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When Facts Are Thin on the Ground

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When facts are thin on the ground

By *Julia Romasevych*

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 [Special Court for Sierra Le.jpg](#)

Fact-finding at the international tribunals is not as precise as we think. Nancy Combs, Professor of Law at William and Mary Law School, explores this in her new book 'Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions'.

By Julia Romasevych and Paul Anstiss

What are the basic conclusions of your book?

My basic conclusions are that, for a variety of reasons, witnesses at the ICTR, the SCSL, and the Special Panels for East Timor have a very difficult time providing the kind of testimony that fact-finders need to receive to determine with any kind of certainty who did what to whom. Testimony at these three tribunals is frequently vague, lacking in necessary detail and inconsistent with the witnesses' previous written statements. Some of these deficiencies stem from innocent causes, such as the witnesses' lack of education, investigator errors, the need for language interpretation and cultural divergences between the witnesses and courtroom personnel, but some of them stem from witnesses' efforts to evade or outright lie. And it's almost impossible to tell one from the other.

Despite these difficulties, the tribunals I studied convict most of the defendants who come before them, so I looked at why that is. I concluded that because the Trial Chambers so frequently receive evidence that leaves them uncertain, they are forced to supplement that evidence with inferences that they draw from the institutional affiliations of the defendant during the conflict. Although these inferences often tell us little about the specific acts charged in the indictment, they – in addition to the testimony – can create a compelling picture of the defendant's overall guilt.

Can justice be delivered in these courts?

I think so. One of my primary conclusions is that the fact-finding at the international tribunals is not the fact-finding that appears to take place, but that doesn't necessarily make the convictions wrongful or the process unjust.

What are the chances that somebody might be convicted and found guilty when actually they maybe are not?

Wrongful convictions are possible in any criminal justice system, but I don't think it's especially likely that the tribunals I studied are convicting innocent people. What is more likely is that the facts that are supporting those convictions are inaccurate. In other words, I believe that – based on the totality of the evidence and the inferences they draw – the Trial Chambers can reach a high level of certainty that a particular defendant played some role in the commission of genocide. But because the eyewitness testimony the Trial Chambers receive is problematic in so many regards, they can have far less certainty that that same defendant was at a particular roadblock on a particular date distributing weapons.

As to fact-finding, is this a case of 'practise makes perfect'?

Not entirely. Many of the fact-finding impediments that the Trial Chambers confront are not amenable to significant change because they stem from educational, cultural and linguistic factors. But improvements can be made. The tribunals need to devote resources to language interpretation and their investigations practices to eliminate the problems that can be eliminated. The tribunals should conduct more on-site visits not only because they provide information and enable the judges to press witnesses in a more informed and rigorous way, but also because they are apt to deter some witness lying. Witnesses are less likely to lie, if they know that their stories would be carefully scrutinized. Finally, I suggest some minor and some major alterations to the tribunals' procedural systems that are likely to enhance accuracy in fact-finding.

Do you think that there is a danger that people fit the case to the facts that are available rather than the facts that are needed?

Yes, but that's been the case throughout time and history. In domestic criminal justice systems, rape convictions are now far more certain than they used to be thanks to DNA evidence, but we still prosecuted rape 30 years ago even though the evidence supporting the convictions was less certain. The tribunals have to do the best they can with the evidence that is available and the improvements I suggested are designed to ensure that they are in fact doing their best.

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