

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.

Nancy Amoury Combs is a Professor of Law at the William and Mary Law School, where she is the 2009–2011 Cabell Research Professor and a 2008 recipient of William and Mary’s Alumni Fellowship Award for teaching excellence. She earned her PhD from Leiden University and her JD from the University of California at Berkeley School of Law. She has served as a law clerk to Judge Diarmuid O’Scannlain on the Ninth Circuit Court of Appeals and to Justice Anthony Kennedy on the U.S. Supreme Court.

Prior to joining the faculty at William and Mary Law School, Professor Combs served as legal advisor at the Iran–United States Claims Tribunal in The Hague. She has written extensively on topics in international law and international criminal justice, publishing two books and numerous articles and essays appearing in the *University of Pennsylvania Law Review*, the *Vanderbilt Law Review*, the *Hastings Law Journal*, the *American Journal of International Law*, the *Harvard International Law Journal*, and the *Chicago Journal of International Law*, among others. She currently serves as member of the International Expert Framework, an international working group that is developing general rules and principles of international criminal procedure.

Fact-Finding Without Facts

THE UNCERTAIN EVIDENTIARY FOUNDATIONS
OF INTERNATIONAL CRIMINAL CONVICTIONS

NANCY AMOURY COMBS

William and Mary Law School



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
978-0-521-11115-7 — Fact-Finding without Facts
The Uncertain Evidentiary Foundations of International Criminal Convictions
Nancy A. Combs
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521111157

© Nancy Amoury Combs 2010

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2010

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Combs, Nancy A., 1965–

Fact-finding in international criminal law / Nancy A. Combs.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-11115-7 (hardback)

1. International criminal courts. 2. Evidence, Criminal. I. Title.

KZ6304.5.E94C66 2010

345'.06-dc22 2009043282

ISBN 978-0-521-11115-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press & Assessment
978-0-521-11115-7 — Fact-Finding without Facts
The Uncertain Evidentiary Foundations of International Criminal Convictions
Nancy A. Combs
Frontmatter
[More Information](#)

For Dadu

Contents

<i>Acknowledgments</i>	<i>page xi</i>
Introduction	1
1 The Evidence Supporting International Criminal Convictions	11
1.A. The Prevalence of Eyewitness Testimony	11
1.B. The Limitations of Eyewitness Testimony	14
2 Questions Unanswered: International Witnesses and the Information Unconveyed	21
2.A. International Witnesses and Their Inability to Answer Who, What, Where, or When Questions	22
2.A.i. Dates	24
2.A.ii. Duration	27
2.A.iii. Distance	29
2.A.iv. Numerical Estimations	33
2.A.v. Two-Dimensional Representations	36
2.A.vi. Important Details	38
2.A.vii. Court Procedures	39
2.A.viii. Summary	43
2.B. Questions and Answers: A Different Sort of Communication Breakdown	44
3 The Educational, Linguistic, and Cultural Impediments to Accurate Fact-Finding at the International Tribunals	63
3.A. Education, Literacy, and Life Experiences	63
3.B. Interpretation Errors	66
3.C. Cultural Divergences	79

3.D. Education, Interpretation, and Culture: Innocent Explanations or Concealment Techniques?	100
3.E. Summary	105
4 Of Inconsistencies and Their Explanations	106
4.A. The Nature of the Inconsistencies	106
4.B. The Prevalence of the Inconsistencies	118
4.C. The Causes of the Inconsistencies	122
5 Perjury: The Counternarrative	130
5.A. A Cultural Component to Perjury?	131
5.B. Perjury Incentives	135
5.C. The Incidence of Perjury at the International Tribunals	149
6 Expectations Unfulfilled: The Consequences of the Fact-Finding Impediments	167
7 Casual Indifference: The Trial Chambers' Treatment of Testimonial Deficiencies	189
7.A. The Trial Chambers' Lackadaisical Attitude Toward Testimonial Deficiencies	190
7.B. Evidentiary Bases Exposed: The <i>CDF</i> Judgment	203
7.B.i. A Brief Summary of the Case	203
7.B.ii. Crimes Committed in the Towns of Tongo Field	204
7.B.iii. Crimes Committed in Koribondo	206
7.B.iv. Crimes Committed in the Bo District	212
7.B.v. Crimes Committed in the Bonthe District	212
7.B.vi. Crimes Committed at Talia	214
7.B.vii. Crimes Committed in the Moyamba District	215
7.B.viii. The Enlistment or Use of Child Soldiers	216
7.B.ix. The Underlying Crimes	219
7.B.x. Summary	220
7.C. Summary and Statistics: International Criminal Trials and the Culture of Conviction	220
8 Organizational Liability Revived: The Pro-Conviction Bias Explained	224
8.A. The Politics of Acquittals	225
8.B. Judicial Backgrounds	234
8.C. The Lure of Organizational Liability	235
8.C.i. Organizational Liability as an Evidentiary Proxy	236
8.C.ii. Explaining the Acquittals by Evidentiary Proxies	254
8.C.iii. Summary	271

Contents

ix

9	Help Needed: Practical Suggestions and Procedural Reforms to Improve Fact-Finding Accuracy	273
9.A.	Improving That Which Already Exists: Small-Scale Adaptations to Existing Procedures	274
9.A.i.	Language Interpretation	276
9.A.ii.	Investigations	277
9.A.iii.	On-Site Visits	281
9.B.	Publicizing and Punishing Perjury	282
9.C.	Large-Scale Procedural Reforms	285
9.C.i.	The Case for Contextualization	286
9.C.ii.	International Criminal Procedures: Uniformity in the Face of Diversity	289
9.C.iii.	Considering Context through the Importation of Domestic Procedures	297
9.C.iv.	The Choice between Adversarial and Nonadversarial Methods of Evidence Presentation	302
9.D.	Reducing the Impact of Testimonial Deficiencies and Aligning Stated and Actual Conviction Justifications Through the Use of Associational Doctrines	321
10	Assessing the Status Quo: They Are Not Doing What They Say They Are Doing, but Is What They Are Doing Worth Doing?	334
10.A.	The Adequacy of Inferences	335
10.B.	The Close-Enough Approach to Fact-Finding	339
10.C.	Reconceptualizing the Standard of Proof	343
	Conclusion	365
	<i>Bibliography</i>	375
	<i>Index</i>	409

Acknowledgments

This book has benefited immeasurably from the comments of those who read previous drafts as well as those who provided comments during the conferences and workshops where I presented portions of this book. In particular, I'm grateful to Lan Cao, Douglass Cassel, Bruce Combs, Mirjan Damaška, Mark Drumbl, Kevin Heller, Máximo Langer, Erik Lillquist, Linda Malone, Paul Marcus, Larry May, John Murphy, and those who attended Harvard Law School's Global Governance Workshop; George Washington University's Global Law Workshop; Washington & Lee's Transnational Law Institute Workshop; UCLA's Symposium on Trends and Tensions in International Criminal Procedure; the 2008 Annual Meeting of the International Society for the Reform of Criminal Law; University of Wisconsin's Law, War and Human Security Workshop; University of Illinois College of Law's Symposium on International Criminal Processes and Human Rights; and the 2007 IVR Conference on Law and Legal Cultures in the 21st Century.

I am also grateful for the research assistance of Karen Anslinger, Philip Fijalkovich, Noah Foreman, Andrew Gore, Kevin Grady, Kristina Hofmann, Michele Slachetka, Mary Thibadeau, Rebecca Wharton, and Michael Willems.