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Book Review of Fraudulent Evidence Before Public International Tribunals: The Dirty Stories of International Law

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International law scholarship frequently centers on big-picture theoretical and conceptual questions. Scholarly debates asking “Is international law law?” were all the rage some decades ago, while now much ink is spilled on the fragmentation (or pluralism) of international law, the rise of the individual in international law, and renewed debates pitting realism against idealism.  


FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS, AS ITS NAME SUGGESTS, DETAILS A SERIES OF CASES IN WHICH LITIGANTS PRESENTED FALSE, FORGED, OR OTHERWISE MISREPRESENTATIVE EVIDENCE TO INTERNATIONAL COURTS AND TRIBUNALS. EACH CHAPTER PRESENTS A CASE STUDY (SEVEN IN ALL), WITH THE FIRST DATING FROM WORLD WAR I AND THE LAST CONCLUDING IN 2001. WHEREAS SOME OF THE CASE STUDIES HAD ALREADY BEEN WELL TREATED IN THE SCHOLARLY LITERATURE, OTHERS WERE VIRTUALLY UNKNOWN BEFORE THE PUBLICATION OF THIS BOOK. 6 MOREOVER, EVEN THOSE CASES THAT HAD
received a reasonable amount of scholarly attention and are discussed far more expansively in this book. For example, although several law review articles and books summarily describe the forged documents that Qatar submitted to the International Court of Justice (ICJ) during its boundary dispute with Bahrain, \(^7\) *Fraudulent Evidence Before Public International Tribunals* examines the forgeries in scrupulous—and interesting—detail. \(^8\)

Indeed, the authors' careful and comprehensive detailing of the various cases probably stands as the book's most notable feature. And beyond such detailing, the authors also include a substantial quantity of background and contextual material that makes the book both informative and accessible. Some of the international disputes in question occurred many decades ago, so readers may not be entirely familiar with them. The background materials that the authors include, however, help to situate each conflict in its relevant geopolitical and legal context. That said, at times the book's descriptions are so richly detailed that readers must take care not to lose the forest for the trees. But overall the book's most significant contribution likely lies in its careful documentation of a series of otherwise unrelated cases in which the presentation of fraudulent evidence not only impaired the relevant international court's ability to find accurate facts but also forced the court to grapple with a host of difficult questions. The discovery of fraudulent evidence in some cases, for instance, required courts to balance carefully the interests of finality against the interests of accuracy. \(^9\) Allegations of fraudulent evidence in other cases led courts to employ evidentiary devices such as presumptions, burden shifts, and adverse inferences, which can serve to deter or encourage the presentation of fraudulent evidence depending on how they are used (pp. 104–17). Finally, cases in which government lawyers were asked to submit questionable evidence or advance misrepresented arguments for the good of the nation showcased the clash between sovereignty and professional ethics that can occur in international litigation. \(^10\)

The authors advance certain conclusions about these issues as they relate to the case studies in question. For instance, they criticize the Iran-United States Claims Tribunal for its "marked disinclination" to publicly call out fraudulent evidence for what it is (p. 125). In addition, they critically observe that the Tribunal's use of inferences, presumptions, and evidentiary burdens, though reasonable on its face, led the Tribunal to impose "no sanctions for the use of fraudulent evidence" (pp. 125–26). The authors also put forth some preliminary views on the questions of professional responsibility raised by fraudulent evidence. They argue, in part, that, in an international case, ..


\(^8\) The only work that I could find that provides a similarly detailed look at Qatar's forged documents is Jawad Salim Al-Arayed, *A Line in the Sea: The Qatar v. Bahrain Border Dispute in the World Court* 355–92 (2003).

\(^9\) The case studies suggest that different tribunals ascribe vastly different weights to finality. The U.S.-Mexican Claims Commission of the mid-nineteenth century, for instance, "show[ed] great reverence for finality of international awards" (p. 10). It consequently rejected Mexico's request for a rehearing based on new evidence because it assumed "that the administrative consequences of allowing the reopening of awards would undermine the entire decisional process" (pp. 10–11). By contrast, the German-U.S. Mixed Claims Commission did not hesitate to reopen the *Sabotage* cases based on American allegations of fraud (pp. 32–33). Some years later, another arbitral tribunal—the Iran-United States Claims Tribunal—exhibited a reluctance to reopen cases on the basis of fraud that was reminiscent of the U.S.-Mexican Claims Commission (pp. 117–23).

\(^10\) The authors' description of the *Corfu Channel* case, *Corfu Channel* (UK v. Alb.), 1949 ICJ REP. 4 (Apr. 9), highlights these tensions (pp. 54–77).
the burden of containing fraud should be borne by
the counsel proffering the questionable evidence
(p. 190). The authors recognize that placing the
burden on the proffering counsel could give rise to
significant practical difficulties, especially if it
requires a lawyer to use experts to investigate his
own client and the documents that the client
provides (id.). They nonetheless conclude that
because proffering counsel possess such superior
information about the evidence that they submit,
they should bear the burden of satisfying them-
selves of the evidence's authenticity (id.). The
book ends with a seven-page conclusion in which
the authors delineate the various difficulties that
render “practicable solutions to the problem of
fraudulent evidence before public international
tribunals . . . elusive” (p. 193).

Although the authors reached well-supported
and interesting conclusions, through much of the
book I found myself itching for more. In particu-
lar, I wished that the authors would do more syn-
thetizing of the various cases and would present
more comprehensive and integrated normative
proposals. As noted, the authors do advance some
normative conclusions, but they stop well short of
promoting a particular thesis for how interna-
tional lawyers should approach questionable
evidence and how courts that receive such evidence
should respond. The authors are undoubtedly cor-
correct that certain features of international law and
international adjudication, not to mention the
impediments posed by global politics, make
addressing fraudulent evidence in the interna-
tional context more fraught with difficulty than in
the domestic context. Yet, my first reaction was to
think that there must be some rules, policies, or
strategies that international courts can usefully
employ to address the problem of fraudulent evi-
dence.

By the end of the book, however, I came to rec-
ognize that a desire for anything resembling a com-
prehensive solution is unrealistic. For one thing,
the case studies in the book feature a wide array
of problematic evidence and arguments, including
various forms of fraud, omissions, and misrepre-
sentations. In some cases, the dishonesty is evident
and unquestionable; for example, the book
describes the ICJ’s Qatar v. Bahrain case, which
featured eighty-two clearly forged documents.11 I
term these documents “clearly forged” because
they “were not only mysteriously absent from any
archive besides the Diwan Amiri Archives in
Doha, but they were also riddled with historical
anachronisms” (p. 180). The documents included
“letters written to and from persons dead at the
time of the alleged writing, letters written to and
from officials whose positions did not exist, [and]
letters written in Arabic between two English
speakers—to name just a few examples of the fraud
uncovered by [Bahrain’s] experts” (id.). Given the
obviousness of the forgeries, it came as no surprise
when Qatar quickly withdrew the documents after
Bahrain’s experts questioned their authenticity.12

In many of the other cases showcased in the
book, however, the evidence featured more subtle
and more contested difficulties. In the ICJ’s Con-
tinental Shelf case involving Libya and Tunisia, for
example, Libya submitted documents and made
arguments that strongly implied an erroneous
(and favorable) boundary for Libya’s oil conces-
sion (pp. 79–80, 89). The documents that Libya
submitted were accurate as far as they went, but
they did not delineate the concession’s coordi-
nates, and Libya failed to submit related docu-
ments that did (pp. 84–85). Two years after the
ICJ issued its judgment, Tunisia learned of
the concession’s actual coordinates, and it asked
the ICJ to revise its judgment accordingly.13 In
addressing Tunisia’s request, the ICJ bypassed any
consideration of the impropriety of Libya’s behav-
ior; instead, it concerned itself with Tunisia, find-
ing that revision was not appropriate under the
ICJ Rules of Court because Tunisia had itself
failed to ascertain the coordinates of the conces-
sion, although that information was available to

11 Maritime Delimitation and Territorial Questions
Between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ
REP. 40, paras. 18, 20 (Mar. 16) [hereinafter Maritime
Delimitation]. The book also describes plainly forged
documents submitted to the Iran–United States Claims
Tribunal, as well as to the U.S.-Mexican Claims Com-
mision (pp. 9–12, 104–17).

12 Maritime Delimitation, supra note 11, para. 20.

13 Application for Revision and Interpretation of the
Judgment of 24 February 1982 in the Case Concerning
the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)
(Tunis. v. Libya), 1985 ICJ REP. 192, para. 6
(Dec. 10).
it. Whether or not one agrees with that holding, no one would deny that Libya's failure to submit relevant evidence (that had not been requested) stands as a lesser form of wrongdoing—if it even should be considered wrongdoing at all—than Qatar's submission of dozens of clearly forged and fabricated documents. Consequently, courts must craft different responses for different types of (mis)behaviors.

Further, it is not only the fact that questionable evidence comes in many different sizes and flavors that complicates the desirability—indeed, the feasibility—of potential remedial options. Various facts about the international courts also become relevant when determining the appropriate response to fraudulent evidence. In particular, courts that boast greater longevity, prestige, resources, and political independence, to name a few factors, may be better able to develop rules designed to punish, and thereby deter, the submission of fraudulent evidence than courts that are temporary, ad hoc, or dependent in some way on any of the state litigants. Of course, this insight is hardly limited to the development of rules responding to fraudulent evidence. Everyone understood, for instance, that when the International Criminal Tribunal for Rwanda (ICTR) abruptly reversed itself in the Barayagwiza case, it did so because Rwanda's extraordinarily negative reaction to the dismissal of Barayagwiza's indictment seriously impaired the ICTR's ability to function. Similarly, Iran's wildly negative response to the Iran-United States Claims Tribunal's decision accepting jurisdiction over the claims of Iranian-American dual nationals led the Tribunal to suspend operations entirely for a few months, and put the cases of dual nationals on hold for even longer, in order to "give Iran time to overcome its anger." In short, anyone who has worked at an international court knows that the development of any rule, policy, or practice takes place against a background of concern about the state response to that rule, policy, or practice. Whereas domestic lawmakers concerned about fraudulent evidence need consider only which policy is mostly likely to advance the lawmakers' goals, international lawmakers must consider that dynamic, plus a multitude of other factors relating to the court's power and influence in the context in which it operates. Put bluntly, it does not matter which course is theoretically best for addressing second I can close the door to my office because without them I cannot do anything at all." J. Coli Metcalfe, An Interview with United Nations' Chief War Crimes Prosecutor, Carla Del Ponte, INTERNEWS, Feb. 15, 2000, at https://web.archive.org/web/20010124093400/http://www.internews.org/activities/ICTR_reports/ICTRDelponte.htm. Following Del Ponte's plea, the Appeals Chamber reinstated Barayagwiza's indictment, and relations between the ICTR and Rwanda normalized. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR172, Decision on Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000). For an insider's account of the crisis, see KINGSLEY MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 101-23 (2005).

Rwanda also responded very negatively to Del Ponte's efforts to investigate members of the current Rwandan government. See Synthesis: Prosecutors at the ICTR, ARUSHA TIMES, Oct. 30, 2003, at http://www.arushatimes.co.tz/2003/43/in_tribunal.htm (reprint of Hirondelle News Agency story); MOGHALU, supra, at 140. After Del Ponte was replaced as prosecutor by Hassan Jallow, no further investigations were undertaken. VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 225 (2008).

14 Id., paras. 25–28.

15 The ICTR Appeals Chamber initially dismissed with prejudice the indictment against Jean-Bosco Barayagwiza and ordered him released after determining that the prosecution had violated Barayagwiza's right to be brought promptly before a judge following arrest. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Motion for Orders to Review and/or Nullify Arrest and Provisional Detention, para. 119 (Nov. 3, 1999). This decision outraged Rwanda to such a degree that it suspended all dealings with the ICTR and refused to issue a visa to the Tribunal's chief prosecutor, Carla Del Ponte. The prosecution consequently asked the Appeals Chamber to reconsider its decision and, in doing so, acknowledged Rwanda's power over the Tribunal. In particular, Del Ponte observed: "If I don't get cooperation from Rwanda, ... I can first open the door at the detention center and set them all free and then
fraudulent evidence at an international court if that best course will be ignored or will impair the court's ability to carry out its mission.

Complicating remedial issues further are the difficulties of proof that attend allegations of fraud. Such difficulties are highlighted in the book’s discussion in chapter 5 of the ICJ’s Nicaragua v. United States case. A key question there was whether Nicaragua had been supplying arms to El Salvadoran insurgents. Although Nicaragua acknowledged that some arms might have entered El Salvador from Nicaragua, it maintained that any such shipments were small in number, and it flatly denied that Nicaragua “had a policy of sending arms to opposition forces in Central America” (p. 91). The ICJ accepted Nicaragua’s denial, Stephen Schwebel, the U.S. judge at the ICJ, vigorously dissented, and there the matter rested until 1993, when a cache of Nicaraguan arms held by Salvadoran rebels was discovered. Many considered this discovery to prove that Nicaragua had lied to the court. For instance, Robert Turner opined that “[w]hatever confusion might have existed a decade ago on this issue, the facts are now clear. The Sandinistas deceived most of the judges on the World Court and a lot of other people as well.” Shabtai Rosenne concurred, concluding that the discovery of the cache “confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.” Indeed, in 2012, Judge Schwebel himself published a letter in the American Journal of International Law in which he maintained that the discovery of the arms cache “should have been the profound embarrassment of the Court” because it “proved that the affidavit of the Nicaraguan foreign minister was false and that the Sandinista government of Nicaragua grossly misled the Court.” However, even after the discovery, no consensus was reached. Counsel for Nicaragua, Paul Reichler, rejected Judge Schwebel’s conclusions, arguing that “[t]he presence of arms in Nicaragua in 1993 does not constitute evidence that the government of Nicaragua was trafficking them to El Salvador seven or more years earlier.” In short, Nicaragua v. United States did little to reveal whether Nicaragua supplied arms to El Salvador, but it did make clear that remedial options become relevant only after fraud has been adequately proved. More to the point, allegations of fraud raise difficult standard-of-proof questions that any normative theory would also have to address.

Indeed, although I wanted Fraudulent Evidence Before Public International Tribunals to provide more answers, my own research on fraudulent evidence in the narrower realm of international criminal law provides compelling evidence that I was unlikely to receive them. My book, Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions, considered fact-finding impediments of all sorts in international criminal trials, and it focused considerable specific attention on false testimony.

20 See also id., para. 134.
21 The Court found that “in the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador.” Id., para. 160. However it also concluded that “the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach Salvadoran armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.” Id.
22 Judge Schwebel opined that Nicaragua’s allegations regarding its alleged supply of arms to El Salvador were “demonstrably false,” and he included a long factual appendix that included evidence to support his conclusions. Id., Diss. Op. Schwebel, J., para. 25.
My research revealed, in particular, that false testimony was pervasive at least at some of the international criminal tribunals, \(^{28}\) and it identified several possible causes of the false testimony. \(^{29}\) However, whereas documenting the incidence of false testimony and speculating about its causes are relatively straightforward, determining how to reduce it is nothing of the sort. Certainly, I advanced various proposals to achieve such a reduction, from sending judges on on-site visits, \(^{30}\) to dramatically increasing perjury prosecutions, \(^{31}\) to employing modes of liability that minimize the need for eyewitness testimony. \(^{32}\) But although I would like to think that I supported these proposals with convincing argumentation, I nonetheless recognize that plausible arguments can be marshaled both against the specific proposals themselves as well as against what might be considered an undue focus on the prevention of false testimony. \(^{33}\) Whether addressing false testimony in the narrow realm of international criminal law or considering all manner of fraudulent evidence in the broader realm that *Fraudulent Evidence Before Public International Tribunals* canvasses, there are no easy answers.

In short, even to start to provide answers requires us to categorize, classify, and consider a host of relevant factors relating to the kind of evidence involved, the nature of the alleged wrongdoing, the role occupied by the alleged wrongdoer, and the power and influence of the international court. In this realm, the devil truly is in the details. Although *Fraudulent Evidence Before Public International Tribunals* does not engage in the categorizing, classifying, and considering required to develop one or even a series of normative theories to combat fraudulent evidence, it is to be applauded for laying some groundwork and starting the dialogue.

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\(^{28}\) For instance, I determined that 92% of cases at the International Criminal Tribunal for Rwanda featured at least one example of diametrically opposed testimony between two or more witnesses, such that the testimony of one of the witnesses was necessarily inaccurate. I acknowledged that the high incidence of blatantly contradictory testimony stood as an imperfect measure of perjury given that some of the contradictions likely reflected the witnesses’ mistaken memories or perceptions, rather than their willfully false testimony. However, I concluded that because the contradictory testimony was so prevalent, it would be naïve to dismiss all—or even a significant proportion—as stemming from honest mistakes. *Id.* at 157–62.

\(^{29}\) I considered both cultural influences and financial incentives as possibly contributing to the incidence of false testimony. *Id.* at 130–48.

\(^{30}\) *Id.* at 281–82.

\(^{31}\) *Id.* at 282–85.

\(^{32}\) *Id.* at 321–33.

\(^{33}\) During a presentation at which I advocated perjury prosecutions for those alleged to have provided willfully false testimony, a judge from one of the tribunals reminded me that every dollar spent to prosecute perjury was a dollar that could not be spent to prosecute international crimes. Although I continue to believe that the costs of ignoring false testimony exceed the costs of combating it, I must acknowledge that, in a world in which funds exist to prosecute only a miniscule proportion of those who commit genocide, war crimes, and crimes against humanity, every diversion of resources is significant.