

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.

style, open access format, and the breadth of topics covered will attract the attention not only of international legal scholars, but practitioners and policy-makers too.

In the opening chapter Marina Aksenova and Morten Bergsmo provide a helpful overview of the concept of international fact-finding itself and of the fact-finding missions established in recent decades. The authors define the concept of fact-finding broadly as a method of ascertaining facts used in international relations for differing purposes (at 2), before noting that traditionally there are three main purposes for establishing facts in international law. The first is the narrow purpose of fact-finding 'in cases where differences of opinion on factual matters underlie a dispute between parties', for which a procedure of inquiry was set out in the 1899 and 1907 Hague Conventions, and which has fallen into desuetude.³ The second purpose is that of supervising the execution of international agreements typically carried out by the UN Specialized Agencies, and the third purpose is fact-finding for the purposes of Article 34 of the UN Charter, namely the power of the Security Council to investigate any situation or dispute that may endanger international peace and security. The overview of fact-finding missions established by principal UN organs, subsidiary organs, national governments, and various Non-Governmental Organizations (NGOs), helpfully set out in the form of a table in the opening chapter, provides a valuable introduction to the subject.

Commentators in the past have lamented the lack of a standard operating procedure for fact-finding missions.⁴ However, a recurring theme of this collection is caution against standardization in light of the inherently context-specific nature of international fact-finding inquiries. Richard Goldstone states that '[i]t is folly to generalise about fact-finding missions. Each situation will have its unique features. What works with regard to one may well fail if applied to another' (at 52). Similarly, Martin Scheinin argues in favour of the maintenance of clear functional distinctions between inquiries, in particular asserting that the 'various mechanisms of mainstream human rights bodies that seek to establish state responsibility for human rights violations should not be subjected to the evidence requirements typical for determining individual criminal accountability' (at 54).

Particularly insightful contributions to the collection are those in which the authors are able to draw on their own practical experience, such as the chapters by Goldstone, Scheinin, Chris Mahony, and David Re. Goldstone's contribution provides a potentially crucial insight into the mind of a man who has been heavily involved in a number of landmark fact-finding missions, both domestic and international. Much of Goldstone's account focuses on two domestic inquiries that he led in South Africa, namely the Sithole Inquiry into the death of a member of the ANC in detention shortly before the release of Nelson Mandela from prison in February 1990, and the Sebokeng Inquiry into the action of police during a mass protest-match in March 1990. The relevance of the discussion of these domestic inquiries to a collection on international fact-finding is perhaps not immediately apparent; however Goldstone's vast experience allows him to make a number of broad proposals for improving the quality of future international fact-finding missions. Amongst them the lessons learned from the Sithole Inquiry in which the transparent nature of the inquiry (which was held in a Johannesburg City Hall instead of a courtroom with no visible security and large public galleries) created a more 'public-friendly' atmosphere and insulated it from political interference, and the proposals for opening the appointment process for members of commissions to public scrutiny, are amongst the most helpful and practical proposals.

Goldstone's contribution is also instructive regarding his involvement in the UN Human Rights Council's Gaza inquiry in 2009, as it illuminates the political machinations 'behind the scenes' that led to the formation of the inquiry and possibly is indicative of the political

³ See, for instance, 1899 Hague Convention, Title 3, Arts 9–14.

⁴ Bassiouni, *supra* note 2, at 40.

process that has led to the establishment of other commissions of inquiry. Similarly interesting is the issue of consent and cooperation – the refusal of Israel to cooperate with the inquiry clearly impeded the Commission's operation and was apparently the cause of many of the 'sleepless nights' that Goldstone subsequently suffered (at 50). The lack of cooperation, coupled with new facts subsequently coming to light, put Goldstone in the position where he felt he had to row back on some of the inquiry's factual findings in a *Washington Post* opinion-editorial. This episode cautions against reliance on any findings-of-fact derived from an inquiry with restricted access to the area investigated, and a resultant need to rely to a much greater extent on secondary sources and press reports. The critical remarks of Wu Xiaodan that Goldstone's change of heart and the furore surrounding Professor Christine Chinkin's alleged bias had cast some doubt on the credibility and impartiality of the Goldstone Report provide a useful counterpoint to Goldstone's chapter (at 201) although an even more robust critique was perhaps warranted.

Similarly, Scheinin draws on decades of practical experience in his contribution dealing with fact-finding in the context of treaty-based human rights mechanisms and the Special Procedures of the UN Human Rights Council. Scheinin's contribution provides a helpful typology of the fact-finding apparatus and organizational structure of treaty-based fact-finding mechanisms, including the reporting procedure, individual complaints, and inquiries. Perhaps the most useful part of this contribution is the section dealing with Special Procedures in which the thoughts of an experienced practitioner are key, given the nature of the topic that would otherwise be largely impenetrable to most. For instance, the contribution explores the two fact-finding functions of Special Rapporteurs, namely communications (letters) to governments and country visits. Scheinin is critical of the communications function, noting that the response rate to letters is low and the information gained from communications is such that they cannot be considered a fact-finding mechanism at all. However, Scheinin is able to draw on his own experience as Special Rapporteur, having paid visits to states such as Turkey and Tunisia, and is positive about governmental compliance with requests made by Special Rapporteurs, access to areas under investigation, and ultimately even the uncovering of facts that could later be used for a number of purposes including criminal prosecution.

Among the most important contributions to the collection is that of Mahony dealing with the security implications for witnesses appearing before fact-finding commissions. This extended, detailed, contribution draws on the author's own experience in Nepal, and both the Truth and Reconciliation Commission and Special Court in Sierra Leone. Whilst having a relatively narrow focus on a small number of situations, the author's own first-hand experience and the level of detail and practical examples provided allow important conclusions to be drawn regarding means of ensuring the safety of witnesses, including details of the legal regime needed for witness protection, consideration of the crucial issue of funding, and more practical issues such as personnel and the institutional location of the programme that could potentially be of use in the context of other commissions.

David Re's contribution is based on his involvement in the criminal courts in the Former Yugoslavia and Sierra Leone and poses a fundamentally important question: what did the ICTY trial and appeals chamber actually do with UN and NGO fact-finding reports? Interestingly, Re shows that relatively minimal (at least explicit) use was made of such factual findings by the ICTY chambers between 1994 and 2013. Most often such findings were utilized as investigative leads for the prosecutor (at 296). Further, Re argues that the findings-of-fact made by such inquiries are likely to be more politically and historically important than judicially influential (at 280). The conclusions to be drawn from this argument are not fully fleshed out, but it is submitted that it is fundamentally important for the future of international fact-finding that they are considered.

Tackling more theoretical issues, Simon De Smet's contribution addresses the theoretical foundations of fact-finding. He takes as his starting point that most fact-finders approach the

subject intuitively: '[e]ven though they may display great care and circumspection in making their findings, they do not necessarily have a strongly developed understanding of what the underlying principles and concepts of fact-finding are' (at 74). De Smet provides a helpful introduction to the epistemology of fact-finding and evidence (at 80) and takes us through important theoretical issues such as the epistemology of how beliefs can be justified, including both probabilistic or Bayesian epistemology and so-called 'inference to best explanation' or relative plausibility theory. In doing so De Smet seeks to provide the basis for improving the overall epistemic quality of fact-finding, without making any claims that doing so would in actual fact improve the accuracy of fact-finding in practice. De Smet tackles a wide array of the goals he has set for himself with relish, although one gets the impression that there is simply not enough space to do justice to the substantial number of important issues ranging from philosophical conceptions of probability to the epistemology of testimony, trustworthiness, competence, and cognitive consensus, to name just a few. While the author's forthcoming monograph will provide a more in-depth analysis,⁵ in the context of this collection, it might have been better to choose a smaller number of discrete issues and explore them in greater detail, but this is a minor quibble.

Despite claiming to deal with non-criminal justice fact-finding (at viii) international criminal law inevitably finds its way into the collection through the contribution by Dov Jacobs and Catherine Harwood which considers the use of international criminal law (ICL) by fact-finding commissions. More specifically, the contribution assesses the creep of international criminal law concepts into the work of fact-finding missions and considers the utility of ICL in general 'outside the courtroom'. The contribution highlights a number of concerns regarding the use of such concepts in fact-finding inquiries, including the problematic use of the criminal law burden and standard of proof in non-judicial situations which raise issues of due process. For instance, cursory legal determinations of complex situations and divergent legal determinations between different commissions of inquiry have caused controversy in recent times.⁶ The contribution ultimately concludes that not only does the use of ICL concepts not help to solve some of the operational problems that fact-finding inquiries face, it in effect creates a number of new problems (at 353). Whilst this contribution complements excellent existing work in this field,⁷ the topic of fact-finding in international criminal law remains one of the most under-researched areas of fact-finding and further research in this area, where the personal liberty of individuals is at stake, is undoubtedly needed.

Other contributions address selected issues including quality control in the context of truth and reconciliation (Liu Daqun at Chapter 5), how commissions of inquiry can provide international prosecutors with the background information they need on specific international criminal law situations (Lyal S. Sunga at Chapter 13), fact-finding difficulties encountered by NGOs (Wolfgang Kaleck and Carolijn Terwindt at Chapter 14), and the role of information technology in the work of fact-finding commissions (Ilia Utmelidze at Chapter 16). In the penultimate chapter Charles Garraway provides a contribution on the International Humanitarian Fact-Finding Commission established under Article 90 of the First Additional Protocol to the Geneva

⁵ The author states that 'a more fully developed treatment of the topics in the context of judicial fact-finding will appear as part of a forthcoming book by this author entitled *Re-thinking Fact-Finding by International Courts* to be published by Cambridge University Press' (at 73).

⁶ Compare, e.g., the divergent determinations on the legality of the naval blockade by the so-called Philips and Palmer reports; Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla Ships Carrying Humanitarian Assistance, Human Rights Council, 15th Session, 27 Sept. 2010; Report of the Secretary-General's Panel of Inquiry on 31 May 2010 Flotilla Incident, July 2011.

⁷ N.A. Combs, *Fact-finding without Facts: the Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

Conventions of 1949, which has never been used to date, but which could be of potential use in the future according to the author, although its competences are in some crucial respects limited in scope. Mention is made of these contributions in order to highlight the sheer breadth of the collection, which endeavours to cover so many discrete and diverse issues in relation to international fact-finding.

Ultimately, *Quality Control in Fact-Finding* is a commendable attempt to address the paucity of literature in an area of international law that is seen as increasingly significant. Whilst a final concluding chapter drawing together some of the main themes and findings of the collection would have been welcome, it contains some genuinely useful contributions, in particular those in which the authors are able to draw on their own experience and those which attempt to systematize and make sense of the operation of international fact-finding.

Individual Contributions

Marina Aksenova and Morten Bergsmo, Non-Criminal Justice Fact-Work in the Age of Accountability;

Richard J. Goldstone, Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes;

Martin Scheinin, Improving Fact-Finding in Treaty-Based Human Rights Mechanisms and the Special Procedures of the United Nations Human Rights Council;

Simon De Smet, Justified Belief in the Unbelievable;

Liu Daqun, Quality Control in Truth and Reconciliation Processes;

Fan Yuwen, Quality Control and the Mandate of International Fact-Finding;

Isabelle Lassée, Coherence in the Design and Implementation of the Mandates of International Fact-Finding Commissions: Internal and External Dimensions;

Wu Xiaodan, Quality Control and the Selection of Members of International Fact-Finding Mandates;

Dan Saxon, Purpose and Legitimacy in International Fact-Finding Bodies;

Chris Mahony, Witness Sensitive Practices in International Fact-Finding Outside Criminal Justice: Lessons for Nepal;

David Re, Fact-Finding in the Former Yugoslavia: What the Courts Did;

Dov Jacobs and Catherine Harwood, International Criminal Law Outside the Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding;

Lyal S. Sunga, Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?;

Wolfgang Kaleck and Carolijn Terwindt, Non-Governmental Organisation Fact-Work: Not Only a Technical Problem;

Charles Garraway, Fact-Finding and the International Humanitarian Fact-Finding Commission;

Iliia Utmelidze, Information Technology and Quality Control in Non-Criminal Justice Fact-Work.

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