but is instructive with regard to the informal processes. It

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174 Lachenmann, ‘Positivism’ in MPEPIL para. 4 views the ‘the critical separation of law as it is from law as it ought to be’ as the ‘lowest common denominator’ of the varieties of legal positivism.

175 Of course, positivism and formalism characterize different aspects: positivism stressing that law is only what is posited by certain actors, formalism emphasizing that law is only what can be identified according to certain criteria of form. However, this distinction is not important for the present inquiry; similarly, Ronen, ‘IHL’ in d’Aspremont and Kammerhofer (eds), *Positivism* (Cambridge University Press 2014) 475–97, 475; cf. Frankenberg, ‘Critical Theory’ in MPEPIL para. 19; Kammerhofer, ‘Positivism’ in Orford and Hoffmann (eds) 409–10.


has not gone unnoticed by legal commentators that acts without formal status have ‘normative ripples’.\textsuperscript{181} Foremost, the normative force of precedents has been examined,\textsuperscript{182} but scholars have also looked at the underlying dynamics of interpretive processes in international law more generally. Other disciplines are being used to account for effects that do not fit into the law/non-law dichotomy. In particular, interpretation and the evolution of meaning have been explained with recourse to literary studies, be it the work of Ludwig Wittgenstein\textsuperscript{183} or the \textit{linguistic turn} and the work of Stanley Fish.\textsuperscript{184} The community perspective is becoming increasingly popular among legal scholars, inspired by international relations literature on epistemic community.\textsuperscript{185} A way out of the constraints of formalism’s binary structure has been seen in the ‘continuum’\textsuperscript{186} of authority to account for the factual element in the normative order which is international law. Authority is neither limited by formal status nor does it equal power, allowing it to account for normativity.\textsuperscript{187} In particular, Ingo Venzke promoted the term \textit{semantic authority} in interna-


\textsuperscript{183} Venzke strongly draws from Wittgenstein’s idea that the meaning of language is created by its usage in his excellent monograph \textit{How Interpretation Makes International Law}.

\textsuperscript{184} See Fish, \textit{Is There a Text?} (Harvard 1980), in particular 167–73 where he developed the idea for the first time as part of his essay ‘Interpreting the Variorum’. The first thorough application to interpretation in international law was Johnstone, ‘Interpretation’ (1990–91) 12 MJIL 371. Today, this is a widely used concept, e.g. Waibel, ‘Communities’ in Bianchi et al. (eds) \textit{Interpretation} (Oxford University Press 2015) 147–65.


\textsuperscript{186} Karl, ‘Vertragsauslegung’ in Schreuer (ed.), \textit{Autorität} (Humblot 1979) 9–34, 27.

\textsuperscript{187} Indeed, the notion of an interpretive community has been criticized as a purely sociological concept without normativity, see Hernández, ‘International Legal Academic’ in d’Aspremont et al. (eds), \textit{International Law as a Profession} (Cambridge University Press 2017), 160–88, 165; Patterson, \textit{Law and Truth} (Oxford University Press 1996); Venzke, ‘Valid Argument’ (2014) 27 LJIL 811.
tional legal scholarship.\textsuperscript{188} Literature on interpretation\textsuperscript{189} and law-making\textsuperscript{190} in international law is drawing from other disciplines and sketching processes that are more complex and dynamic than positivism suggests.\textsuperscript{191} These strictly informal elements are increasingly considered essential to the theory of international law.\textsuperscript{192} Such a ‘relative normativity’\textsuperscript{193} has invited legal scholars to consider particular instances of informal phenomena and led to oxymorons,\textsuperscript{194} such as ‘soft law’ or ‘informal law-making’.\textsuperscript{195, 196} Indeed, whole projects, such as International Public Authority (or the Heidelberg Project)\textsuperscript{197} and Global Administrative Law,\textsuperscript{198} are built around the idea that positive law is only part of the picture. Much of this theoretical groundwork can be employed in the informal setting of IHL without having to abandon the intrinsic value of an international order based on positivism.

Lastly, a more critical perspective will be taken to develop a better understanding of the power dynamics between the various actors and communities. In this regard, David Kennedy’s accounts of the IHL community are valuable.\textsuperscript{199} His emphasis that the ‘humanitarians’ and the military lawyers coalesce for the cause of IHL is instructive to view the current debate on the relationship of human rights and humanitarian law as an inter-communitarian struggle. Lastly, this book will offer a counter-narrative\textsuperscript{200} to the usual claim

\textsuperscript{188} Venzke, \textit{Interpretation} particularly 62–4.
\textsuperscript{190} Bradley (ed.), \textit{Custom’s Future} (Cambridge University Press 2016).
\textsuperscript{191} See Kästle-Lamparter, \textit{Kommentare}.
\textsuperscript{192} Hernández, ‘Interpretive Authority’ in Bianchi et al. (eds) \textit{Interpretation} (Oxford University Press 2015) 166–85, 183; for earlier accounts in this regard, see Fastenrath, \textit{Lücken} (Humblot 1991) 198; Karl, ‘Vertragsauslegung’ in Schreuer (ed.) 30.
\textsuperscript{193} Fastenrath, ‘Relative Normativity’ (1993) 4 EJIL 305.
\textsuperscript{195} Pauwelyn et al., \textit{Informal Lawmaking} (Oxford University Press 2012).
\textsuperscript{196} In fact, the present book will propose the term ‘informal formalization’, but more to highlight the contradictory claim and practice around expert restatements than to ascribe some legal status to it.
\textsuperscript{197} E.g. von Bogdandy et al. (eds), \textit{Public Authority} (Springer 2010).
\textsuperscript{200} Similarly, Corten, ‘Formalization and Deformalization’ in Beneyto and Kennedy (eds), \textit{New Approaches} (Asser 2012) 251–72.
of an overall deormalization of international law. The case of restatements is peculiar in this regard because it keeps the image of formal law alive. However, the effects are similar: while putting formal law at the forefront, expert groups actually amplify many of the concerns raised when formal processes are evaded.

1.5.2 Methodological Caveats

The described exercises of influence and power are difficult to prove empirically because they are informal and take place behind closed doors. A purely legal perspective can only capture formal legal acts – though law itself is not empirically verifiable. A conventional legal undertaking would be to think in legal sources: not the experts and their products, but their reception in the formal sphere would be the focus of scrutiny. The inquiry would be where expert manuals have made their way into formal law, such as international treaties, customary international law, case-law. This would also be in line with the image the experts themselves often try to transmit, namely a non-binding service for states.

The experts, however, have an impact that goes beyond mere proposals and their self-proclaimed function as a service provider to states and other formal law-makers. The focus must, therefore, shift to the experts themselves and on what drives them in their work. Positivism cannot explain this – not least because expert processes do not directly produce positive law. Yet, even employing instruments and concepts of other disciplines, some empirical difficulties persist. The role of expert groups does not always manifest itself in visible data that would wait out there to be collected. However, there are

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205 Cf. ILC, Conclusion 4(3) on the Identification of customary international law, UN Doc. A/73/10 para. 65; Conclusion 5(2) on Subsequent agreements and subsequent practice in relation to the interpretation of treaties, UN Doc. A/73/10 para. 51.

instances where expert manuals’ normative expansion surfaces in ways that are generally accepted as showing influence on the law, namely, where, above all, a court defers to an expert manual.

The aim here is to provide claims based on a theoretical framework and substantiated by practical examples and thereby to avoid the trap of ‘pop sociology’.\textsuperscript{207} The original domain of the lawyer is to distinguish law from non-law,\textsuperscript{208} but the gray area in between must not be left to scholars of international relations and sociology because they generally lack the sensitivity for law’s peculiar hybrid stance between an art and science.\textsuperscript{209}

\textsuperscript{207} Kammerhofer, ‘Scholars’ in Brölmann and Radi (eds) 319.
\textsuperscript{208} D’Aspremont, Epistemic Forces 61.