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BOOK REVIEW

Morten Bergsmo (ed.), *Quality control in fact-finding*, Torkel Opsahl Academic EPublisher, 2013, 478 pp., ISBN 978-82-93081-78-4

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This anthology raises key questions for the international human rights community. Fact-finding remains among the core activity of UN bodies, international commissions of inquiry, truth and reconciliation commissions, as well as a large number of non-governmental human rights organisations. How can these organisations ensure that fact-finding is of high quality, specifically in terms of the rendering of facts, legal analysis and in the way it fulfils its mandate? Important overarching questions regard how fact-finding can effectively contribute to peace and the prevention of further atrocities.

At the organisation for which I work, the Norwegian Helsinki Committee, we frequently struggle with issues discussed in detail in this impressive volume. Among the many challenges are how to tailor-make fact-finding according to its purpose. If fact-finding is mainly conducted in order to convince political decision-makers to stop human rights violations, it will certainly be designed differently from those missions motivated by triggering criminal investigations. If the main audience is authorities in other countries or international organisations that may be able to influence a precarious human rights situation, that will also have consequences on the way the fact-work is organised and how the facts are presented.

In some situations, influencing authorities and/or other actors that commit abuses or could prevent them is hard or even impossible. Still, fact-finding remains crucial. Information about abuses and crimes might eventually change the parameters of willingness. Influencing the world's public opinion remains a vital tool of human rights fact-finding. Shifts in public opinion may prove decisive for decision-makers to realise that they should initiate (even costly) measures to alleviate the situation on the ground. Last but not least, fact-finding may bring about prosecutions in international or national jurisdictions for those responsible for international crimes. Or there might be some other form of limited justice.

This review will provide one example of such a seemingly hopeless situation. For years, human rights institutions and organisations have been involved in documenting grave abuses in the North Caucasus. This conflict-ridden area forms a part of the Russian Federation, neighbouring Sochi and the Krasnodar region where the 2014 Olympic Winter Games recently took place. Russian and international human rights organisations, the Council of Europe, the OSCE as well as UN agencies and media outlets have produced literally tons of documents detailing human rights violations and serious crimes taking place in the North Caucasus since the early 1990s when conflicts started to escalate in Chechnya.

Even though there is some sort of peace in the region today, violence and serious human rights violations continue to occur. The number of conflict casualties is particularly high in Dagestan, a neighbouring republic of Chechnya. However, in other parts of the region torture, disappearances, acts of terrorism, and violent clashes continue to take place.[1]

An important cause of this situation is the prevailing practice of impunity. Despite extensive documentation of abuses, as well as efforts to raise cases with local prosecution services, the European Court of Human Rights remains the only credible avenue of justice for the victims. There is almost no domestic justice available, and appeals for international criminal justice have proved unrealistic.

Where does this situation leave human rights fact-finding? It leaves it exactly where some of the reflections of this book start. According to its editor, Morten Bergsmo, the idea behind preparing the book originated in 1993 while he was serving as a Legal Adviser to the Commission of Experts for the Former Yugoslavia. The Commission received large quantities of information on the armed conflicts and atrocities in the Former Yugoslavia. According to Bergsmo, the Chairman of the Commission, Professor Frits Kalshoven, who was confronted with this veritable flood of information, never lowered "his professional guard. He repeatedly asked questions about the authenticity of the source, its credibility, whether there was corroboration by other sources, the chain of transmission of any documents, the quality of translations, or the potential to verify what a source claimed" (at iii).

Bergsmo sums up Kalshoven's lasting influence on him and on the idea of making this book, by this approach: "… I sensed that Professor Kalshoven expected self-discipline in the relevant work processes, born out of a recognition of the fine balancing of interests on which international humanitarian law is based, the extent of the persistent politicization of war, the pervasive emotions generated by war crimes, and the limits to what we can precisely know about certain incidents in armed conflicts" (at iv).

For a practitioner of human rights fact-finding, the book is full of thought-provoking and useful insights. Fact-finding mechanisms and missions during the last 20 years are analysed and assessed by the book's 19 authors, including well-known actors such as Richard J. Goldstone, Martin Scheinin, and Liu Daqun. There are experience-based contributions, as well as those dealing mainly with the theory and methodology of fact-finding.

An insight consistently presented by the book's authors is that fact-finding is not at all something "self-evident, something that everyone is capable of doing and requiring no special skills or training" (at 73). On the contrary, fact-finding is a profession. And as with any profession, it has to be learned and constantly adapted to new circumstances, possibilities and challenges. The authors argue that fact-finders need to be more aware of the work processes on which they depend in order to produce reliable and high quality end results; in other words to get as close as possible to describing "what really happened".

Another important theme explored in the book is the ways in which fact-finding has been influenced, over the last two decades, by the establishment of national and international courts that prosecute core international crimes (war crimes, crimes against humanity and genocide). Even though the book documents that international courts like the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) make limited use of human rights reports by the UN, international inquiry commissions or non-governmental organisations in trying suspects, these reports are nevertheless important

1 See Caucasian Knot News portal for statistics of victims: http://eng.kavkaz-uzel.ru/articles/27026/

in that they lead to investigation.[2] Fact-finding seldom provides decisive evidence against a suspect, but it could still be effective in convincing prosecutors and judges to initiate an investigation in a particular situation or case.

A development has taken place, described in the book by Dov Jacobs and Catherine Harwood, of a "migration of international criminal law concepts from courtroom and into commissions' investigations" (Chapter 12, at 427). One may think that this migration is only positive, that it will lead to better quality and accuracy in fact-finding. However, a focus on prosecution might narrow the scope of fact-finding in unwanted ways. "If quality is considered more as a holistic notion linked to normative and narrative agendas, an international criminal law-focus might in fact reduce quality by unnecessarily narrowing the focus and outcomes of fact-finding, both in terms of the scope of facts considered and the persons or entities investigated" (at 427).

A feature of international commission and NGO fact-finding is sometimes to publish the names of suspected perpetrators of serious human rights violations. This could also entail the categorisation of international crimes. As Jacobs and Harwood warn, fact-finders must realise that in doing this, they might step too far. Importing international criminal law into fact-finding entails serious risks. There is, for instance, a risk that the "*mens rea* [element] for a crime to be constituted" is overlooked (at 355). Fact-finding may authoritatively establish that human rights violations amounting to international crimes have taken place and that certain perpetrators were involved. Though it rarely presents evidence that persons involved also had a "guilty mind".

Fact-finders have to be careful in designing the direction and goals of their efforts. More so now than before, since so many mechanisms exist that could address human rights violations. Still, the quality of fact-finding might also lead to a certain flexibility in the way it can be used. On this point, the limited success of fact-finding in the North Caucasus is illustrative and will be returned to shortly.

Those in doubt of the value in continuing to fact-find in situations where the effect is very limited will find reasons not to despair by reading this book. The book points in the direction of improving methods and work processes. Positive results may come when you don't expect them, but they are less likely to occur if fact-finders do not steadily perfect their methods and skills.

Information technology could play an important role in improving fact-finding. In Chapter 16, Ilia Utmelidze argues that it could help in systematising and making massive documentation accessible to wider audiences. His last sentence, indeed the last sentence of the book, is an upbeat one: "IT tools can open new possibilities for both quantitative and qualitative scrutiny of collected data and give new means for the communication of factual findings to the general public and decision-makers" (at 460).

Fact-finding is about finding and preserving truth. Fact-finders naturally want to make use of those findings in order to improve a situation. Yet, fact-finders have so far been largely unable to improve the situation in North Caucasus. But they *have* been able to ensure that the abuses are not forgotten, keeping the possibilities of future justice open.

Together with colleagues in Russian organisations, the Norwegian Helsinki Committee has often discussed how to make better use of the extensive documentation of torture and disappearances that has been produced. On 12 December 2012, a new mechanism was

2 See in particular, Chapter 11, "Fact-finding in the Former Yugoslavia: What the Courts Did", by David Re.

established by the US government, entitled the so-called Magnitsky Act. The act imposes visa bans and asset freezes on officials of the Government of the Russian Federation who have committed "extrajudicial killings, torture, or other gross violations of internationally recognised human rights" against whistle-blowers or human rights defenders.

It is true that this is limited justice. Nevertheless, it demonstrates the importance of fact-finding even in situations where justice seems utterly unrealistic. Fact-finding of high quality, properly systematised and analysed, might become useful in ways not foreseen. For a victim of serious human rights violations in North Caucasus, the fact that the violations are recognised and the persons responsible sanctioned by a foreign state might make a difference. Government officials may also be deterred from violating human rights in the future.

The book, inspired as it is by Professor Kalshoven's emphasis on quality in fact-work, shows both the importance of fact-finding and the importance of improving it. It might be hard to get at the truth, and sometimes the truth does not seem enough to change the world. The rational response, the book says, is to perfect one's skills.

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