

Michael Byers. *International Law and the Arctic*. Cambridge: Cambridge University Press, 2013. Pp. 340. \$99. ISBN: 9781107042759.

Those who follow the newspapers and media in general are led to believe that the stakes are getting higher in the Arctic. Climate change is melting the sea ice and opening up new economic opportunities: oil, gas, moving fish stocks, and shorter navigational routes are among the benefits to be had by those who are bold enough to make a move. According to the media, China and other emerging economies are claiming their own piece of the Arctic. In the scramble among states for the riches of the Arctic, we sense a scenario that may even drive states to the point of military conflict. Yet, this scramble does not take place in a legal vacuum – there are plenty of legal rules that govern the behaviour of states and other actors in the region. Indeed, this is one of the salient points that Michael Byers makes in his book.

Byers is not alone in his endeavour. Academic research on the role of law and in particular international law in the Arctic has been growing in recent years, mainly for two reasons. First, climate change and economic globalization are opening up the Arctic to new economic activities, creating a demand for legal rules to ensure safety and order. Secondly, the media frenzy over an alleged great power game between the Arctic states has prompted scholars to take an interest in law and politics in the region.

Legal scholarship dealing with Arctic issues has grown substantially. When the Arctic Council's original *Arctic Human Development Report* (AHDR) was compiled in the 2002–2004 period,¹ it was difficult to find enough legal scholars to contribute to the chapter on law. Today, there is no shortage of contributors to the updated edition of the AHDR which is currently being finalized. New journals and periodicals have emerged, such as the *Yearbook of Polar Law* and the *Arctic Review on Law and Politics*, and new books on legal issues in the Arctic have been published.² Moreover, the Nordic Council of Ministers has funded two textbooks on polar law.³ Networks of legal scholars interested in polar and Arctic law issues have developed, among them a thematic network on Arctic law created by the University of the Arctic,⁴ and symposia have been held on polar law.

Michael Byers' book, *International Law and the Arctic*,⁵ is comprehensive, dealing with essentially all the international legal issues of importance in the Arctic. Byers' writing is approachable in style; he introduces the new issues informed by personal experiences, and writes in an engaging manner. Stylistically the book compares with some of the new popular approaches to events in the Arctic, in particular Charles Emmerson's *The Future History of the Arctic*.⁶ Yet, Byers' work is a piece of academic scholarship and is to my mind closest to the pioneering work by Erik Franckx⁷ and especially the book by Donald Rothwell, *International Law and the Polar Regions*,

¹ http://www.svs.is/ahdr/AHDR%20chapters/English%20version/AHDR_first%2012pages.pdf.

² See, e.g., T. Koivurova, C. Keskitalo, and N. Bankes (eds), *Climate Governance in the Arctic* (2009) [L. Heinämäki, *The Right to Be a Part of Nature: Indigenous Peoples and the Environment* (2010); N. Bankes and T. Koivurova (eds), *The Proposed Nordic Saami Convention: national and International Dimensions of Indigenous Property Rights* (2013).

³ Polar Law Textbook, TemaNord 2010:538, Nordic Council of Ministers, Copenhagen 2010; available at: www.norden.org/fi/julkaisut/julkaisut/2010-538.

⁴ More information on the University of the Arctic's Thematic Network on Arctic Law can be found at www.arcticcentre.org/InEnglish/RESEARCH/The-Northern-Institute-for-Environmental-and-Minority-Law/University-of-the-Arctic-Thematic-Network-on-Arctic-Law.

⁵ The book is not written by Byers alone, but 'with James Baker', who co-authored one chapter and has co-authored a workshop paper with Byers on the Lomonosov Ridge.

⁶ Byers has already published a book directed to a non-academic audience: *Who Owns the Arctic?*

⁷ E. Franckx, *Maritime Claims in the Arctic* (1993).

published in 1995. While Rothwell also examines the law relating to Antarctica, Byers focuses exclusively on the Arctic, allowing him to treat the issues in greater depth.

International Law and the Arctic is divided into eight chapters and a short concluding part. The first five chapters deal with the basic ‘ownership’ issues in the Arctic, which remains the salient topic for legal scholars. In a phenomenon known as ‘creeping jurisdiction’, the law of the sea has evolved towards granting coastal sovereigns an ever larger set of sovereign rights and broader jurisdiction over marine areas. This has made it beneficial for a state to possess a coastline. In Chapter 1 on Territory, Byers does not waste time on the questions of sovereignty over land, since these are all well settled, with the minuscule exception of Hans Island. More interesting for him is Greenland’s self-governance arrangement, which may eventually lead to the secession of and independence for the world’s largest island and its Inuit-majority population. So too, the diplomatic history relating to ownership of the Sverdrup Islands in the Canadian archipelago interests the author. Since land is the basis of all the maritime zones in the Arctic, where the continents converge, states in the region are bound to have many overlapping claims and entitlements. In Chapter 2, Byers outlines the history of how boundary disputes have been settled one by one, culminating with the historic resolution in 2010 of the dispute between Norway and Russia in the Barents Sea, a disagreement that had lasted more than 40 years. Inspired by the way that dispute was resolved, Byers devotes the following Chapter 3 to the possibilities of resolving a still-pending maritime boundary dispute between the United States (Alaska) and Canada in the Beaufort Sea. More boundary disputes may be forthcoming as Arctic coastal states now delineate the outer limits of their continental shelves beyond 200 nautical miles. These shelves may be extensive indeed, given that the Arctic Ocean is shallow in many places. Chapter 4 examines the possible outcomes of states establishing shelf limits that may overlap with neighbouring states’ claims. The law of the sea has also come to favour coastal states in allowing them to use straight baselines to enclose larger areas as part of their internal waters. This development has posed a direct challenge to those states that are reliant on international straits for maritime transport. Byers analyses the principal uncontroversial and contested straits in the Arctic in Chapter 5, paying close attention to the notoriously complex issue of the Northwest Passage.

The three remaining chapters address environmental protection, the rights of indigenous peoples, and security. All these areas are the subject of international law, and Byers examines its specific application to issues arising in the Arctic. The concluding chapter is short, sums up the main findings of the study, and suggests questions for future research, e.g., how we could characterize the development in the Arctic from the viewpoint of the theory.

Byers’ expertise in the field is apparent. One can only admire how he covers so many diverse and complicated areas of international law demonstrating how they play out in the reality of the Arctic. Yet, it is also obvious that his is a Canadian/North American take on how international law operates in the Arctic; this bias is reflected in the issues he takes up (the Beaufort Sea, the Northwest Passage) and the examples he uses (Canadian land claims agreements), as well as in the way he construes the legal issues in ‘the Arctic’ as relating to the Arctic Ocean rather than the region’s vast land areas.

In the following I offer some suggestions how this perspective might be broadened. First of all, the Arctic international institutions might deserve more attention. Byers explains his choice of not treating them in a separate chapter by saying, ‘the nascent institutions of regional governance ... are considered only insofar as they provide relevant context for the rules and rule-making processes’ (at 9). As a consequence several interesting international governance arrangements in the Arctic that are not of immediate relevance for rules and rule-making are ignored. The Arctic Council and the Barents Euro-Arctic Council, for example, do not have the status of inter-governmental organizations, because their founders did not establish these bodies via international treaties, but rather via declarations. Significantly, however, both the Arctic Council and Barents Euro-Arctic Council have been able to provide innovative approaches to

international governance. For instance, Barents co-operation involves not only states, but also the northern counties of Finland, Sweden, Norway, and Russia, and indigenous peoples' organizations enjoy a unique standing in the Arctic Council.

Paying more attention to the Arctic Council would be useful, given the Council's attempts to meet the extensive challenges ahead. A rapid strengthening of the Council is underway: its political steering mechanisms have been made stronger; a permanent secretariat has been established, and two international agreements (on search and rescue and oil spill preparedness and response in the Arctic) have been negotiated under its auspices; the European Union and states such as China and India want to exercise influence on Arctic governance by becoming observers on the Council.⁸

Even though Byers does not have a special chapter on the Arctic Council and related institutions, he does provide important information on how the Council functions. Yet, I beg to differ in some respects. As concerns observer status by China, Byers is sceptical with respect to China's intention to become an observer, given that it would need to recognize – and here he quotes as one criterion for observer status – 'the Arctic States' right to administer the Arctic Ocean under the Convention on the Law of the Sea'. However, this criterion cannot be found among the observer criteria adopted by the Council in its 2011 ministerial meeting in Nuuk. Those who want to be observers need to '[r]ecognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic' and '[r]ecognize that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea'. There is nothing in what Byers quotes or the Nuuk criteria that China cannot accept, although it is true that Chinese legal scholars were concerned about these criteria, as Byers demonstrates. But surely China can recognize that the Arctic states are sovereign states in the Arctic and that they have extensive national jurisdiction over large expanses of Arctic waters. Moreover China should be able to accept that the Arctic states administer the Arctic Ocean provided this is done on the basis of the law of the sea and Law of the Sea Convention (UNCLOS), especially with China itself a party to the UNCLOS. Eventually, China did indeed apply for observer status, and received it during the 2013 Kiruna ministerial meeting of the Council.

I also differ from Byers as concerns the status of the Arctic Council. Byers is of the opinion that by founding a permanent secretariat in 2011, the Council's eight member states are 'arguably transforming the Arctic Council from an inter-governmental forum into an international organization' (at 9). In a related footnote (36), he explains that even if the Council was established via a declaration rather than a treaty, 'such a treaty is not a necessary condition for an international organization'. Byers compares the Council to the Organization for Security and Co-operation in Europe (OSCE) that, according to some scholars, has gradually evolved into an international organization from what originally was an ambiguous status. However, the OSCE, and especially its secretariat, has been pushing for a treaty that would provide the forum with legal personality, an ambition seen particularly in its adoption of the 2007 draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities. Even after adoption of the draft, doubts remained among partner states why exactly there is a need to turn the forum into a fully-fledged inter-governmental organization, and thus no convention has as yet been adopted. The same applies to the Arctic Council. It is difficult to see that it would somehow gradually evolve into a fully-fledged inter-governmental organization without the member states explicitly deciding on such a step via an international convention.

⁸ Byers calls the status 'permanent observer status', but this is incorrect, for the simple reason that the Council constantly evaluates whether observers fulfil the criteria for that status; if they fail to do so, their involvement in the Council is discontinued. There are only permanent participants, who represent the international organizations of the region's indigenous peoples.

A clearer articulation of the author's views on soft law and how it influences international law and politics would have been useful for the book's discussion of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Byers argues, at 232, that:

the Circumpolar Inuit Declaration seeks both to consolidate and to develop international law. For this reason, it omits to mention that UN General Assembly Resolutions such as the UN Declaration are not legally binding instruments. In addition, the customary international law status of some of the UN Declaration's provisions remains contested ... That said, new norms of international law often take the form of 'soft law' on their way to acquiring binding 'hard law' status, and that may well be happening here.

It would have been helpful to clarify (also for the non-expert readers) the requirements that need to be met in order to qualify any of the Declaration's soft law provisions as customary international law.

Without a clear conception of soft law and how it can generate normative effects, it becomes difficult to analyse most of the normative instruments that are influential in the Arctic such as the instruments issued by working groups and ministerial meetings of the Arctic Council. The author's stance as to these instruments' effects remains unclear. As a case in point, one might ask how to correctly assess the legal status of the Ilulissat Declaration, issued by the Arctic Ocean coastal states, which Byers contrasts in Chapter 7.4 with the Circumpolar Inuit Declaration on Arctic Sovereignty, the latter being issued by a non-governmental organization and the former by states. Can we see elements of soft law in both, or is it only state-adopted instruments that can be perceived as soft-law instruments?

Even if some provisions of the UNDRIP may be on their way to becoming customary international law, as Byers suggests, concentrating on the emergence of customary law may miss the way such declarations are meant to function. If one looks at the UNDRIP – and how it was laboriously negotiated for over 20 years directly between states and indigenous peoples – it is obvious that it carries a high practical authority, whatever its rank in international law is deemed to be. In fact, application of the UNDRIP manifests itself all around the world, including in the matters that Byers analyses. For instance, when he discusses the EU's seal product ban in chapter 7.6., he could have provided the reader with a richer account by showing that the Commission carved out an indigenous exemption to the Seal Regulation to ensure that the ban was in line with the UNDRIP. Any international treaty regime that applies to indigenous issues – be it the International Whaling Commission or CITES – must now take the UNDRIP into account in making its decisions.

The treatment of indigenous peoples in Chapter 7 evidences some further shortcomings. Thus, Byers does not mention the only contemporary legally binding international convention specifically devoted to indigenous rights, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. This convention is important in the Arctic, given that there are two Arctic states that are parties to it (Norway and Denmark) and two in which ratification is being studied (Finland and Sweden). Moreover, Norway has implemented the Convention with the so-called Finnmark Act, a unique piece of legislation that tries to accommodate indigenous rights in a region where different population groups live side by side. To be sure, Byers mentions the current process of trying to negotiate a Nordic Saami Convention (at 219); but the ILO convention remains the main instrument to discuss when we address the issue of how to guarantee internationally protected rights for the Saami. It would also have been welcome to see at least one section dedicated specifically to the UNDRIP, which is rapidly developing into a cornerstone of indigenous rights throughout the world. It is mentioned only in the chapter dealing with the Circumpolar Inuit Declaration, and there only marginally, which certainly does not reflect its status in practice. Finally, I would have liked to see indigenous peoples' rights discussed from a perspective that is more relevant to the peoples in practice than the debate on self-determination,

which Byers chose to focus on. Indigenous peoples themselves are actively trying – now under the umbrella of the UNDRIP – to develop international law, particularly as regards their land, resource, and cultural rights. Byers seemingly shies away from this discussion, perhaps partly because he focuses so much on the Canadian situation and land claims agreements.

Byers' treatment of the Northwest Passage dispute very much focuses on the arguments supporting Canada's claim. In addition he could have taken up the critique directed against Canada's contention that the waters of the Northwest Passage are part of its historic internal waters. The US has already twice sent ships through the Northwest Passage on the premise that it is an international strait and thus that travel through it requires no prior consent from Canada. Canada has reacted to both crossings with controversial measures. In 1970, it enacted the Arctic Waters Pollution Prevention Act (AWPPA), pursuant to which it claimed a 100-nautical-mile pollution zone better to control navigation in what are difficult-to-navigate icy waters. Even though the AWPPA exceeded Canada's coastal state rights at the time, Canada and Russia were able to convince the international community of the importance of a 200-nautical-mile protection and prevention zone in ice-covered waters. This was included as Article 234 of the UNCLOS and subsequently became part of customary international law. But this evidently did not resolve the problem for Canada, since the US still regarded the Northwest Passage as an international strait. After the *Polar Sea* crossing of 1985, Canada again took firm action and enclosed its Arctic archipelago as its historic internal waters via straight baselines. Thus, Canada was able not only to enclose the waters as its internal waters (requiring prior consent), but also to do so in a way that would not maintain the right of innocent passage for other states' vessels. Whatever we might think of this argument – and it does have problems⁹ – this is the current position of the Canadian government. Historic use is, according to the government, affirmed by the immemorial use of these lands and icy waters by the Inuit and also Canadian governmental practice. With the sea ice melting due to climate change and the Northwest Passage becoming gradually more amenable to navigation, it is obviously an important issue for Canada whether the waters of the archipelago are historic internal waters or whether the country should allow innocent passage (under Article 8(2) of the UNCLOS) or even transit passage.

My objections to Byers' treatment of the Northwest Passage relate to the way he refutes the positions of the US and the EC/EU. In the concluding chapter, he ponders the role that power politics still plays in the Arctic today, which is limited. Yet, he argues that '[w]ithin the security context, especially, significant elements of power politics remain, as is apparent in ... the continuing absolutism of the United States on their legal characterization of the Northern Sea Route and Northwest Passage as "international straits"' (at 283). If we only think of the Northwest Passage dispute between Canada and the US, it is difficult to argue that the stance taken by the US has been motivated solely by power politics, given the country's long-standing policy of defending freedom of navigation. Byers does not seem to have much understanding for the US position. In analysing the letter of protest sent by the Americans after the Canadians had enclosed the entire archipelago as their historic internal waters in 1985, Byers argues that 'regardless of the merits of the US position, the letter was incorrect that an acceptance of Canada's straight baselines would necessarily terminate any right of transit passage, since straight baselines cannot have the effect of closing-off an existing international strait' (at 134). However, it is difficult to argue, as Byers does, that Article 8(2) of the UNCLOS would save the right of transit passage; the Article merely ensures the right of innocent passage, a different set of rights from transit passage. More to the point, the US letter was clearly correct in asserting that by enclosing its archipelagic waters as historic internal waters, Canada was claiming that no one had even the right of innocent passage as guaranteed in UNCLOS.

⁹ See, e.g., the analysis by C.R. Symmons, *Historical Waters in Law of the Sea: a Modern Reappraisal* (2008), at 29–35.

In another context, Byers analyses the European Community's position at the time, whereby the Community questioned 'the validity of a historic title as justification for the boundaries drawn in accordance with the [1985] order'. He opines that this is not an objection 'to Canada's use of straight baselines per se, and might refer to the unusual length of several of the baselines' (at 138). It is difficult to understand this argument, given that the EC clearly questioned the validity of historic title as a justification for the use of straight baselines; it is precisely the argument based on historic waters that Canada uses to block the application of Article 8(2) UNCLOS, which provides for innocent passage of vessels via the Northwest Passage.

Byers advances yet another line of argument to support the claim that the waters in the Canadian archipelago are, indeed, subject to full Canadian sovereignty. He refers to the ICJ's 1975 *Western Sahara Advisory Opinion*, and argues that the ICJ confirmed 'that territories inhabited by indigenous peoples who have a measure of social and political organization are not *terra nullius*; as a result, these human collectivities possess a limited but no less real international legal status' (at 132). This would mean, for Byers, 'that Canada would have to persuade other states or an international court or tribunal, that: (1) sea-ice can be subject to occupancy and appropriation like land; (2) under international law, indigenous people can acquire and transfer sovereign rights to states; and (3) the Inuit ceded such rights to Canada'. This is an interesting argument, but it is hard to see how it is more realistic than the one that the Canadian government relies on, that is, that immemorial occupation and use by the Inuit of land and ice in the archipelago justifies considering it to be historic internal waters. Byers admits that the argument he puts forward here is a controversial one, and it certainly is. The benefit of his treatment of the Northwest Passage is that it does take the reader beyond the official positions, and pushes the boundaries of legal thinking on what has been a thorny issue.

Byers sets out his objectives in the introduction to the book. He states at 9 that 'this book tries to shine light on the growing role of law-based cooperation in a rapidly changing Arctic'. He also asserts that the 'growth of international law-making in the Arctic is an important enough story, both in itself, and as a factual counterweight to the all-too-widespread narrative of unbridled competition and impending conflict' (at 9). In the short concluding chapter (four pages), Byers summarizes some of the main findings of his research. He emphasizes that peace and co-operation in fact reign in the Arctic, whereas the media seem to be buying into the narrative of a great power game in the region. This is not a novel observation on the part of an international lawyer; rather it is precisely the one subscribed to by many scholars in the field. What makes Byers' argument particularly compelling, however, is the extensive evidence which he adduces to show that international law prevails in many areas of law and policy in the Arctic.

It is slightly surprising then that some of the clear themes running through Byers' book are not taken up in its conclusion. The author seems to think that it is too early to judge whether it is realist or constructivist explanatory theories that better capture the reality of the Arctic. Yet, his endeavor as a whole testifies to the power of the rules of international law in the Arctic. Throughout the book he demonstrates how international law and co-operation are the name of the game. Why should these findings of his not also influence the way we approach the region from the theoretical viewpoint? Byers also demonstrates how the international law applicable in the Arctic is actually a regional manifestation of the more widely applicable rules of international law. There is, in effect, little in the way of Arctic-specific international law, as he shows. For example, in the case of the Search and Rescue Agreement, Byers convincingly shows that even a convention negotiated by the Arctic states for the Arctic derives its content from existing multilateral treaties.

Overall, Byers' conclusions are balanced. He argues that regions dominated by realist thinking – as was the case in the Arctic during the Cold War – 'are susceptible to "creeping cooperation": a momentum-generating process of institutionalization and legalization' (at 283). He also argues that the Arctic can serve as a great laboratory for students of 21st-century international relations, given its unique combination of security, environmental and indigenous politics.

Another positive feature of the book is its comprehensive scope. It is a landmark work on this issue-area. Byers covers practically all the issues of international law that are relevant to the Arctic, which in itself is a major achievement. The book is a good illustration that one need not succumb to the fragmentation of international law. It is only by engaging with all the rules which evolve in the region that one can make a cogent synthesis of the general trajectory of change in the Arctic. This is an immense undertaking, and unfortunately we have fewer and fewer generalists like Michael Byers in international law who are up to this task. As the book well demonstrates, most Arctic international law issues can be traced to global and regional legal developments, so to be a good Arctic specialist one needs to be an even better generalist. Overall, despite some minor weaknesses, I think it is clear that Michael Byers has written a book that will become a cornerstone of legal studies on the Arctic. The book is comprehensive in scope, most readable, and deep in its understanding of the issues. By any yardstick, this is an excellent book that will likely become a standard text for all Arctic enthusiasts.

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Morten Bergsmo (ed.). **Quality Control in Fact-Finding**. Florence: Torkel Opsahl Academic EPublisher, 2013. Pp. 508. £19. ISBN: 9788293081784.

Quality Control in Fact-Finding is, above all else, a very welcome addition to the literature on international fact-finding. Whilst there has been a marked increase in the number of fact-finding inquiries established in the last couple of decades,¹ this has not been matched by a similar increase in the number of scholarly studies of such inquiries.² In light of both the number and high-profile nature of such inquiries, the absence of scholarship focusing squarely on the contemporary role of inquiries up to the present day seems like an oversight.

This collection, published in open access format by Florence-based, not-for-profit 'academic EPublisher' Torkel Opsahl (named after the late Professor Opsahl who himself briefly chaired the Commission of Experts for the Former Yugoslavia until his untimely death in 1993), attempts to address this lack of academic attention. The collection ostensibly sets out to 'make a contribution to the emerging discourse on fact-finding mechanisms' by 'focusing specifically on quality awareness and quality improvement in non-criminal justice fact-work' (at viii). Its accessible

¹ Some of the most prominent in the last few years being the HRC report on Gaza in 2009 (HRC Res. A/HRC/12/48, 25/9/2009), and the inquiries into the Gaza Flotilla incident (HRC Res. A/HRC/14/L.1; HRC Res. 15/1, 29 Sept. 2010; HRC Res. 16/20, 25 Mar. 2011; HRC Res. 16/32, 25 Mar. 2011; HRC Res. 17/10, 17 June 2011) and the conflict in Syria (HRC Res. S-17/1, 23 Aug. 2011; see First Report A/HRC/S-17/1/2/Add. 1 and Second Report A/HRC/19/69, 22/2/12).

² N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (1974); Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', 5 *Washington U J L & Policy* (2001) 35; Bourloyannis, 'Fact-finding by the Secretary-General of the United Nations', 22 *NYU J Int'l L & Policy* (1989) 641; Franck and Farley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies', 74 *AJIL* (1980) 308; Jacheč-Neale, 'Fact-Finding', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011); Kerley, 'The Powers of Investigation of the United Nations Security Council', 55 *AJIL* (1961) 892; Lenk, 'Fact-Finding as a Peace Negotiation Tool – The Mitchell Report and the Israeli-Palestinian Peace Process', 24 *Loyola of LA Int'l & Comp L Rev* (2002) 289.