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The problem of fraudulent evidence before public international tribunals

Good decisionmaking presupposes the intelligence, craft skill, and character of those charged with making the decisions. It also presupposes accurate information. Without accurate information about what has occurred, even those endowed with character, skill, and focused energy are unlikely to produce a sound decision.

Because the business of government is making decisions, it is no surprise that governments undertake substantial efforts to secure reliable information. Executive branches and legislatures proactively obtain information through various methods, including intelligence services, testimony in hearings, and proprietary research services. Courts are an exception to this practice, for they continue to rely nearly exclusively on the litigants themselves for the information that is the predicate of their decisions. Externalizing the costs of assembling information is an economic and rational method for intelligence-gathering in cases and controversies. Parties and interveners have powerful incentives to collect and organize the relevant facts and all parties are assumed to have sufficient resources to do the job. In theory, oaths and perjury laws can be used to deter dishonest impulses and, failing those, parties can be expected to ferret out the truth in the theater of cross-examination.

However, some people, undeterred by fear of moral, professional, or state-imposed consequences, will try to mislead courts with fraudulent information. The adversarial system's equivalent of the invisible hand – the powerful incentives that motivate parties to flush out falsehoods and reveal the truth – is relied upon to make the system work. But the law's invisible hand is an imperfect mechanism. Various extrinsic factors may distort the dynamics of information gathering. Resource disparities between the parties may create informational imbalances. Political actors may inundate

decisionmakers and adversaries with disinformation and propaganda. And where one of the parties is a government with control over whatever is in dispute, access to information vital to the decisionmaking process may simply go unknown.

Usually, factors intrinsic to the judicial process will temper disparities and equalize parties. But not always. Not all of the intrinsic features of the judicial process work to ensure that accurate information reaches decisionmakers. Only a novelist would have the courage to confess that "seldom, very seldom does complete truth belong to any human disclosure; seldom can it happen that something is not a little disguised, or a little mistaken."[1] The myth system of the bar holds that lawyers are officers of the court. Yet the competitive nature of the adversarial system follows an operational code of ethics that tolerates, justifies, indeed applauds, presentation of the relevant factual and legal data in the light most favorable to the client.[2] Precisely because the law presumes that the parties are in a situation of equality, neither counsel feels obliged to "argue" its adversary's case. Moreover, counsel often believes that the client is entitled to all the presumptions and potential arguments that the law avails; counsel may believe that she is under a professional ethical obligation to ensure that her client gets the benefit of those presumptions. The result is an arsenal of accepted practices that may sometimes distort the information provided to decisionmakers. These tactics may corrode the accuracy of information just as if counsel had consciously provided fraudulent evidence. Yet these tactics are not fraudulent.

One very basic dimension of the problem is thus identifying positively a "fraud." In grappling with it, one is reminded of Potter Stewart's resigned response to the intractable problem of defining "hard-core pornography": "I know it," he said, "when I see it."[3] Litigation, after all, is a competition for high stakes, for all its normative regulation. The representatives of the parties struggle to present versions of facts and authoritative policy in a light most favorable to their principals. Within the bounds of plausibility, advocates are expected to produce interpretations of the law, of custom and general principles, and relevant prior judicial and arbitral decisions in ways that support the parties' respective arguments. In some cases, unscrupulous lawyers intentionally misstate the law, either by commission or omission. But since *curia novit lex* (the court knows the law), the court

[1] J. Austen, *Emma*, reissue edn. (New York, NY: Bantam Classics, 1984), p. 374.
[2] W. M. Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (New York, NY: Free Press, 1979).
[3] *Jacobellis* v. *Ohio*, 378 US 184, 197 (1964) (Stewart, J., concurring).

is expected – and more importantly, is able – to expose and correct such misstatements. It is the misrepresentation of facts that concerns us. And bear in mind that at international law, facts include national law. Thus, an intentional suppression of a secret decree by one of the litigants that would have been outcome-determinative in a case but was not disclosed might, depending on one's view of fraud, constitute fraudulent evidence. Similarly, the promulgation of a national decree after the fact but with intended retroactive effect, might constitute fraud from an international perspective. In terms of this sort of analysis, the suppression of a relevant and potentially outcome-determinative governmental decision by one party in circumstances in which the other could not, by its reasonable efforts, have learned of its existence, would also qualify as fraud.

Not all intentionally inaccurate facts constitute fraud in its strict legal sense. Where a controverted and determinative issue is "A" or "not-A" and each party adduces evidence to support its side of the issue, a decision by the tribunal will necessarily mean that one party's evidence is more credible than the other's, whatever the threshold of credibility may be. But the implication of that finding as to whether the losing party practiced fraud varies depending on the type of evidence adduced.

The determinative issue may turn on what we might call *evaluative* evidence, that is, evidence with respect to which both parties concede the existence of a person, thing or event, but disagree about some aspect of its relative meaning or value. In these circumstances, a tribunal's finding of "A" does not necessarily mean that the evidence adduced to support "not-A" was a lie or fraudulent evidence. If you and your attorney insist, in a proceeding before the Foreign Claims Settlement Tribunal, that your house in Havana was worth $50,000, but the tribunal holds that it was worth $15,000, the tribunal's finding does not necessarily mean that it believed you were lying (though you may have been) or, perhaps more pertinently, that the tribunal would use that term to describe the mix of greed and self-delusion that was motivating your testimony. Reasonable people (including arbitrators) may disagree as to the value of a thing and/or as to the criteria to be used in its evaluation.

The normative prism through which evidence is viewed may also color the evaluative conclusion. One party may claim that the other's manifestations of sovereignty over contested territory have no legal value because of an earlier critical date or because of the operation of some other legal principle; for example, *uti possidetis*. No matter how forced or implausible such a legal argument may be, it would not be characterized as fraud.

In contrast to evaluative evidence, a determinative issue may turn instead on what we might call *existential* evidence, that is, whether the person, thing or event exists, existed, or ever happened. In such cases, it is more likely that a tribunal's finding of "A" does mean that the evidence to support "not-A" was a lie or was fraudulent. When you attest, by affidavit, that you had a house in Havana at a particular address and the tribunal decides that no house ever existed at that site, the implication is that your evidence was a lie or was fraudulent. And, of course, if you produce documents such as deeds that state that you owned the house, a rejection of those documents must connote something more than unpersuasive evaluative evidence. When a decisionmaker rejects one party's existential evidence, it may say that it is "unpersuaded" or that it is not making judgments of truth or falsity or that you had failed to shift the burden of proof. But sometimes it is in effect holding that one allegation is false and, by implication, that the evidence supporting it is false. The rejection of evidence in this sense, therefore, is quite different from a rejection of evaluative evidence.

Whether evidence is existential or evaluative may sometimes be a close call. One might describe a two-room cottage as "palatial," and many tribunals would characterize the adjective as permissible puffing. To describe the two-room cottage as a ten-room house would surely be fraudulent. But to describe the structure as a "commodious residence" without indicating the number of rooms or square feet, in the hope that the other party or the tribunal will not insist on a specification, shifts our discussion from fraudulent evidence *qua* evidence to the question of what parties are expected to prove in order to prevail in a particular litigation. Even then, however, a relevant question may be whether the other party had a reasonable opportunity to secure the facts that would have corrected the misimpression created. In the *Tunisia/Libya* case, which we consider in Chapter 4, one might say that Libya's failure to submit to the court the coordinates for oil concessions had greatly exaggerated Libya's claim. Or, one might say that Libya's nonfeasance was a direct cause of the judicial "confirmation" of a boundary that did not exist legally. But indicative of the intellectual difficulty, one might also say that Libya was under no duty to volunteer the coordinates and that Tunisia's counsel should have checked the records in Tripoli to find or verify them.

Most cases contain existential and evaluative issues. With existential issues, by implication, the evidence of the losing party is false, even if the decisionmaker couches its conclusion in terms of not having shifted the burden of proof or not having established a preponderance of truth. Though the distinction may be difficult in some cases, it is important to

bear it in mind, for how the claim is characterized will have a significant effect on how it is dealt with.

In international law, the knotty issues surrounding the definition and identification of "fraud" are intertwined with questions of how best to deal with its consequences. If processes of revision are available for allegations that the winner lied on existential issues, the loser may bring such claims after judgment when the alleged fraud is uncovered, opening the issues to a new proceeding. This has a potential for social and economic disruption, as third parties may have relied on the prior decision.

The issue is skirted but not really resolved if one says that arbitrators do not determine truth or falsity but, assuming the good faith of the litigants, simply record whether the burden of proving a particular fact is met or shifted. The explicit obligation in Article 53 of the Statute of the International Court of Justice which requires the court to "satisfy itself," when a party is absent, "that the claim is well founded in fact and law," might be read to suggest that there is no such obligation when the defendant is present; then, perhaps, the burden is on each party. But the general evolution of the notion of "equitable principles" and, particularly, after *North Sea Continental Shelf*, the idea that even a negotiated settlement must be equitable,[4] suggest that *a fortiori* the outcomes of a judicial process must also be equitable. This may import a more active role and burden on the court as suggested in the *Taba* award and in Judge Oda's opinion in *Tunisia/Libya*, both of which we will examine.

But in the absence of an international tribunal's more active role and an independent curial burden to determine the facts, fraud becomes relevant in judgment review only if there is an additional, independent assumption that a prohibition on the submission of fraudulent evidence is always implied in international adjudication and arbitration. However, in the international forum, the robustness of this implied prohibition is tethered to political forces which may sometimes overwhelm legal and ethical norms.

As compared to national legal systems, the international system is institutionally limited in its ability to prevent and punish fraudulent conduct. National legal systems may police the boundary between zealous advocacy and fraud through codes of professional conduct that both prescribe limits and sanction violations. These codes are applied by professional societies concerned with regulating the comportment of their members. In egregious

[4] *North Sea Continental Shelf (Germany* v. *Denmark/Germany* v. *The Netherlands)*, 1969 *ICJ Rep.* 3, para. 85 (20 Feb.), 41 *ILR* 29.

cases, courts themselves have an array of deterrent and punitive techniques to police the comportment of counsel.

The international system has nothing comparable to this arsenal of deterrent, preventive, and punitive weapons. There are, as yet, no international professional associations to which a measure of disciplinary jurisdiction has been delegated. Still, the absence of effective institutions does not mean that there can be no authoritative and controlling decisions, as the very operation of the international legal system demonstrates. Unorganized social systems or unorganized sectors within them may develop effective functional equivalents to the enforcement methods of domestic legal systems. In the rather turbulent political arena in the United States, for example, an electorate, dependent on information from political actors, runs risks comparable to those of courts which must depend on information from the litigants. Some observers believe that the system adjusts itself to these exigencies. Michael Kelly has written:

> Politics, in its own strange fashion, is an honest business. The rules of the game allow small lies of omission, waffling, fudging and any amount of hedging. But flat-out lying and acts of direct betrayal are much rarer than cynics believe, and greatly frowned upon. The survival of the system demands this.[5]

Others may have less sanguine assessments of the self-corrective mechanisms within American politics. But commentators across the political spectrum seem to agree that some sort of official or quasi-official "truth squad," along with a centralized sanctioning system, would impose collateral costs on the operation of the system that would outweigh any possible benefits. A respected conservative weekly in the United States, commenting on a perennial problem in American politics, opined that:

> [w]ithholding information from Congress, short of actual false statements or perjury, is a political phenomenon and part of the inevitable and indeed healthy interbranch rivalry. If witnesses go too far, they have committed a political sin and they should receive a political punishment, even up to losing their jobs; they should not be subject to criminal prosecution.[6]

Others may well disagree with this laissez faire approach.

In the international system, it would seem that a similar approach has been taken until now. Courts and tribunals follow the diplomatic practice of

[5] M. Kelly, "The President's Past," *NY Times (Magazine)* (31 July 1994), § 6, 20, 40.
[6] "Partisan Reflections," *Nat'l Rev.* (29 Aug. 1994), 15.

not "insulting" governments if it appears that they have engaged in fraud. Hence use of the term "fraud," international law's quintessential "f" word, is, as will be clear from the case studies, likely to be avoided, especially when the perpetrator of the fraud was a government official, acting in an official role. A document that is exposed as counterfeit will probably not be called fraudulent, but rather "inauthentic." The party that adduced it will not only not be sanctioned but may also still be permitted to prove its case by means of other documents. Perhaps international courts and tribunals are simply being realistic in taking for granted a certain amount of "sinning." It may be that they view their assignment as not to police the ethics of government practitioners in court, but to reach the right decision. Alas, this also incentivizes undesirable behavior.

An effort to submit fraudulent evidence that is exposed in the course of the arbitral process may arouse indignation or embarrassment, but, precisely because it is unsuccessful, it does not deform the decision. The fraud exposed prior to decision is simply disallowed legal effect.[7] The problem of fraudulent evidence is most acute where the fraud is effective: a decision, which would not otherwise have been made, has now been made as a direct consequence of one of the party's efforts to mislead the decisionmaker.

The problem of the legal treatment of the results of defrauding legislatures is different from that of courts. There is no modern doctrine of "*res legislativa*" parallel to *res judicata*. By contrast to the pretended finality of the decrees of the Medes and the Persians, modern legislation is accepted, as Pound put it, as an experiment in social organization. When legislatures discover that some of their factual assumptions were mistaken, whether as a result of someone's good or bad faith, they routinely amend, revise, or abrogate their handiwork. Like courts, they too recognize the importance of settled expectations and reliance, but these policies do not, apparently, raise the same specters as they do in the judicial arena.

[7] This is long-standing practice. The rules of the US Chilean Commissions of 1885 and 1892 allowed the tribunal on motion of a party to strike from the record "improper, irrelevant, immaterial or scandalous evidence." J. B. Moore, *History and Digest of the International Arbitrations to Which the United States has Been a Party*, 6 vols. (Washington DC: Gov. Printing Office, 1898), vol. III, p. 2228. A similar power was asserted in the US Mexican Claims Commission of 1868, whereby "Tribunals will disregard evidence shown to be forged or to contain perjured testimony, although in general they have no authority to punish the persons forging or swearing to the false documents." D. V. Sandifer, *Evidence Before International Tribunals*, rev. edn. (University Press of Virginia, 1975), p. 164.

In international courts and tribunals, by contrast, the doctrine of *res judicata*, finality for courts' decisions, is accorded high deference. Even precedents, which are, after all, a form of judicial lawmaking, are rarely openly overruled. They are "distinguished."

Perhaps this stance is an acknowledgment of the absence of an enforcement mechanism in public international law. When domestic courts realize that the mistakes they have made are the result of the prevailing litigant's deliberate misrepresentations, rectification is a problem with which they struggle in ways that legislatures do not. This divergence in practice is curious, for a legislative change – of course – is likely to affect many more people than will the revision or invalidation of a "final" judgment. The reasons for the difference in treatment may be found in what Merriam called "miranda."[8] Whether one follows Holmes[9] or Kelsen[10] on this matter, the judgments of the courts are our law: law, as Holmes put it, is what the courts "do in fact."[11] In effective constitutional systems, we organize our lives and finances around the expectation that what courts have done is legal and right. We organize much of our national myth and rest much of our public conception of ethics and probity on the holdings of our courts. Perhaps, in light of this ethos, the custodians of the courts feel that too much – including their own legitimacy – is at stake.

One cannot consider the problem of fraudulent evidence in international law without relating it to the larger issue of loyalty in international politics. In national legal systems, the assumption is that there is a single authority to which loyalty is owed. In international politics, by contrast, there are competing loyalty systems. First and foremost, citizens still owe allegiance to their states, not to the world community. When individuals representing their states confront each other in an international tribunal or another international institution, their loyalty will be to the sovereign. In the competition for loyalty, international tribunals, with the fragility of

[8] C. H. Merriam, *Political Power: Its Composition and Incidence* (New York and London: Whittlesey House, McGraw Hill, 1934), pp. 102–13.

[9] O. W. Holmes, Jr., "The Path of the Law," *Harv. L. Rev.*, 10 (1897), 457, 461; see also O. W. Holmes, "The Path of the Law," address delivered at the dedication of the New Hall of the Boston University School of Law (8 Jan. 1897) in M. Lerner (ed.), *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*, reprint edn. (New York: Modern Library, 1959), pp. 71, 75 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[10] H. Kelsen, *General Theory of Law and State*, A. Wedberg (tr.), (Cambridge, MA: Harvard University Press, 1945).

[11] Holmes, "The Path of the Law," p. 461.

their power base and, in ad hoc tribunals, their ephemeral existence, are a weak second.

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As we will see, the international legal system encounters daunting challenges in dealing with awards and judgments that have been secured by means of fraudulent evidence. Precisely because of the weakness of enforcement mechanisms, international law elevates the principle of *res judicata* to a *grundnorm* on par with a *pacta sunt servanda*. As a result, when it confronts an international decision which has been secured by fraud, international law, rather than acknowledging that *res judicata* has its limits, inclines to stand by the decision but looks plaintively to national law for a remedy.

Consider the extraordinary incident of the *Weil* and *La Abra* claims before the Mexican Claims Commission.

In 1868, Mexico and the United States established an international claims commission for injuries that Americans were alleged to have suffered in Mexico in the civil war. In *Weil*, Benjamin Weil, a naturalized American, claimed $334,950 in compensation for nearly 2,000 bales of cotton he alleged had been seized and appropriated on September 20, 1864 by General Cortina of the Mexican Liberal forces. His sole evidence consisted of an affidavit he himself had executed in New Orleans in 1869 along with some other supporting affidavits made between 1869 and 1872.[12] According to the affidavits, the receipts for the cotton and travel expense vouchers had been lost.[13]

The American Commissioner, perhaps betraying his discomfort over the wispiness of the evidence, stated: "I am willing to give every opportunity in my power, as a commissioner, to the [Mexican] government to make a full and ample investigation of the claim, and respond to it, and very much wish that this might be done."[14] Mexico declined this invitation, apparently out of fear that it would allow Weil another opportunity to submit false evidence. The Mexican Commissioner observed the dubious credibility of the evidence and complained of the difficulty for Mexico to establish "negative proof."[15]

As the two national Commissioners did not agree, the decision fell to the umpire, Sir Edward Thornton. In his opinion, the claimant's version was "sufficiently proved" and "not disproved by evidence on the part of the

[12] Moore, *History and Digest*, vol. II, p. 1324. [13] *Ibid.*, 1325. [14] *Ibid.*, 1324.
[15] *Ibid.*, 1325.

defence."[16] According to his view, an international arbitrator assumes the credibility of the evidence and determines only whether burdens of proof have been met or shifted. Hence, Sir Edward awarded for the claimant.[17]

The *La Abra* claim was for the alleged dispossession of a mine and seizure of ores by the Mexican authorities.[18] As in the *Weil* claim, the Mexican Commissioner opposed the claim. He contested the authenticity of the evidence, pointing out several oddities. For example, the mine, which had been sold in 1865 for $50,000, was valued by the claimant in 1868 for $2.5 million, despite the mine's difficult history and no record of economic success.[19] In the view of the Mexican Commissioner, much of the evidence had been obtained by fraud. The umpire decided for the claimant, holding that Mexico had behaved in a hostile manner in order to drive the claimants out.[20]

Mexico requested rehearing based on new evidence.[21] The umpire refused on the grounds that under the Convention he had no competence to reconsider matters that the Commission (and he) had already considered, that in any event a reexamination would not lead him to change his mind, and finally, that the decisions had already been made public and thus reliance interests may have arisen.

> [T]he Mexican agent would wish the umpire to believe that all the witnesses for the claimant have perjured themselves, whilst all those for the defense are to be implicitly believed. Unless there had been proof of perjury the umpire would not have been justified in refusing credence to the witnesses on the one side or the other, and could only weigh the evidence on each side and decide to the best of his judgment in whose favor it inclined. *If perjury can still be proved* by further evidence, the umpire apprehends that *there are courts of justice in both countries by which perjurers can be tried and convicted*, and he doubts whether the government of either would insist upon the payment of claims shown to be founded upon perjury. In . . . 'Benj. Weil v. Mexico', the agent of Mexico has produced circumstantial evidence which, if not refuted by the claimant, would certainly contribute to the suspicion that perjury has been committed and that the whole claim is a fraud. For the reason already given *it is not in the power of the umpire to take that evidence into consideration, but if perjury shall be proved hereafter no one would rejoice more than the umpire himself that his decision should be reversed and that justice should be done.*[22]

Sir Edward's stance shows great reverence for finality of international awards. It assumes that the administrative consequences of allowing the

[16] *Ibid.*, 1326. [17] *Ibid.*, 1324–27. The award was for $479,975.95 in gold coin.
[18] *Ibid.*, 1327. [19] *Ibid.*, 1328. [20] *Ibid.* [21] *Ibid.*, 1329.
[22] *Ibid.*, 1329–30 (emphasis added).