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Book Review of Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions

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academic discourse accompanying it has been the inevitable questioning of the assumptions underlying the initially enthusiastic reception of these institutions. Much of this questioning initially dealt with whether the punishment meted out by these institutions actually served the classical purposes of criminal punishment, especially general and specific deterrence.² In a broader context, discussion ensued as to whether criminal tribunals assisted or impeded postconflict reconstruction. In these discourses, realists questioned more fundamental aspects of the usefulness of international criminal trials, and comparative scholarship evaluated the best mix of legal systems to address the seemingly unique aspects of international criminal trials of the perpetrators of mass atrocities.³ In all of these scholarly perspectives, a presumption arose that the tribunals functioned more or less as contemplated on a systematic level, however unsatisfactory or flawed the analyses or outcomes might be in individual cases or even types of cases. Simply put, international criminal tribunals functioned to determine—with the requisite due process—an individual's innocence or guilt relating to the offenses specifically charged based upon the most reliable and relevant evidence that could be obtained.

Primarily, the last part of this presumed equation, the evidentiary aspect, is seriously called into question in *Fact-Finding Without Facts* by Professor Nancy Combs of William and Mary Law School, who served as a legal adviser at the Iran–United States Claims Tribunal prior to her academic career. The modest assumption that international criminal trials might at the least be “useful mechanisms for determining who did what to whom during a mass atrocity” (p. 4) is no longer a safe assumption after Combs's blistering deconstruction of the fact-finding process. The core of the book is her empirical evaluation of thousands of pages of transcripts from the International Criminal Tribunal for Rwanda (ICTR), the

Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions. By Nancy A. Combs. Cambridge, New York: Cambridge University Press, 2010. Pp. xi, 420. Index. \$125.

Over the past twenty years or so, international criminal law has developed from an establishment of a norm against impunity for international crimes to a proliferation of international and hybrid criminal tribunals, culminating in the establishment of the International Criminal Court (ICC).¹ Throughout this evolution and the

⁶ Capoccia & Kelemen, *supra* note 3, at 368.

⁷ *Id.*

¹ See generally MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007).

² See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

³ ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005).

Special Court for Sierra Leone (SCSL), and the East Timor Special Panels for Serious Crimes (Special Panels). Combs justifies the obvious absence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) due to the relative commonality of education, culture, and language between witnesses and courtroom staff in the ICTY. In addition, given the prevalence of African conflicts in the ICC, the flaws in the other tribunals have more relevance to issues of accurate fact-finding because the ICC cases thus far do not have the relative commonality of courtroom staff and witnesses as the ICTY.

The magnitude and prevalence of these fact-finding flaws discovered by Combs will surprise even the most cynical followers of international criminal law. Given the lack of documentary evidence of atrocities and given the difficulties of obtaining forensic evidence, it is not surprising that most evidence comes from eyewitnesses. The inherent unreliability of eyewitness testimony in domestic trials, particularly for violent crimes, is well documented and has not gone unnoticed by the tribunals. Nevertheless, the tribunals have relied upon eyewitness testimony so inherently suspect in the way in which it was collected as to be patently unreliable. For example, in the ICTR case *Prosecutor v. Kamuhanda*,⁴ witnesses were asked out of court to identify a male defendant from a single picture of a group of individuals, but he was the only man in the picture, and he had a red mark on his shirt for good measure. This example is one of many that Combs provides throughout the book that are laughable in their absurdity, despite the seriousness of the flaws that they reveal. In some instances, the disconnect between the questions asked of the witness and the answers provided demonstrates that the witness had no understanding of the questions being asked. The author's painstaking review of the transcripts reveal, by way of illustration, that a witness being asked repeatedly about critical timing issues might well respond with descriptions of clothing and yet be deemed reliable for whatever information the witness manages to convey. Among other fact-finding impediments, Combs highlights wit-

nesses' trouble not only estimating distances, duration, and numbers but also understanding maps, photographs, and sketches; the failure of Western court personnel to understand the answers they do receive; in-court testimony inconsistencies with out-of-court statements; and purposeful attempts to evade questions. Again, none of these problems is unique to international tribunals, but their prevalence and obviousness in the transcripts are striking and disturbing. Similarly, the causes that Combs suggests for these impediments to fact-finding—lack of education and life experiences, differences in culture and language, and difficulties of straightforward translation—are not as surprising as the extraordinary magnitude of the problems that they produce.

Given these evident and prevalent fact-finding deficiencies, why have the trial chambers been so accepting of such faulty evidence? The author suggests that principles of organizational and associational criminal liability, purportedly discredited at Nuremberg, continue to be influential in the politicized atmosphere of international tribunals.

The final chapters address the normative questions raised by these fact-finding deficiencies. Combs suggests various adjustments in the pre-trial, trial, and post-trial processes to improve fact-finding, but emphasizes that large-scale procedural reform may still be necessary. She proposes "contextualization" of international criminal procedure (p. 286), with more incorporation of localized domestic criminal procedure in tribunals rather than the one-size-fits-all approach previously taken in the establishment of tribunals. Another proposal, which she describes as less desirable (and certainly more controversial), is overt recognition of associational liability through the joint criminal enterprise doctrine to "reflect the actual nature of current tribunal fact-finding" (p. 322).

Ultimately, Combs offers and explains her support for international criminal tribunals regardless of the fact-finding deficiencies. Drawing inferences of guilt from official positions or institutional affiliation remains problematic, although less so if the defendants are thoughtfully selected in the context of the conflict in which they were involved. She utilizes the scholarship suggesting

⁴ *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T (Jan. 22, 2004).

that the proof standard of “beyond a reasonable doubt” is actually a highly variable standard of proof that requires different levels of certainty in different cases. In other words, virtual certainty in fact-finding and guilt determinations is an illusion in any criminal justice system and does not negate other justifications for the necessity and legitimacy of international criminal tribunals. Her thorough, expansive, and meticulous research into the tribunals’ transcripts provides virtually irrefutable evidence that the magnitude of these problems in reliable fact-finding has never been fully appreciated, with all the consequences for international criminal justice that entails.

At the 2011 Annual Meeting of the American Society of International Law (ASIL), the International Criminal Law Interest Group sponsored a roundtable discussion of *Fact-Finding Without Facts* with Combs, this reviewer as moderator, and six other participants: Professor David Crane of Syracuse Law School and founding chief prosecutor of the SCSL, the first hybrid international criminal court; Professor Margaret deGuzman of Temple Law School, former law clerk in the Office of the Prosecutor of the ICTY and legal adviser to Senegal at the Rome Conference; Professor Hannah Garry, director of the International Human Rights Clinic at the University of Southern California School of Law and former legal officer in the appeals chamber of the ICTY/ICTR; Professor Saira Mohamed of U.C. Berkeley School of Law and former senior adviser to the U.S. special envoy for Sudan; Marko Divac Öberg, legal officer at the ICTY; and Dan Saxon, Leverhulme Visiting Professor of Law at Cambridge University and former senior prosecuting attorney at the ICTY. They all offered their own personal views, not necessarily reflecting the views of the institutions with which they had been affiliated, but with a wealth of first-hand experience with the fact-finding processes of international tribunals. No one questioned either Combs’s assessment of the fact-finding problem or the empirical evidence demonstrating it. As one commentator remarked, “Nancy Combs has demonstrated that fact-finding at international criminal tribunals is startlingly unreliable.”⁵

⁵ The quotations from the roundtable participants will be available in the 2011 ASIL Proceedings.

The roundtable was standing room only, and the audience heard a variety of responses from the roundtable participants (and audience) as to what the appropriate “remedy” for this conceded fact-finding deficiency should be. As a result, the discussion assumed the empirical inevitability of her research and focused beneficially on the appropriate response to these fact-finding deficiencies. The most discussed aspect of Combs’s normative conclusions was the proposition that convictions in international criminal tribunals may be legitimate, regardless of fact-finding deficiencies based on realistic assessments of group criminality. In reinforcing and yet limiting that suggestion, her book proposes that tribunals should limit their indictments to the upper-echelon leaders of mass atrocities.

Öberg spoke of his experience with the ICTY, a tribunal that, as noted, was not included in Combs’s analysis. He suggested that the tribunals or the ICC be less insecure in rejecting evidence or, when evidence is accepted, that the basis of its acceptance be adequately explained in the judgment. Behind the scenes, he also suggested that the judges discuss to whatever extent possible each case while it is fresh in their minds, with summaries to follow. Clearly, putting defendants on trial as soon as possible while evidence and memories are fresher is a huge challenge to the international tribunals evaluated (with the possible exception of the Special Panels) but perhaps will be less so with the ICC. To avoid the possibility of convicting an innocent person, Öberg recommended that the solution to such a problem is to indict fewer persons.

Saxon expanded upon Öberg’s experience with the ICTY to speak to other reasons why the ICTY might have experienced fewer problems identified by Combs, aside from the relative commonality suggested above. One of the most intriguing suggestions was that—whatever violations might have occurred—each party to the armed conflict have professional officers and soldiers in their units and well-educated civilian leaders. One need look no farther than the Geneva Conventions for recognition that mandatory education in the laws of war is every state’s responsibility, not just for its military but also for its civilian population. If the

most developed and privileged countries in the world do not educate their populace in the humanitarian laws of war, what expectations of compliance can be imposed on paramilitary groups in less stable situations? The educational requirements of the Geneva Conventions are often overlooked, if not totally ignored, for civil society.

Mohamed concluded that associational responsibility is not as discredited in international law as many scholars might assume. She demonstrated that associational doctrines at Nuremberg were not totally discredited and that certain associations (the SS, SD, Gestapo, and Nazi Party leadership) were determined to be criminal organizations. She endorsed Combs's suggestion that associational doctrines, especially extended joint criminal enterprise (JCE III), might be used to reduce reliance on unreliable eyewitness testimony. For future development of the law in the ICC, Mohamed noted that it is not clear whether JCE III is an available form of liability under the Rome Statute, unfortunately making it less likely to remedy deficiencies in fact-finding in that forum. She offered another justification for associational liability—that is, to place blame appropriately for mass atrocities on states and institutions rather than on a handful of perpetrators.

DeGuzman examined how the goals of international criminal punishment may have to be reevaluated to allow expanded reliance on group criminality in international criminal tribunals. In one of the book's most challenging perspectives, Combs evaluates whether proof "beyond a reasonable doubt" is not the actual standard even in those legal systems that herald it, minimizing the significance of less than certain factual determinations. DeGuzman challenged the concept that international tribunals should accept a standard of proof that "can encompass a relatively broad probability range" given the purposes to be served by international criminal tribunals (p. 344). Even assuming the legitimacy of group criminality, deGuzman noted that the suggestion that this assumption be combined with prosecution of only the top organizational leaders would not seem to serve the purposes of retribution, deterrence, community reconciliation, historical record creation, or inter-

national law formulation. In the book, Combs addresses these arguments by suggesting that most international criminal facts simply cannot be demonstrated with the optimal level of certainty.

The importance of empirical research is that it challenges the unsubstantiated assumptions of researchers who have proceeded in theory based on such assumptions. If Combs's empirical research is essentially unchallenged, as is likely, it is a game-changer for how international criminal justice should proceed. It is noteworthy that the author herself does not take these fact-finding deficiencies as negating the value and legitimacy of international criminal tribunals. It would be far too easy, and inappropriate, to use *Fact-Finding Without Facts* as an argument against recognition of international criminal tribunals as instruments of justice.

Crane made the final remarks of the roundtable discussion. He pointed out that we are only fifteen years into this experience of multiple international criminal tribunals, "at the beginning of the beginning" of international criminal justice. Crane and Combs agree that her findings bring to the fore the need for more utilization of domestic courts to punish mass atrocities. In addition, perhaps, non-adversarial domestic measures may be more effective in context, such as the town hall program started by Crane for cultural awareness and public education in Sierra Leone. He noted that what he called a "grand experiment" in international criminal justice—the establishment of the international criminal tribunals—has shown relatively little creativity or flexibility in the form that it has taken so far. As more tribunals are started and as the ICC defines itself beyond the four corners of the Rome Statute, the most fundamental question going forward is the concluding question in Crane's remarks: "Is the justice we seek the justice they want?"

Fact-Finding Without Facts provides hard facts about evidentiary deficiencies in international criminal tribunals to advance the purposes of international criminal justice and to confront some hard truths in any criminal justice system along the way. As noted, Combs does not in any way advocate ending international criminal tribunals, but the book is a bold and persuasive call for

a new, wiser, and more realistic beginning to this beginning.

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