Is There Any Disincentive to Deceiving an International Court or Tribunal?

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W. Michael Reisman and Christina Parajon Skinner, Fradulent Evidence Before Public International Tribunals: The Dirty Stories of International Law (Cambridge University Press 2014).

Although its publication may come a bit late for our summer reading, Professor Michael Reisman's Herch Lauterpacht Memorial Lectures have finally (with the co-authorship of Christina Skinner) been released by CUP in the form of a long-awaited 222-page monograph, including a detailed and valuable index. Occasionally the passage of a decade (in this case somewhat more) between the spoken word and its reformulations in print leads to an attenuation of the bluntness of the message. Innocents whose sensibilities with respect to the realities of international adjudication may have been assaulted in the course of those three wintry evenings in Cambridge can now verify that the carryings-on reviewed by the authors are still captured with uncompromising directness, as the subtitle suggests. Given the essentially consensual nature of all international adjudication, this study should be given concerned attention in relation not only to permanent courts but also to arbitrators whose mandate is limited to a single case.

On one view, we really shouldn't be the least shocked. After all, States repeatedly find it legitimate to put their own soldiers in harm's way, and presumably think the slaughter of young people from neighboring countries is justified, in order to secure territorial ambitions or to maintain what they think of as their "credibility". What then is a bit of forged evidence (or even a case entirely based on it) among urbane friends, when used for the same purpose but on the legal battlefield?

Public international tribunals are notoriously poor fact-finders, and the larger their membership the greater their fecklessness. Naturally this deficit reveals itself when the factual inquiry involves allegations of forged evidence. And some of the causes of paralysis in such instances are common to the more general pattern of inadequacy: the absence of effective powers of compulsion, the stubborn disinclination to hear witnesses or even to engage neutral experts versed in matters of which the putative fact-finders are at best amateurs, and indeed the frequent selection of judges and arbitrators whose career paths as lawyers never required them to venture outside the realms of high abstraction. But something far more sinister is at work here, namely the implicit acceptance that *la raison d'Etat* sanctifies everything, and the implicit *sub rosa* code that the international community should turn a blind eye to "practices that would be condemned in developed national legal systems but have hitherto been ignored by international tribunals and international scholarship".[1] The legal profession's reaction has been "baffling", the authors write, and identify the stakes as follows:

> … cases of fraudulent evidence which have been practiced on public international courts and tribunals … mar the noble vision and ennobling practice of sovereign States voluntarily submitting their disputes to courts and tribunals for peaceful resolution in accordance with international law; in raising doubts about the accuracy of international decision, they diminish the future willingness of States to resort to tribunals. Moreover, corruption of the truth often extends beyond the hearing room of a single case: in an interdependent world, lies which

> manage to distort judicial or arbitral decision in one case can contaminate many others. Judge Schwebel, to whom this book is respectfully dedicated, put it concisely: “they undermine the essence of the judicial function.” [2]

The authors examine in detail a number of incidents before international fora, some of them very familiar cases which their research reveals as having had somber undersides. The culpable States are a motley crew, including some usually thought of as enjoying a high degree of institutional maturity. Their brazenness and cynicism in many of these instances are startling, but less so than the studied indifference of many judges, arbitrators, diplomats, and (for all their verbosity in pronouncing on the logic and doctrinal orthodoxy of judgments and awards) commentators.

One understands the impulse behind invocations of *la raison d’Etat*: a public objective the pursuit of which is said to be so indispensable as to justify unsavory means. The terrible problem is that expediency and hypocrisy are habit-forming, and before you know it the indispensable public end becomes anything which suits the purposes of officials who adorn themselves with the raiments of the State. Needless to say, they undermine the stance of legions of highly principled public servants who understand that must is lost when such behavior is condoned or ignored: trust in the institutions charged with ensuring the rule of law in the international community.

Reisman and Skinner are telling us that we have a serious problem, not how to solve it. They would clearly have preferred an international system in which adjudicators do not sidestep the inconvenient discovery of fraudulent behavior by disputants by allowing them to plead their cases on alternative grounds which do not rely on the discredited evidence. This practice means that there is little disincentive for unscrupulous attempts to deceive the decision-maker, but such has been the (low) road taken and the authors do not suggest that the dynamics of the process leave grounds to hope for a change. They note proposals for regulating the conduct of international advocates, but for various reasons do not find them realistic. The dynamics of the international processes and the divided loyalties they create (often resolved against the notion of a duty of candor to the tribunal) are described in ways of which this brief note cannot give a substantive account, but only affirm that this is previously unexplored and disturbing territory.

Public international adjudication it but one form of international dispute resolution in which the decision-makers’ authority is ultimately and necessarily based on the consent of the disputants. One must therefore wonder what aspects of these “dirty stories” tend to replicate themselves in the much larger field of international arbitrations involving private parties, and whether this question posed by the authors could be posed replacing the word “states” with the generic “parties”:

> Are we entitled to conclude that from the perspective of international tribunals, they have no ancillary duty to police the honesty of states and their representatives but rather to rely on the cleansing dynamic of the adversarial process, to work through the evidence, as best they can, and to reach the right conclusion?[3]

Some will answer as Judge Stephen Schwebel did in *Nicaragua v United States*:

> Deliberate misrepresentations by the representatives of a government party to a case before this Court cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the Court’s judgment. [4]

All of us are left to ponder how the international community could find effective ways to reject what "cannot be accepted", if that phrase is to covey anything more than a noble sentiment.

1. The quoted words appear on the back cover, ostensibly anonymous or attributable to the publisher; but does anyone pretend they weren't written by the authors?
2. P. x.
3. P. 199
4. *Nicaragua v. United States*, **1986 I.C.J. 14**, 27 (June 27) (dissenting opinion of Judge Schwebel).

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