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Book Reviews

Anton Orlinov Petrov. ***Expert Laws of War: Restating and Making Law in Expert Processes***. Cheltenham: Edward Elgar, 2020. Pp. 296. £90. ISBN: 9781789907582.

'Experts do not make law'. The opening of Anton Petrov's *Expert Laws of War* is brief but very informative: first, because of the paradox it entails. Recalling that experts do not make law suggests that some people may believe they do. And if people do, especially if they represent states, experts may indeed contribute to the formation of law. It is, therefore, not surprising to read that Petrov qualifies the opening of his book as both 'true' and 'misleading' (at 1). There is more to legal expertise than neutral restatements that can be accepted or rejected as one pleases, especially in the field of international humanitarian law. Second, the opening is informative because it underlines the importance of expert committees in international humanitarian law. After all, why would one bother to recall that experts do not make law if they only operate in the margins? It is exactly the central place occupied by experts that gives Petrov's book its bite and relevance. In the past decades, war and technology have evolved rapidly, as evidenced by the rise of drone warfare, hybrid warfare, new forms of intelligence gathering, cyber warfare and the (further) militarization of outer space. States across the world have picked up such trends and adapted their defence (and offence) strategies accordingly.

However, traditional international law-making has been lagging behind. In the field of cyber war, for example, no specific treaties have been concluded, case law is virtually absent and states have been reluctant to contribute to the development of specific rules of customary law. In order to ensure that novel forms of warfare do not operate in a legal vacuum, experts have been called in to restate and apply existing law to the phenomena at hand. Sometimes the point of such restatements has been to set in motion a process of treaty formation; in other instances, the aim may also have been to prevent burdensome and uncertain negotiations of new treaties. Petrov's book takes the reader on a tour across many of these expert reports, varying from the 1880 *Oxford Manual on the Laws of War on Land* to the 2009 International Committee of the Red Cross' *Guidance on Direct Participation in Hostilities* and the still ongoing project to draft a *Manual on International Law Applicable to Military Uses of Outer Space*.[1] Petrov argues

[1] L. Doswald-Beck (general editor), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995); Institut de Droit international, The Manual on the Laws of War on Land, adopted at Oxford, UK, on 9 September 1880 5 *Annuaire de l'Institut de Droit International* (1881–1882); N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), available at: https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf (last visited 25 May 2021); Program on Humanitarian Policy and Conflict Research at Harvard University, *HPRC Manual on International Law Applicable to Air and Missile Warfare* (2013); M. Schmitt (general editor), *Tallinn Manual on the International Law Applicable to Cyberwarfare* (2013); M. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Operations* (2nd ed., 2017).

that an important shift has occurred since the late 19th century: where the 1880 Oxford manual was most of all meant as groundwork for later treaties, contemporary manuals in the field of humanitarian law claim to be restatements or 'mirrors' of existing law. None of the reports discussed in the book may be new or unknown to the reader. However, seeing them placed (and briefly discussed) one after the other does give a sense of their omnipresence. It also reinforces the paradox that I mentioned earlier: while formally experts do not make law, it is difficult to make sense of the field of international humanitarian law without taking into account the multitude of restatements and applications of law by expert bodies. Their claim to authority, however, ultimately rests on the idea that they lack such authority and that they only restate rules that are legally valid already.

Petrov's book grew out of the paradoxes and omnipresence of expert restatements in international humanitarian law. He underlines both through a brief anecdote presented in the opening pages, where he informs the reader about his time as a clerk at the German Ministry of Foreign Affairs (at 1, 2). Upon entering the ministry, Petrov was struck by the prominent place of the *Tallinn Manual 2.0* on the desk of his supervisor.[2] The story does not really continue, but the idea presented to the reader is clear: expert reports make their way into policy circles, especially in fields where traditional, formal forms of law-making lag behind. They are taken up as placeholders for the real thing: specific treaty law, real-life applications of existing law by courts and states and general practices accepted as law. This spurred confusion and agitation in the author: why are expert products such as *Tallinn Manuals* often taken as the law itself? What does it mean for issues such as authority and accountability if states defer the articulation of the law to experts?

This brings me to the third way in which Petrov's opening is illustrative. To say that experts do not make law is hardly a neutral description. Just like restatements of expert committees always do more than just mirror existing law, Petrov's opening is more than a restatement of what we already know about the formal powers of expert committees. The opening reflects the critical attitude towards expert restatements running through the entire book. The book echoes not only some of the well-known critiques – concerning, for example, the composition of the groups of experts – but also the impossibility of neutrally restating the law or the lack of transparency. It also contains more detailed critiques of the content and approach adopted in the expert reports. The book takes issue with the methodology used in expert reports, as it conflates treaty law and customary law. It questions the use of similar methods of interpretation for both categories and argues that conclusions in expert reports are often not sufficiently based on state practice and *opinio iuris*.

The book also holds that expert reports sometimes prefer creativity over thoroughness and too often rely on teleological reasoning. In terms of narrative perspective, Petrov criticizes expert reports for writing as if the law were restated and applied by a court instead of sticking to the limited task of presenting scholarly knowledge. Personally, I particularly liked the part where Petrov zooms in on the way in which

[2] Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Operations*, *supra* note 1.

expert reports claim authority by referring to the possible future uses of the views contained therein. As Petrov concludes, expert groups 'found their expertise as the basis of their authority on the prospect of being received well' (at 187). Following this observation, he moves to the way in which the *Tallinn Manuals* refer to what the experts believe to be a likely reaction of states in the future. The discussion on the prohibition on the use of force as applied to cyber space, for example, moves beyond a restatement of existing law and into a presentation of factors that states are likely to take into account when they are confronted with a cyber attack. Similarly, the interpretation of neutrality in the cyber domain is partly derived from what the experts believe to be the unlikely response of states to an attack (at 188).

Let me turn to the fourth and final aspect illustrated by the opening sentence ('experts do not make law'). In fact, my fourth point is more of a re-turn, back to the paradoxical nature of expert restatements discussed earlier. This time, however, the paradox spills over into international legal scholarship more generally. Confronted with products such as the *Tallinn Manual*, international legal scholarship has responded in at least two ways. The more common and traditional approach is to assess the work of experts in terms of existing sources of international law. This could take the form of an inquiry into the formal status of expert reports as such – for example, comparing them to the 'teachings of the most highly qualified publicists of the various nations' – as mentioned in Article 38 of the Statute of the International Court of Justice (ICJ Statute).[3] While this framing of the *Tallinn Manuals* has been advocated by some – including the chair of the group of experts, Michael Schmitt – it does raise some critical questions. Is it possible for the manuals to be a neutral restatement of existing law and also to be a separate source of international law? Are the groups of experts indeed publicists from the various nations? Existing sources have also been used to assessing the content of the expert restatements: do they 'really' reflect international law as it is? Or do the expert restatements 'in fact' move beyond existing law in an attempt to progressively (or regressively) develop it? The other way in which scholars have tried to make sense of the rise of expert restatements is by turning to sociology, political science, philosophy and linguistics. The main question then is not whether expert restatements somehow fit existing sources of international law but, rather, how new understandings of international law manage or fail to get acceptance in practice. The outcomes of such inquiries could challenge legal doctrinal work that claims to work on positivistic assumptions. If the work of experts does not fit existing sources and is yet treated as authoritative, what does that mean for legal scholarship? Does 'positivism' mean following the will and practice of states, even if they go beyond existing sources? Or does it mean adherence to existing sources of international law, even if this means it is difficult to make legal sense of the actual practice of states?

Expert Laws of War echoes the two approaches that can be found in legal scholarship more generally. On the one hand, the book follows and defends a positivist understanding of international law, which holds that law is created by those who enjoy the formal legal powers to do so. Following Kelsen's pure theory, *Expert Laws of War* further maintains

[3] Statute of the International Court of Justice 1945, 33 UNTS 993.

the distinction between 'cognition' and 'acts of will' when it comes to legal interpretation. Absent formal law-making powers, Petrov holds, the role of expert committees is limited to 'cognition' – that is, they should only set out legally permissible interpretations in the abstract. The concrete application of law requires an act of will, or, as Petrov puts it, 'creativity', and is thus the prerogative of those who enjoy the formal power to do so. It remains a little unclear what such restatements of law in the abstract would look like though. How could a reader make sense of abstract legal propositions other than through imagining what they mean in more concrete circumstances?

As Charles Sanders Peirce has argued, the meaning of the concept can only be ascertained by considering the conceivable effects. This is indeed what happens in manuals such as the *Tallinn Manual*: the reader is presented with an endless set of hypotheticals, a series of imagined applications of the general rule involved. If one follows the positivistic tradition, such acts of imagination can only be treated as scholarly opinions, acts of will by people without formal legal powers. However, if that is all there is to it, why should we bother? The answer to this can be found in the other parts of *Expert Laws of War*, especially the parts where the book builds on very different academic traditions and foregrounds the idea of humanitarian law as a community of interpreters. It is here that expert committees, despite their possible methodological flaws, do matter. The image of humanitarian law as a community is far from 'pure': it is the messy practice where formal sources and stringent methods of interpretation are often bypassed; where policy-makers and judges may use expert restatements because they lack time and resources to conduct independent research into state practice; where chairs of expert committees lobby to get their products accepted as reflection of customary law; where 'authority' may flow from other sources than the ones mentioned in Article 38 of the ICJ Statute.

Of course, this does not mean that all the messiness should be accepted, just because this is how the world is apparently run. It remains even more important to assess critically how claims to authority are made, accepted and effectuated. This is what gives *Expert Laws of War* its critical bite: not so much the assessment of expert restatements as falling short of the criteria of positivism but, rather, the use of the very same criteria by experts to claim authority – the idea that 'experts do not make law' and, yet, once we look at the way in which law evolved in the community of humanitarian law, this statement is 'as true as it is misleading'.

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Jean Ho. ***State Responsibility for Breaches of Investment Contracts***. Cambridge: Cambridge University Press, 2018. Pp. 374. £95. ISBN: 9781108415842.

To take an abandoned, monumental topic, follow its trajectory and streamline it requires a certain skill – yet this is what Jean Ho succeeds in doing in her monograph