
“Fact-Finding Without Facts” from the Perspective of the Fact-Finder

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If only top leaders are prosecuted, it may also be impossible to build a complete historical record. For example, it is often particularly difficult to demonstrate leadership responsibility for crimes of sexual violence. Excluding such crimes from prosecution when they have been committed on a widespread basis would seriously undermine the accuracy of the historical record. Moreover, excluding such crimes would limit the tribunal’s ability to express important norms against the use of sexual violence as an instrument of conflict.

In sum, while a great deal more work should be done to identify the appropriate goals and priorities of international tribunals, Combs’s book serves as a reminder of the serious practical impediments that exist to achieving some of the lofty goals international tribunals currently seek to pursue.

‘FACT-FINDING WITHOUT FACTS’ FROM THE PERSPECTIVE OF THE FACT-FINDER

*By Marko Divac Öberg**

My perspective on Nancy Combs’ ground-breaking book is that of a legal officer in Chambers at the International Criminal Tribunal for the former Yugoslavia (ICTY). As such, I assist the judges in their fact-finding tasks. While Combs chose not to focus on the ICTY, it faces some of the challenges she describes, albeit generally in less severe forms.

Combs describes a series of problems arising from common deficiencies in the testimony received from witnesses in international criminal trials. There is no easy fix for these problems, but there are a few ways in which they may be alleviated.

Combs’ analysis indicates that Trial Chambers make factual findings where they would have rejected the testimony if they had had more details. For instance, had a witness provided a date for an incident at which the accused was allegedly present, it would have become clear that the accused was abroad at the time. In my submission, Trial Chambers, when faced with testimony lacking important details such as dates, should examine reasonable scenarios in which the missing details would lead them to reject the evidence. If they see such a scenario, then they should not base a conviction on that evidence, at least not exclusively.

Combs criticizes Trial Chambers for not mentioning in their judgments many testimonial deficiencies, including contradictions between prior statements and in-court testimony, and content omitted from prior statements.¹ Such discrepancies are very common, including for witnesses who are highly educated, fluent in the language of the Court, or who have no particular reason to be biased or dishonest. While Trial Chambers should consider the discrepancies, international cases are simply too big to dwell on all of them. In general, the best approach is to summarize in the judgment the evidence in a way that implicitly shows what conclusions the Trial Chamber drew regarding the discrepancies. For instance, if a witness twice describes the same event but only once mentions the presence of her cousin at that event, the judgment might include a sentence, footnoted to both of these sources of evidence, which mentions the presence of the cousin. This approach saves time and helps

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¹ NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 179–84, 195–97, 280–81 (2010).

judgments maintain a manageable length. However, deficiencies that are truly disturbing or concern crucial pieces of evidence deserve more explicit treatment and explanation.

Several of the problems identified by Combs² could be solved by adopting a proper methodology. It is a good idea for the judges to discuss the strengths and weaknesses of a witness's testimony while it is still fresh in their minds, and let their assistants draft as soon as possible a summary of the testimony that mentions any significant deficiencies and is in a style and quality that allow it to later be used in the judgment. If one postpones such drafting until all the evidence has been received, one loses sight of each witness's strengths and weaknesses, and it becomes extremely difficult to give proper consideration to a witness's testimonial deficiencies.

Finally, putting a case on trial sooner rather than later will limit the problems linked to witnesses' fading memories, as well as reduce the number of previous statements—taken at different times by different persons—among which inconsistencies invariably occur.

Combs provides further good ideas for improvement, such as placing direct examination of witnesses in the hands of the judges.³ Good implementation here is the key to success. Currently, judges and Chambers staff may not be sufficiently equipped to take on this task, which is rather different from what most of them have come to specialize in. Judges would need to take on a very active role in the courtroom, which may be unfamiliar especially to judges of the common-law tradition. Judges and legal assistants would have to shift the balance of their work from after a witness has testified, to before she testifies. Appropriate training and modified recruitment criteria may be advisable.

I also agree with Combs' assessment that it is necessary to keep a system that is essentially adversarial.⁴ I would add that one great aspect of the adversarial system in the politically charged environment of international criminal justice is that it allows each party to blame another party for how a judgment turned out. It can be legally sound, but politically difficult, to acquit a person who is generally believed to be guilty. With an adversarial system, the prosecution can blame an acquittal on the Trial Chamber for having demanded evidence of an unrealistically high quality, and the Trial Chamber can blame it on the prosecution for not having properly investigated or presented its case.

Several of the problems identified by Combs raise the specter of convicting an innocent person. This arises in particular from the combination of (1) huge complex cases; (2) under-resourced defense teams; (3) tension between the pressure on international tribunals to apportion blame for atrocities and the shortcomings of witness testimony as described by Combs; and (4) what Combs calls the cavalier attitude of Trial Chambers towards fact-finding. This problem is not resolved by making more transparent use of expanded criminal liability doctrines.⁵ It calls for indicting fewer persons, on a more solid basis on average,⁶ and setting high and demanding standards for the application of such liability doctrines to the facts.⁷ Convicting the innocent, apart from being fundamentally unjust, has great potential to be costly for international criminal justice. Convictions carry extreme reputational damage, not only for the defendants but also for their families. Strong reputational damage is one of

² *E.g., id.* at 179–80.

³ *Id.* at 319.

⁴ *Id.* at 310.

⁵ *See id.* at 333.

⁶ *See id.* at 339.

⁷ *See id.* at 337–38.

the strengths of international criminal law, which should not be diluted by a string of questionable convictions.

REMARKS BY SAIRA MOHAMED*

Nancy Combs’ *Fact-Finding Without Facts* provides a groundbreaking contribution to both scholarship and practice in international criminal law. Rather than discussing the empirical findings of the book, I will focus in my remarks today on three points arising out of its conceptual and normative arguments on organizational liability.

First, I seek to clarify the book’s assertion that associational doctrines were discredited at Tokyo and Nuremberg.¹ In today’s discussions of organizational liability, we often recall the famous statement of the International Military Tribunal (IMT) that “[c]rimes against international law are committed by men, not by abstract entities.”² This echoed the words of Justice Jackson, who had asserted in his opening statement, “Of course, the idea that a state, any more than a corporation, commits crimes is a fiction. Crimes always are committed only by persons.”³ Justice Jackson, however, continued: “While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.”⁴

Jackson thus acknowledged the reality of collective liability, and despite the Tribunal’s purported stance against responsibility of “abstract entities,” I propose that associational doctrines were not discredited at Nuremberg. The Tribunal certainly placed significant limitations on the reach of conspiracy liability and the criminal organizations doctrine, but at the same time, it did declare the SS, the Gestapo and SD, and the Leadership Corps of the Nazi Party to be criminal organizations. By doing so, the Tribunal made clear that individuals were not the sole bearers of responsibility for the horrors of the war; it announced that a state’s military forces, security services, and political parties may not be used to commit crimes, and it informed the world about the role of the German state and bureaucracy in these acts—about the crimes of not merely the individuals who perpetrated atrocities, but of the institutions that enabled them. Moreover, this message was not confined to the IMT. The Allies declared the vitality of organizational liability when they enacted Control Council No. 9 to dissolve I.G. Farben, the corporation which, among other things, had produced Zyklon B for the Nazis.⁵ A few years later, the issue of Farben’s collective responsibility again arose when the U.S. military tribunal charged that Farben executives committed war crimes and crimes against humanity not only individually, but also collectively, and acting through the instrumentality of Farben.⁶

Next, I turn from the history of associational doctrines to their future. Combs focuses on the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special

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¹ See NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 224–25 (2010).

² International Military Tribunal, Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (1947).

³ Robert H. Jackson, Chief of Counsel for the United States, Opening Statement (Nov. 21, 1945), in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 150 (1947).

⁴ *Id.*

⁵ Control Council Law No. 9 (Nov. 30, 1945), in 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225 (1945).

⁶ See *United States v. Krauch*, Judgment, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1081, 1108, 1167 (1952).