

Nancy A. Combs. ***Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions.*** Cambridge: Cambridge University Press, 2010. Pp. 432. £80.00. ISBN: 9780521111157.

The field of international criminal law (ICL) is synonymous with the crowded courtroom and the infamous individual in the dock; Adolf Eichmann, Slobodan Milošević, Saddam Hussein, and now Radovan Karadžić. The actions of such individuals have taken place within the various conflicts and mass atrocities that have proven to be lamentably frequent both during the last century and now into this one. In the aftermath of this sustained bloodshed, trials, whether national (Klaus Barbie in France, John Demjanjuk in Germany) or international (Jean Kambanda before the International Criminal Tribunal for Rwanda (ICTR)), have constituted a frequent (David Scheffer's pronouncement of 'tribunal fatigue' suggests perhaps too frequent) reflex reaction by states and have formed the backbone of ICL. Beginning with the Leipzig trials, then via Nuremberg and Tokyo, Yugoslavia and Rwanda to the creation of the International Criminal Court (ICC), successive tribunals have sought to build upon the strengths (and weaknesses) of their predecessors. For example, the recent rise of hybrid courts such as the Special Tribunal for Lebanon and Extraordinary Chambers in the Courts of Cambodia (ECCC) can be attributed, at least in large part, to the flaws of previous international judicial institutions; a perceived lack of legitimacy, huge running costs, and detachment from victims, communities, and the *locus delicti*. The evolution of ICL thus proceeds through a series of trials and error.

Yet this gradual refinement process has been concerned with form rather than substance. It is to questions such as the location of trials, financial budgeting, and the composition and nationality of judges within these institutions that an abundance of academic commentary has been dedicated. Equally, there has been no shortage of ink devoted to questioning the theoretical rationales put forward for international criminal justice and highlighting the limits of the logic underpinning that reasoning: the tension between rendering justice and maintaining peace, the extraordinary nature of the crimes committed and the inadequacy of conventional punishments, and the questionable deterrence value of trials.

But what of the trial process itself? The underlying and prevailing assumption among scholars has appeared to be that 'even if international trials have uncertain philosophical foundations, even if they 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' (at 4). It is this assumption which is challenged in the present book (at 174). Based upon a large-scale review of transcripts from three international (or internationalized) criminal institutions, the ICTR, the Special Court for Sierra Leone (SCSL), and the Special Panels for Serious Crimes in East Timor ('Special Panels'), the author, a Professor of Law at the William and Mary Law

School and a former legal adviser at the Iran–United States Claims Tribunal in The Hague, contends that international criminal trials ‘are beset by a variety of fact-finding impediments’ (at 167), calling into question the accuracy of the factual determinations made not only by these institutions but also, by extension, other institutions (such as the ICC) which find themselves in a similar position.

As noted by Combs at the outset of this book, the leaders of Nazi Germany were meticulous in keeping records of their acts. Such documents were later found to be of great assistance to the prosecution in presenting its case at Nuremberg. However, this is not a phenomenon which has been replicated in later conflicts. The inevitable consequence of that fact has been that later tribunals have relied primarily upon (fact) witness testimony as evidence. In so doing, Combs asserts, the fact-finding process has been impaired by numerous difficulties.

The first six (of 10) chapters in this 373-page book are dedicated to explaining the difficulties of fact-finding in international criminal law proceedings and their consequences. In introducing the thesis of her work, Combs explains 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’ (at 7, 179). Ordinarily, for example, witnesses are expected to ‘recount their firsthand experiences in a way that is comprehensible to fact finders and that provides fact finders sufficient information about the events in question’ (at 177). However, when one takes into account factors such as the level of education and literacy rates within other countries (Sierra Leone’s literacy rate is said to stand at 35 per cent of the population), this is not an expectation which can necessarily be taken for granted in the international criminal context. Witnesses may, for example, struggle to find the right words with which to answer a question put to them. Moreover, those who cannot read or write are unlikely to be able to use a map and identify or verify locations where events took place (at 65–66). As Combs rightly acknowledges, ‘[t]hat is not to say that witnesses in Western domestic trials always attend to and convey key details. Nor is it to deny that some international witnesses do provide a clear and reasonably detailed account of the events they witnessed. But a substantial proportion do not’ (at 177).

The issue of interpretation compounds these difficulties further. Radically different languages (Kinyarwanda to French, for example) are tricky enough, but add to this the fallibility of interpreters, understaffing, and inadequate training and a significant problem becomes apparent. By way of illustration, the Special Panels (closed in 2005) often lacked interpreters who could offer direct translation from the language a witness was speaking to an official language of the court. Consequently, this meant that ‘from the point at which a question was asked until counsel received a reply, it was not uncommon for six interpretations to have been made’ (at 70). This is clearly highly unsatisfactory.

In addition, cultural divergences have proven to be a further obstacle to sound fact-finding. Two specific instances of confusion offered by Combs are, first, the broad notion of family relationships adopted by the Timorese and the impact which this had on determining whether witnesses were related (at 84), and, secondly, the role which superstition and magic play in the lives of Sierra Leoneans, as shown by the reluctance of one defendant to answer a question concerning a dead person due to cultural tradition (at 89). Furthermore, Combs highlights the worrying lack of ability by witnesses to recall or understand what are regarded as fundamental concepts in Western criminal proceedings, such as dates, times, or distances; ‘[w]itnesses who spend their lives engaged in subsistence farming need to keep track of the rainy and dry seasons but have far less need to know specific months and days’ (at 66). Lastly, there are those problems uniformly applicable to all witnesses, regardless of background or culture. Stress, triggered either by recalling the (often gruesome) events that have taken place or, indeed, simply by engaging in the act of testifying itself, can have a negative impact on recollection (at 304–305).

Memories also simply fade or distort over time. That deterioration is likely only to be exacerbated when combined with the slow and inefficient nature of international criminal proceedings themselves (at 14–17). All of these factors, once accumulated, demonstrate the extreme difficulty faced by Trial Chambers in assessing the credibility and demeanour of a witness and, perhaps most importantly, in ensuring that the content of what they have said has been accurately conveyed in the trial setting. Such is the level of impairment that Combs goes as far as to describe such proceedings as ‘a form of show trial’ (at 172, 176).

So have Trial Chambers recognized the seriousness of these impediments and treated such evidence accordingly? In chapter 7 (‘Casual Indifference’), Combs suggests that most of the time, they do not. Displaying a ‘cavalier attitude toward testimonial deficiencies’ (at 189), they are eager to explain away many discrepancies as innocent mistakes (at 221) and ‘fail to find reasonable doubt in some of the most doubtful instances’ (at 224). Seeking to explain why this is, Combs argues in chapter 8 (‘Organisational Liability Revived’) that the consequences of acquittal are ‘particularly costly’ for international criminal tribunals and that international judges, who believe in the value of international trials, display a subconscious ‘pro conviction bias’ (at 230–234). It is difficult to disagree with her conclusions. In light of the time, effort, and cost required to create and maintain such institutions, there would certainly appear to be an in-built expectation of achieving ‘results’. While ‘results’ could (and should) mean trials run in a scrupulously fair manner, ultimately what matters is convictions.

Having outlined these impediments, Combs then proceeds to spend the final two chapters of the book, 9 (‘Help Needed’) and 10 (‘Assessing the Status Quo’), offering practical suggestions to improve the fact-finding process and, ultimately, asking whether the flaws identified fatally undermine the work of international criminal trials. The practical suggestions offered in chapter 9 are immediately preceded by the author’s acknowledgement of the ‘tremendously challenging circumstances’ faced when running an international criminal tribunal (at 274). As such, while Combs’ list of suggestions, small-scale (better investigations, on-site visits) or large-scale (importation of domestic procedures), may be desirable, whether they are actually attainable is the more difficult and pressing question. With hybridity increasingly favoured, and as the strained relations between the ECCC and Cambodia have demonstrated, the level of cooperation offered by the national government in question and the attitude of the international community are likely to be the decisive factors in this regard. Ultimately, as Combs recognizes, the powers and structure of a bespoke international criminal tribunal will be dictated by *realpolitik* (at 225). Chapter 10 ‘assumes the status quo and assesses it’ (at 334). Ultimately, Combs concludes that the limits of our current knowledge of the efficacy of international criminal punishment and a lack of viable alternatives ‘together make a compelling case for the international criminal justice project persevering at least for the time being’ (at 372–373).

Combs states that the primary aim of this book is ‘to shine a spotlight on a previously unilluminated aspect of international criminal justice’ (at 366). Judged by that standard, this book is a great success. It combines considered insight with sustained analysis of issues which are of the utmost importance to the conduct and credibility of international criminal trials but, paradoxically, have received only peripheral attention until now. Her findings, albeit preliminary and somewhat retrospective, merit serious scrutiny and demand introspection. Accurate and reliable fact-finding is the foundation upon which international criminal justice should be built. The seriousness of the crimes alleged demands nothing less. Combs therefore deserves praise for bringing these uncertain evidentiary foundations to our attention. As Louis Brandeis once remarked, sunlight is said to be the best of disinfectants.

Chris Stephen

Volterra Fietta

Email: [chris.stephen@volterrafietta.com](mailto:chris.stephen@volterrafietta.com)

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