"Fact-finding Without Facts": A Conversation with Nancy Combs

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“FACT-FINDING WITHOUT FACTS”:
A CONVERSATION WITH NANCY COMBS

This roundtable was convened at 10:45 a.m., Friday, March 25, by its moderator, Linda A. Malone of William & Mary Law School, who introduced the speaker, Nancy Combs of William & Mary Law School. Professor Combs’ presentation was followed by remarks from the following discussants: Margaret deGuzman of the Irish Center for Human Rights; Marco Divac Oberg of the International Criminal Tribunal for the Former Yugoslavia; Saira Mohamed of the University of California at Berkeley School of Law; and Dan Saxon of the International Criminal Tribunal for the Former Yugoslavia’s Office of the Prosecutor.

REMARKS BY NANCY COMBS*

I am tremendously grateful to ASIL for convening this panel to discuss my book, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions. I am really looking forward to the insights of this group of esteemed international law scholars. Although there is much that I would love to discuss, time constraints compel me to confine my own remarks to an exceedingly short description of the book’s empirical conclusions.

My conclusions stem from my review of thousands of pages of transcripts from the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Special Panels of East Timor (Special Panels). From this review, I discovered that many international witnesses are unable to convey the kind of information that court personnel expect—and need—if they are to have confidence in the factual determinations they make. Sometimes witnesses claim not to know the sought-after information, while in other instances, communication breaks down as a result of the questioning process. Moreover, the clear information witnesses do convey during in-court testimony is often inconsistent with the information appearing in the witness’s pre-trial statement. As a consequence, I conclude that the tribunals under study are beset by a variety of fact-finding impediments that make it very difficult to tell who did what to whom with any measure of certainty.

So what sort of problems did I discover? As noted, witnesses frequently have difficulty answering certain basic factual questions. For instance, with some notable exceptions, witnesses have trouble providing the dates of the events that they witnessed. Additionally, they have trouble estimating distances, duration, and numbers, and making sense of maps, photographs, and sketches. The failure to answer these sorts of questions can substantially impair a tribunal’s ability to find facts. The failure to date events can conceal inconsistencies between witness accounts that would otherwise come to light. Moreover, it prevents a defendant from presenting an alibi defense. Accurate answers to distance questions are likewise of key importance to fact-finders. How much weight a Trial Chamber can justifiably place on a witness’s identification of a defendant at a particular scene will largely depend on how far the witness was from the defendant. A Trial Chamber hearing only that “the distance was not great” is making factual findings in the dark. As for maps, photographs, and sketches, defense counsel frequently show witnesses these representations to test the witness’s memory or to challenge whether the witness was even present at the site. But if the witness says she cannot understand the picture, then there is no way to tell if she was there or not. Even if the Trial Chamber is sure that the witness was there, it might wish to

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pinpoint her exact location in order to assess the weight to give to her testimony. One ICTR witness, for instance, was able to point out her position on a photograph of a stadium, and because she was able to do so, the Trial Chamber was able to determine that she could not have identified anyone located where the witness said the defendant was located.

Sometimes questions go unanswered not because the witnesses do not know the answers, but because the witnesses do not understand the questions they are asked, or the Western court personnel do not understand the answers that they receive. Sometimes the witness will not understand the terminology used in the question, and at other times it is the form of the question that gives rise to difficulties. Sometimes it is not clear what the problem is, but it is clear that some problem exists because the witness’s answer will not in any way match counsel’s question. In other cases, the communication difficulty will become apparent because counsel must ask a question multiple times in order to get a responsive answer from the witness. And it is not infrequent for counsel never to get a pertinent answer, as witnesses frequently seem to talk around the relevant topics.

A final problem concerns testimony that is inconsistent with previous statements. Investigators interview witnesses before they come to court, and they draft written statements ostensibly containing the information that the witnesses conveyed to them. The problem is that a substantial proportion of witnesses testify inconsistently with their written statements or with their in-court testimony in previous cases. While some of these inconsistencies are trivial, many are not. As Chapter Four of my book reveals, the inconsistencies cover a wide range of information. Discrepancies are particularly apt to appear in testimony that concerns dates, distance, duration, numerical estimations, and the other sorts of key details that international witnesses have such trouble providing. In other cases, the inconsistencies concern the specific facts of the crime and even the defendant’s involvement in the crime. These sorts of inconsistencies would be troubling enough if they happened only occasionally, but in reviewing the transcripts of all of the SCSL cases and a handful of ICTR cases, I found that, on average, approximately 50 percent of witness testimony was seriously inconsistent with past statements.

Having summarily canvassed the impediments bedeviling international criminal trials, let me now briefly mention some of the causes of those impediments. The most obvious factor is lack of education and relevant life experiences. A substantial proportion of witnesses are illiterate and have had no or virtually no formal education. Because many of these witnesses not only do not know how to read and write, but also have never been taught to tell time or to measure, it can come as no surprise when these witnesses are unable to answer many of the questions put to them. Cultural differences between the witnesses and Western court personnel also prove an additional impediment to accurate fact-finding. Indeed, an inability to answer certain questions may be driven less by educational factors than by cultural factors. My book canvasses the work of several anthropologists who show that many cultures do not attach the same importance to dates, distances, and other objective units of measure as we do in West. Taboos can also prevent clear, forthright testimony, and culture can frequently influence the style of answering questions, as some groups speak in a more indirect fashion than that which is customary in the West. Because Western speech patterns tend to be relatively direct, witnesses who provide indirect, circuitous answers are often thought at best to lack confidence in their perceptions, and at worst to be deceptive. Such inferences are obviously not appropriate with respect to witnesses from certain cultures, but because the trial judges often are not intimately familiar with the culture in question, they are left not knowing what speech signals or demeanor clues should give rise to concern. Finally, the
fact that virtually all testimony must go through one or more rounds of language interpretation only exacerbates the problems already mentioned.

The explanations just canvassed can be deemed "innocent." The problem is that many of these same phenomena can also be plausibly explained as purposeful efforts to conceal. Indeed, the very fact that questioning at the international tribunals seems so frequently bedeviled by educational deficits, interpretation errors, and cultural divergences means that witnesses can invoke these communication impediments even when they are not in play, as a means of concealing lying, inconsistencies, or other weaknesses in witness testimony. International witnesses who are falsely accusing a defendant may, for instance, find it useful to provide a vague account, devoid of meaningful details. Dating events permits a defendant to contradict the witness's testimony, so it may prove safer for the witness to claim that he does not know the relevant dates. Making distance and numerical estimates can likewise leave a witness vulnerable to contradiction, so they too are better left unstated. The same goes for the numerous examples of frustrating exchanges and unresponsive responses. While these may reflect confusion about terminology or a cultural proclivity toward indirect speech, they may also reflect a witness's desire to evade the question at hand, or at least to buy some time to consider the answer he wishes to give.

There is no way to determine whether a particular testimonial problem results from perjury or one of the many innocent explanations, but I did consider whether perjury seems in general to be a problem at the international tribunals, and I conclude that at some tribunals, it is. Some witnesses outright admit that they lied in their testimony or in their written statements. Moreover, we can tell that false testimony is prevalent at the ICTR in particular because my review of the transcripts and judgments reveals that virtually every ICTR case has featured either an alibi or some other form of blatant contradiction between witnesses for the defense and for the prosecution. Certainly, some of the instances of contradictory testimony probably reflect poor memory and perception, rather than perjury, but conflicting testimony is so prevalent in ICTR cases that it would be hard to dismiss all—or even a significant percentage—of it as the result of honest mistakes.

In the remainder of the book, I explore the implications of these empirical findings. I compare transcripts to judgments to reveal the way in which the Trial Chambers treat the testimonial deficiencies that I describe, and I construct what I believe is a compelling explanation for that treatment. In the book's final two chapters, I address various normative questions, including the most crucial: whether the testimonial deficiencies I identify fundamentally undermine the international criminal justice. I am sorry that time does not permit me to discuss those issues here, but I am eager to hear the comments of my esteemed colleagues.