

BOOK REVIEW

Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (eds), *Quality Control in Criminal Investigation* (Torkel Opsahl Academic EPublisher, 2020) 1108 pp. (e-book) ISBN 978-82-8348-130-3

The sweeping, eight-year Quality Control Project of the Centre for International Law Research and Policy has published its latest and final installment: *Quality Control of Criminal Investigation*.¹ Shifting the gaze towards criminal investigation processes,² this 23-chapter anthology, focused on addressing a number of 'bottlenecks' in core international crimes cases,³ is especially timely.

- 1 The volume is available online at <https://www.toaep.org/ps-pdf/38-qcci>. As a disclaimer, in light of the scale of the project itself and for reasons of readability and word limits, I restrain myself to mentioning just some contributions of the many that left an impression. No intention to deliberately exclude any contributions should be inferred from this.
- 2 Prior anthologies concerned fact-finding and documentation: M. Bergsmo and C. Stahn (eds), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher, 2020), available online at <https://www.toaep.org/ps-pdf/19-bergsmo-stahn-second> (visited 17 August 2021), and preliminary examinations: M. Bergsmo and C. Stahn (eds), *Quality Control in Preliminary Examination: Volume I* (Torkel Opsahl Academic EPublisher, 2018), available online at <https://www.toaep.org/ps-pdf/32-bergsmo-stahn> (visited 17 August 2021), M. Bergsmo and C. Stahn (eds), *Quality Control in Preliminary Examination: Volume II* (Torkel Opsahl Academic EPublisher, 2018), available online at <https://www.toaep.org/ps-pdf/33-bergsmo-stahn> (visited 17 August 2021).
- 3 X. Agirre and M. Bergsmo, 'Investigative Bottlenecks and the Mindset of Quality Control', in X. Agirre, M. Bergsmo, S. De

The International Criminal Court (ICC) is said to be facing an 'evidence problem':⁴ the concerns about the quality and assessment of evidence are shared by the Independent Group of Experts,⁵ and new, factually and evidentially complex situations are facing not only the ICC, but also the increasing domestic prosecution of international crimes.⁶

Carsten Stahn opens the volume with an invitation to rethink the foundations and the architecture of existing international criminal justice system. This claim is further unpacked by Thijs Bouwknegt who, by way of critically analysing ICC investigations, questions both the ability and the practicality of the Office of the Prosecutor (OTP) to

- Smet and C. Stahn (eds), *Quality Control in Criminal Investigation* (Torkel Opsahl Academic EPublisher, 2020) 1–34, at 5.
- 4 C.M. De Vos, 'Investigating from Afar: The ICC's Evidence Problem', 26 *Leiden Journal of International Law* (2013) 1009–1024.
 - 5 International Expert Review of the International Criminal Court and the Rome Statute System, *Final Report*, 30 September 2020, available online at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (visited 17 August 2021), at 785–801.
 - 6 See e.g. TRIAL International, *Universal Jurisdiction Annual Review 2020*, available online at https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/TRIAL-International_UJAR-2020_DIGITAL.pdf (visited 17 August 2021); B. Wible, 'Jeopardizing Justice: Domestic Prosecutions for International Crimes and the Need for Transnational Convergence', 31 *Denver Journal of International Law & Policy* (2002) 265–295.

effectively carry out the investigations in general. This fundamental structural question of whether organizational set-up allows for historical or forensic truth to be uncovered is premised upon the authors' findings related to often simplistic prosecution arguments, evidently biased towards incrimination.

The call for independence of thought in order to improve decision-making in criminal investigations continues with Moa Lidén pointing towards the one denominator that these processes have in common: '[T]hey are all fundamentally dependent on the decision-making processes of humans operating inside of them.'⁷ Ultimately, the quality of decisions depends not only on the structural framework, but on the individuals making up the organizations: their backgrounds, training, personal preferences and prejudices, as recognized by the editors in the preface: '[T]he abilities of staff are at the centre of all seven bottlenecks.'⁸ Cognitive biases and limitations make surprisingly frequent appearances throughout the anthology, from macro- (Carsten Stahn, Thijs Bouwknegt), to micro-level biases in decision-making (Simon de Smet, Xabier Agirre Aranburu, Moa Lidén, amongst others). Many other contributions touch upon biases indirectly, highlighting areas where outcomes could be improved with the use of explicit argumentation tools (as

explained, for example, by Olympia Bekou), or pointing out how subjectivity could be harnessed and accepted (Cale Davis), and how organizational structures could improve analytical independence (Christian Axboe Nielsen, amongst others). This unprecedented attention to human cognition, albeit limited in terms of its empirical foundation, is refreshing. In the context of increasing awareness of the limitations inherent in all human decision-making,⁹ these contributions may serve as a strong starting point to ask further questions on how systematic biases in criminal investigations could be assessed and, hopefully, addressed.

In addition to Lidén, several other contributions demonstrate the importance of empirical methods to understanding (and improving) prosecutorial decision-making. Matthias Neuner, by way of analysing public ICC pre-trial records, finds that the OTP struggles to maintain consistency in advancing modes of liability, and thus to realistically assess the results of its investigation. Cale Davis, combining multiple methods, including numerical analysis and practitioners' interviews, explores the rationales for cumulative charging, and provides added explanatory layers to Neuner's assessments. Davis discusses multiple reasons for and against cumulative charging, as

7 M. Lidén, 'Confirmation Bias in Investigations of Core International Crimes: Risk Factors and Quality Control Techniques', in Agirre, Bergsmo, De Smet and Stahn (eds), *supra* note 3, 461–528, at 461.

8 Agirre and Bergsmo, *supra* note 3, at 6. The authors identify seven 'bottlenecks' to 'effective and fair investigation and preparation of fact-rich cases'.

9 See e.g. D. Kahneman, D. Lovallo and O. Sibony, 'A Structured Approach to Strategic Decisions', 60 *MIT Sloan Management Review* (2019) 67–73; A. Sagana, 'The Downward Spiral of Biases in Criminal Investigations: From Eyewitnesses to Forensic Experts and Judges', in S. Barton et al. (eds), *Vom hochgemuten, voreiligen Griff nach der Wahrheit: Fehlhurteile im Strafprozess* (Nomos, 2018) 133–146.

explained by the individuals issuing those charging documents. Rather than searching for prescriptive solutions, he acknowledges the diversity in the discretion of international criminal law practitioners, and argues for an approach to quality control different from normative benchmarks: the extent to which prosecutors are willing to have a meaningful debate and accept critique of their decisions, as well as amending their choices. In other words, transparency and open-mindedness may suffice where subjectivity in prosecutorial choices is perhaps inevitable.

Beyond the direct lessons to be learnt from the contributions, the volume highlights several strands for further inquiry. Alf Butenschøn Skre makes an important observation, suggesting the need for 'more empirical research on which policies and practices of criminal investigations may help maximize efficiency and reliability'.¹⁰ He also offers several reasons for the lack of empirical examination to date, such as the limitations stemming from confidentiality and non-disclosure in law enforcement authorities, as well as a possible lack of interest among some communities of practitioners in criminal investigations to engage with the scientific community (and vice versa). The importance of independent and scientific examination discussed by the authors in relation to most of the topics covered in the anthology cannot be over-estimated. While the editors identify

two quality control mechanisms inherent to criminal justice settings (the work of the judges and the defence),¹¹ major advances in the practices of criminal investigations have been made based on scientific findings.¹² Neglecting this major (and available) source of quality control and support for the improvement of criminal investigations would be unwise. Institutions concerned with fact-rich cases could, and should, make use of the expertise available outside of their domains in order to address both the lack of manpower to examine their own quality control, as well as confirmation (or other) biases that might interfere with an objective examination of their own procedures and processes, as acknowledged in this anthology.

Overall, the Quality Control project has certainly brought to the fore many voices in the fact-finding and investigations domain that might otherwise have not been heard or been openly available to the public. While improving diversity of contributions in terms of gender, geographical spread and professional backgrounds would have been very much desirable, the editors

11 Agirre and Bergsmo, *supra* note 3, at 4.

12 See e.g. G. Pike, C. Havard, G. Harrison and H. Ness, 'Eyewitness Identification Procedures: Do Researchers and Practitioners Share the Same Goals?' 23 *International Journal of Police Science & Management* (2021) 17–28; Academy of Social Sciences, *Making the Case for the Social Sciences*, 2013, available online at https://www.acss.org.uk/wp-content/uploads/2013/11/mtc4_crime.pdf (visited 17 August 2021); G.L. Wells and A. Quigley-McBride, 'Applying Eyewitness Identification Research to the Legal System: A Glance at Where We Have Been and Where We Could Go', 5 *Journal of Applied Research in Memory and Cognition* (2016) 290–294.

10 A. Butenschøn Skre, 'Investigation Plans as a Tool for Managing Investigations in Norway', in Agirre, Bergsmo, De Smet and Stahn (eds), *supra* note 3, 887–902, at 887.

have demonstrated remarkable transparency and open-mindedness. Even though a majority of the contributors have practised at one of the international criminal courts and tribunals, their experiences are contrasted with domestic ones, including Italian, Norwegian, French, Indian, British, American and Israeli. The comparative potential of the anthology is its major strength, and an important lesson for future projects concerning the assessment of the mechanisms to ensure quality control in fact-rich cases: there are lessons to be learnt, both from national jurisdictions and international ones, from the academia

and from practice. The editors should be commended for creating a space which made this exchange possible. Now, with the project coming to the end, it might be time to consider a synthesis of the cross-cutting, pragmatic proposals to inform future research, set the agenda for upcoming projects and support practitioner–academia collaborations on this important matter.

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