

Expert Laws of War: Restating and Making Law in Expert Processes

Anton O Petrov

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In *Expert Laws of War: Restating and Making Law in Expert Processes*, Anton O Petrov analyses the use of expert processes in International Humanitarian Law ('IHL') and argues that the use of processes such as expert manuals to 'clarify the law' is overstated.¹ IHL has long relied on and been moulded by the work of experts. This is because the unique and remote nature of armed conflict generally makes it more difficult for lawyers and courts to understand the intricacies and considerations of making decisions in times of armed conflict. This in turn creates the need for more practical sources of information usually derived from expert processes—defined as the 'deliberative process of experts participating in individual capacity [sic], which produces a non-binding document containing a set of rules and commentary that the authors regard as reflecting binding law'.

Petrov adopts a holistic approach, evaluating in detail the use of numerous manuals, studies and interpretive guides often relied on in IHL. In this book, Petrov also provides a comprehensive analysis of the strengths and shortcomings of relying on expert processes, including analysing its place in IHL and delving into the strength of the manuals as a source of law.

His analysis begins with consideration of the work of large expert institutions such as the International Law Commission, Institut de Droit International and International Law Association, and also covers specific manuals and guides often used in IHL. Although the work of such experts does not formally bind international actors,² Petrov recognises that expert processes still play a pivotal role on the ground in armed conflict, in government decisions and decisions of international criminal tribunals.

One concern Petrov raises about expert processes is that the use of these processes does not fit squarely within the 'methodology' of other international rules. While Petrov acknowledges the helpful purpose of expert manuals and studies in filling the gaps where international law is 'indeterminate' or 'uncertain', especially in the IHL field, he notes various drawbacks of these mechanisms, one of which is in striking a balance

¹ Anton O Petrov, *Expert Laws of War: Restating and Making Law in Expert Processes* (Edward Elgar Publishing, 1st ed, 2020). The eBook version is priced from £22/\$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

² Cf *Statute of the International Court of Justice* art 38(1)(a)–(c) which lists the primary sources of international law as 'international conventions', 'international custom', 'general principles of law recognized by civil nations'; cf *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 21(1).

between offering interpretation of international rules and applying these rules to specific situations.

Crucially, although Petrov recognises that expert manuals help to provide a uniform practical approach for interpreting rules of IHL, he posits that the basis of these manuals is flawed in relation to the way they rely on sources of international law and the means in which they interpret the rules. For example, in Chapter 3, Petrov argues that when coming up with rules in IHL, experts rely on both customary international law and treaty law.³ However, in doing so, they often omit to distinguish the basis of each source of law and the impact this has on the meaning and interpretation of the particular rule, demonstrating a flaw in the methodology of expert processes.⁴

Further, notwithstanding the gap-filling purpose of expert processes,⁵ Petrov argues that this purpose is not manifested in reality because these processes lack the normative validity and formality of judicial decisions and cannot be accepted as a codification of formal laws. Petrov builds on this analysis in Part 6.1.2 where he explains how the authority of expert manuals stems from the expertise of individuals. This means that such expert manuals lack the formality of other sources of IHL and therefore, should not be sufficient to bind actors in the IHL community. This viewpoint is consistent with theories of international law and should therefore be accepted. Expert manuals are by their very nature antithetical to the foundational principle of international law—state consent—and should therefore be secondary to formal sources.

The analysis in *Expert Laws of War* may benefit from a deeper consideration of the unique and more remote nature of IHL. Unlike other areas of international law such as international trade, the primary lawmakers and negotiators of traditional IHL rules (such as treaties and case law) are far removed from actual armed conflict. The abstract concept of war may therefore be better approached through the lens of experts in the field. Although Petrov acknowledges this at the beginning of Chapter 7 where he argues that expert groups should not be given such an ‘almighty image’,⁶ more credit should be given to the strength of expert manuals in explaining the law, in a way treaties and cases cannot.

Therefore, although the book provides deep insights into the use, authority and creation of expert processes, it would benefit from a juxtaposition of these expert manuals with the use of other sources of IHL. It may also be worth considering the prospect of giving expert processes greater credence or legitimacy by utilising expert processes in the creation of more

³ Petrov (n 1) 105.

⁴ Ibid 107.

⁵ Ibid 87.

⁶ Ibid 195.

traditional sources of IHL (such as the International Committee of the Red Cross' initiative in providing commentary to the *Geneva Conventions*).⁷ In this way, the practical information contained in the expert processes can fit more seamlessly into the administration of IHL and its rules.

Overall, Petrov's *Expert Laws of War* provides a fresh perspective and scrutiny of an otherwise routinely used tool in IHL. Petrov's conclusion that 'experts do not make the law' as their processes lack formal validity as a source of law, is well-supported.⁸ Even if it may be difficult to reduce the reliance of IHL actors on expert processes, in the least, this book serves as a reminder for individuals making decisions in the IHL sphere to reconsider or re-evaluate their use of expert manuals, or at least the weight given to these manuals.

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⁷ The ICRC Commentary is also often relied on by the international criminal tribunals, given the strength of the ICRC as an impartial humanitarian body prescribed by the *Geneva Conventions of 1949*; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3.

⁸ Petrov (n 1) 230.

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