



Fact-Finding Without Facts

The Uncertain Evidentiary
Foundations of
International Criminal Convictions

Nancy Armoury Combs

CAMBRIDGE

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OF INTERNATIONAL CRIMINAL CONVICTIONS

NANCY AMOURY COMBS

William and Mary Law School



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FACT-FINDING WITHOUT FACTS

Fact-Finding Without Facts explores international criminal fact-finding – empirically, conceptually, and normatively. After reviewing thousands of pages of transcripts from various international criminal tribunals, the author reveals that international criminal trials are beset by numerous and severe fact-finding impediments that substantially impair the tribunals' ability to determine who did what to whom. These fact-finding impediments have heretofore received virtually no publicity, let alone scholarly treatment, and they are deeply troubling not only because they raise grave concerns about the accuracy of the judgments currently being issued but because they can be expected to similarly impair the next generation of international trials that will be held at the International Criminal Court. After setting forth her empirical findings, the author considers their conceptual and normative implications. The author concludes that international criminal tribunals purport a fact-finding competence that they do not possess and, as a consequence, base their judgments on a less precise, more amorphous method of fact-finding than they publicly acknowledge. The book ends with an exploration of various normative questions, including the most foundational: whether the international tribunals' fact-finding impediments fatally undermine the international criminal justice project.

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Introduction

After decades of inactivity, international criminal law has lately emerged as one of the most rapidly developing and influential subjects of international law and global politics. Sixty years after Nazi offenders were prosecuted at Nuremberg, the international community established an international criminal tribunal to prosecute those responsible for international crimes in the former Yugoslavia (ICTY). The ICTY spawned a number of progeny, including the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Panels in the Dili District Court in East Timor (Special Panels), the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and, most importantly, a permanent International Criminal Court (ICC). The establishment of these institutions constitutes, in Mark Drumbl's words, "one of the more extensive waves of institution-building in modern international relations."¹

Most international law scholars warmly greeted the establishment of these tribunals.² Although large-scale atrocities have been committed since the dawn of humanity, for most of human history these atrocities have not elicited

¹ MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 10 (2007).

² Richard Goldstone called the new international tribunals "a tremendous and exciting step forward," Richard Goldstone, *Conference Luncheon Address*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 2 (1997), while Payam Akhavan hailed them as "an unprecedented institutional expression of the indivisibility of peace and respect for human rights" that represented "a radical departure from the traditional *realpolitik* paradigm which has so often and for so long ignored the victims of mass murder and legitimized the rule of tyrants in the name of promoting the purported *summum bonum* of stability," Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 *DUKE J. COMP. & INT'L L.* 325, 327 (1997).

At least that was the view of commentators with an internationalist perspective. Scholars of a realist bent have questioned the wisdom and viability of international trials. See, e.g., Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, *DÆDALUS*, Winter 2003, at 47, 47–53; Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 *AM. J. INT'L L.* 500, 500–02 (1994). For a brief discussion of the realist critique of international criminal law, see DRUMBL, note 1, at 10.

criminal sanctions. So, the move to impose accountability on brutal dictators who were responsible for widespread death, suffering, and destruction was considered a tremendous advance, and early commentators credited international criminal prosecutions with promoting a host of praiseworthy purposes. International criminal prosecutions were said to affirm the rule of law in previously lawless societies,³ to promote peace building and transition to democracy in war-torn lands,⁴ to assist in reconciling former enemies,⁵ to deter future megalomaniacs from committing similar crimes,⁶ to create a historical record of the conflict,⁷ and to diminish the victims' propensity to blame collectively all those in the offenders' group.⁸ International criminal justice was, in sum, the subject of a great deal of soaring and inspirational rhetoric.

In recent years, the glow surrounding international criminal justice has begun to fade. The scandalous length and cost of international criminal trials have driven some critiques,⁹ while inadequate outreach efforts have formed

³ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 25 (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 56 (2000); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 L. & CONTEMP. PROBS. 81, 83 (1996); The Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, delivered to the Security Council*, para. 39, U.N. Doc. S/2004/616 (Aug. 23, 2004).

⁴ Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 9–10 (1998).

⁵ For a discussion of this literature, see Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 1, 3–4 (2004).

⁶ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); Alejandro Miguel Garro & Enrique Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 343 (1987); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?* 12 HUM. RTS. Q. 1, 12 (1990); M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 192 (2003). Indeed, the Security Council established the ICTY while the Yugoslavian conflict was still underway with the express goal of deterring international crimes. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, para. 13, 49th Sess., U.N. Doc. A/49/150 (Aug. 29, 1994).

⁷ Richard May & Marieke Wierda, *Evidence Before the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 249, 252–53 (Richard May et al. eds., 2001); Cassese, *On the Current Trends*, note 4, at 9–10; Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6–9 (1998).

⁸ Cassese, *On the Current Trends*, note 4, at 9; see also MINOW, note 3, at 40; Richard J. Goldstone, *50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in *CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES* 215, 215–16 (Albert J. Jongman ed., 1996).

⁹ See, e.g., John E. Ackerman, *Assignment of Defense Counsel at the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 167, 170 (Richard May et al. eds., 2001); Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused*

the basis for others.¹⁰ On a much broader scale, Larry May, in his trilogy on crimes against humanity, war crimes, and aggression,¹¹ has carefully scrutinized and explicated the normative foundations of international criminal law, rejecting much that does not conform to his moral minimalist account. Other scholars have begun questioning the ability of international criminal tribunals to achieve many of the goals that previously had been reflexively attributed to them. Thus, whereas early commentators unquestioningly assumed that international criminal prosecutions would serve to deter the next generation of genocidal maniacs, more recently scholars have questioned that assumption.¹² Recent empirical research also has called into question the ability of international criminal tribunals to advance reconciliation and peace-building efforts following large-scale violence.¹³ And Mark Drumbl, for his part, has offered a comprehensive and sophisticated critique of international criminal justice, concluding that there exists a palpable disconnect between the effects of sentencing and the penological theories that are expected to justify the imposition of criminal punishment.¹⁴

These are impressive studies because they scrutinize many of the foundational beliefs that drove the establishment of the international criminal tribunals, but, as impressive as they are, they assume the question that forms the

in *Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 623 (1998); Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 759 (2000); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 367–69 (1999); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 584 (2000); Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 536 (2001); International Crisis Group, *The International Criminal Tribunal for Rwanda: Justice Delayed* ii (June 7, 2001).

¹⁰ See, e.g., Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crime Trials*, 3 J. INT'L CRIM. JUST. 354, 355 (2005); Samantha Power, *Rwanda: The Two Faces of Justice*, 50 N.Y. REVIEW OF BOOKS, Jan. 16, 2003; Ivan Simonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2 J. INT'L CRIM. JUST. 701, 706–07 (2004); Christopher M. Gosnell, *A Court Too Far*, INT'L HERALD TRIB., Mar. 28, 2008.

¹¹ See generally LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (2005); LARRY MAY, *WAR CRIMES AND JUST WAR* (2007); LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* (2008).

¹² See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2007); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 8–11 (2002).

¹³ ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005); Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); Marie-Benedicte Dembour & Emily Haslan, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151 (2004).

¹⁴ DRUMBL, note 1, at 149–80.

basis for this work. The scholars I have mentioned might question whether the prosecution of certain international crimes can be justified given their infringement on state sovereignty,¹⁵ or they might conclude that international criminal trials impair the prospects for reconciliation rather than advance them,¹⁶ but their critiques presuppose that international trials – even if they can do nothing else – can determine with some measure of certainty whether a defendant engaged in the acts alleged in the indictment.¹⁷ That is, even if international trials have uncertain philosophical foundations, even if they regularly fail to deter, rehabilitate, or reconcile, international criminal trials have at least been considered useful mechanisms for determining who did what to whom during a mass atrocity.

It is that assumption that I will challenge. My study will reveal that international criminal trials confront severe impediments to accurate fact-finding, impediments that should give rise to serious doubts about the accuracy of the Trial Chambers' factual determinations. The basis for my study is a large-scale review of transcripts from the ICTR, the SCSL, and the Special Panels. From this review, I conclude that much eyewitness testimony at the international tribunals is of highly questionable reliability. In particular, many international witnesses are unable to convey the information that court personnel expect – and need – to receive, if they are to have confidence in the factual determinations they make. Sometimes witnesses claim not to know the sought-after information, whereas in other cases the communication breaks down as a result of the questioning process. Chapter 2 details these testimonial deficiencies while Chapter 3 considers some of their causes. Chapter 3 reports, for instance, that many witnesses lack the education and life experiences to be able to read maps, tell time, or answer questions concerning distances and dates. Cultural norms and taboos create additional communication difficulties, as some witnesses are reluctant to speak directly or at all about certain events and as international judges inappropriately assess witnesses' demeanor and willingness to answer questions by Western norms. The need for language interpretation for virtually every fact witness – sometimes through multiple interpreters – and the unfamiliarity of most witnesses with the predominantly

¹⁵ See, e.g., MAY, *CRIMES AGAINST HUMANITY*, note 11, at 83 (contending that “international prosecutions require a showing that harm that is group-based has occurred”).

¹⁶ See, e.g., STOVER, note 13, at 15.

¹⁷ When Larry May, for instance, proposed a series of reforms designed to reduce the appearance of political influence over international trials, he acknowledged that accepting his proposals would make “the pursuit of the truth of the causes of the larger atrocity harder to ascertain by means of trials.” He consoled readers, however, that “There will be truths nonetheless that will emerge . . . namely that truth concerning whether a given defendant did participate in an atrocity and to what extent.” MAY, *AGGRESSION*, note 11, at 337.

adversarial trial procedures used at the international tribunals only compound these problems.

My review does not encompass ICTY proceedings because the ICTY is an outlier amongst the tribunals that have prosecuted international crimes and that will be doing so in the future. Although a cursory review of ICTY transcripts reveals that those proceedings do feature some of the problems that will be described in the following pages, because the ICTY prosecutes crimes that took place in Europe, the educational, cultural, and linguistic divergences between witnesses and courtroom staff that so impair communication at the ICTR, the SCSL, and the Special Panels do not prove as distortive. That in itself would not be reason to exclude the ICTY from my study, but the fact that the ICC is currently focused exclusively on African conflicts suggests that the fact-finding impediments that I have identified in ICTR, SCSL, and Special Panels proceedings constitute a continuing concern for international criminal justice despite the fact that the ICTY does not feature them in the same number or severity.

As a consequence of the fact-finding impediments that I will describe, the testimony of international witnesses often is vague, unclear, and lacking in the information necessary for fact finders to make reasoned factual assessments. Moreover, what clear information witnesses do provide in court often conflicts with the information that the witnesses previously provided in their pre-trial statements. Chapter 4 canvases such inconsistencies and reveals that they both pervade international criminal testimony and frequently pertain to core features of that testimony. In particular, my review of all of the completed SCSL cases and a handful of ICTR cases shows that more than 50 percent of the prosecution witnesses appearing in these trials testified in a way that was seriously inconsistent with their pretrial statements. Sometimes the inconsistencies related to such details as the date, time, or place of the crime, but as frequently they related to such fundamental matters as the nature of the crime and the nature of the defendant's involvement in the crime.

The inconsistencies that pervade international criminal transcripts can be explained by the educational, cultural, and linguistic factors described in Chapter 3, but they, along with other problematic features of witness testimony, also can be explained by witness mendacity. Indeed, many of the other testimonial difficulties chronicled in Chapter 2 – from the failure to answer date, time, and distance questions to the circuitous responses that so lengthen and complicate communication – could also stem from a witness's desire to evade. Although every criminal justice system in the world has its share of lying witnesses, Chapter 5 suggests that some international tribunals have more than their share. The group-based loyalty and ethnic divisions that gave rise to the international crimes in the first place can create powerful incentives to put

enemies in prison, whether they belong there or not, and the international tribunals offer additional incentives – perhaps unwittingly – through the financial assistance that they provide to testifying witnesses. Whatever the causes of the false testimony, Chapter 5 reveals that some international criminal tribunals hear a lot of it. Indeed, my review of ICTR cases shows that more than 90 per cent of them featured an alibi or another example of diametrically opposing testimony from defense and prosecution witnesses. Although some of these witnesses may be honestly mistaken, the use of alibis and the incidence of contradictory testimony so vastly exceeds that which is common to domestic trials that it would be naïve to dismiss a substantial portion of it as arising from honest mistakes.

These fact-finding impediments might not be worthy of significant concern if most convictions were supported by a substantial quantity of documentary or forensic evidence, but that simply is not the case for today's international trials. Whereas prosecutors at the Nuremberg Tribunal could rely on a colossal cache of documents to establish the guilt of the Nazi defendants before them, today's international criminals no longer leave a clear paper trail of their offenses. Orders are issued orally, and lines of command are blurred through the use of parallel structures of authority. Even forensic proof that a particular massacre took place is often lacking. As a consequence, prosecutors at today's international tribunals rely almost exclusively on eyewitness testimony. The substantial reliance on eyewitness testimony in itself would be worrisome because recent psychological research, as well as advances in DNA testing, has shown eyewitness testimony to be unreliable in numerous regards. The fact-finding impediments detailed in Chapters 2 through 5 serve only to increase the uncertainty of international criminal fact-finding based on such eyewitness testimony.

Although the factors just described should raise grave concerns about the reliability and credibility of the testimony presented to the international tribunals and the concomitant accuracy of the judgments that are based on that testimony, these problems heretofore have received virtually no publicity, let alone scholarly treatment or remedial legislation. Although occasional non-governmental organization (NGO) reports have commented on a dearth of interpreters at one tribunal or judicial insensitivity at another, no comprehensive efforts have been undertaken to examine the significant impediments to accurate fact-finding that exist at the international tribunals. Such an examination is vitally important to the legitimacy of the international criminal justice project. Concededly, trials involve multiple layers of knowing. They encompass a normative spectrum that, in Robert Burns' words, features at one end "[d]id he do it?" kinds of questions (brutally elementary data) to questions involving the interpretation of the meaning of circumstantial evidence and then to the

provisional acceptance of morally and politically charged narratives.”¹⁸ I focus here only on the “brutally elementary data” question of “[d]id he do it?” but that is a crucial question, for it is arguably the question on which all other questions are based.

In considering that question, I conclude that international criminal trials purport a fact-finding competence that they do not possess. International criminal trials are conducted as Western-style proceedings, which embody certain fact-finding expectations. Chapter 6 considers these expectations and assesses the capacity of international criminal trials to meet them. As a result of this assessment, I conclude that, by using the Western trial form, international criminal proceedings cloak themselves in a garb of fact-finding competence, but it is only a cloak, for many of the key expectations and assumptions that underlie the Western trial form do not exist in the international context. Chapter 6 also highlights the ways in which international tribunals obscure the uncertain foundations of their factual determinations.

That international criminal trials are less reliable adjudicatory mechanisms than they appear does not mean that the judgments reached after those trials are of questionable legal accuracy. Certainly, the fact-finding impediments that I will describe render assessing prosecutorial allegations a challenging task. Prosecution testimony is frequently vague, lacking in detail, and contradicted by defense testimony. Fact finders are typically presented no documentary or forensic evidence on which they can anchor their findings, and they have little ability to assess the witnesses’ demeanor because the witnesses speak a different language and adhere to different cultural norms than the fact finders. Consequently, if the tribunals were asked to determine the defendant’s guilt on a preponderance-of-the-evidence standard, we might expect them to reach inaccurate conclusions a substantial proportion of the time. But the tribunals are not asked whether it is more likely than not that the defendant committed the crime; they are asked whether the prosecution has proven beyond a reasonable doubt that the defendant committed the crime. That is a much easier question to answer correctly, and while I cannot say whether the tribunals do answer it correctly in any particular case – let alone in a whole body of them – I can assess whether their treatment of fact-finding impediments generally comports with the beyond-a-reasonable-doubt standard that ostensibly applies to international criminal prosecutions.

This assessment takes place in Chapter 7. Through a comparison between witness testimony and the Trial Chambers’ description and treatment of that testimony, I discovered that, as a general matter, the tribunals take a cavalier

¹⁸ Robert P. Burns, *How Law Knows in the American Trial Court*, in *HOW LAW KNOWS* 126, 127 (Austin Sarat et al. eds., 2007).

approach to fact-finding impediments. Many testimonial deficiencies are never mentioned in the Trial Chambers' judgments, and most of those that are, are reflexively attributed to innocent causes that do not impact the witnesses' credibility. Even severe inconsistencies between a witness's testimony and pre-trial statement are sometimes overlooked, though a particularly large number of particularly substantial inconsistencies typically does garner judicial attention. Chapter 7 begins by describing the Trial Chambers' general approach to fact-finding impediments, and then it illustrates those general conclusions with a comprehensive and careful examination of the *CDF* case at the SCSL. The two sections together show that the Trial Chambers frequently are willing to base their factual findings on deeply flawed witness testimony. Indeed, considering that vague, inconsistent testimony is the standard fare of the international criminal trials, that perjury is prevalent, and that even the most basic facts cannot be verified, one might have thought that Trial Chambers would rarely be able to find that the prosecution has proven its allegations beyond a reasonable doubt. But as a result of the lackadaisical attitude that most Trial Chambers bring to fact-finding impediments, the very opposite is true: The international tribunals under study convict the vast majority of defendants who come before them of at least one of the crimes for which they are charged.

So, why do the Trial Chambers seem so unconcerned about fact-finding impediments? Chapter 8 considers this question, beginning with a discussion of politics. International criminal tribunals are intensely political institutions, and although we have no reason to believe that political considerations directly influence the disposition of particular cases, they may well operate indirectly to bias the Trial Chambers in favor of conviction. Next, the chapter briefly considers the backgrounds of the judges as a factor that might also incline them toward conviction. Whereas these factors may play a small role in the Trial Chambers' cavalier treatment of testimonial deficiencies, I believe that the attitude derives more directly and fundamentally from principles of organizational liability that appeared in the Nuremberg Charter. These organizational liability principles were ostensibly discredited during the Nuremberg Trial, but I maintain that they continue to exert a powerful influence over fact-finding at today's international tribunals.

I argue indeed that, if the Trial Chambers appear largely unconcerned about testimonial deficiencies, it is because the testimony itself is not the exclusive basis for the Trial Chambers' factual determinations. Although the Trial Chambers appear to be convicting defendants on the basis of the acts charged in the indictments and basing their factual findings about those acts solely on the testimony that has been presented to them, I contend that the Trial Chambers in fact supplement that testimony with inferences that they draw from the defendants' official position or institutional affiliation in the context of the